

Witness Name: Rt. Hon. Dorothy Bain KC

Statement No.: 1

Exhibits: DB

Dated: 30th November 2023

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

WITNESS STATEMENT OF THE RT. HON. DOROTHY BAIN KC (LORD ADVOCATE)

In relation to the issues raised by the Rule 9 notice: M2A-DB-01 dated 16th June 2023 served on the Lord Advocate, in connection with Module 2A, the Rt. Hon. Dorothy Bain KC will say as follows: -

1. Module 2A is examining and making recommendations about the Scottish Government's core political and administrative decision-making in response to the Covid-19 pandemic between early January 2020 and April 2022, when the remaining Covid-19 restrictions were lifted in Scotland.
2. Annex A, para 3 of your letter states that for the purposes of your request my statement should focus upon the specified period beginning on 21st January 2020, which is the date on which the WHO published its 'Novel Coronavirus (2019-nCoV) Situation Report -1' and ending on 18th April 2022, which is the date when the remaining Covid-19 restrictions were lifted in Scotland.

Introduction

3. I am the Rt. Hon. Dorothy Bain KC of Crown Office, 25 Chambers Street, Edinburgh, EH1 1LA.
4. I have prepared this statement: (i) with reference to the records and materials provided to me by the Scottish Government, specifically by the Covid-19 Inquiry Information Governance Division, and; (ii) with assistance from my Legal Secretariat and Private Office.

5. Unless stated otherwise, the facts stated in this witness statement are within my own knowledge and are true. Where they are not within my own knowledge, they are derived from sources to which I refer and are true to the best of my knowledge and belief.
6. References to exhibits in this statement are in the form [DB/number - INQ000000].

Appointment as Lord Advocate

7. I was appointed Lord Advocate on 18th June 2021 by Her late Majesty Queen Elizabeth II on the recommendation of the then First Minister of Scotland Nicola Sturgeon and following the unanimous agreement of the Scottish Parliament, as per the procedure set out in the Scotland Act 1998 (the "Scotland Act") section 48. Prior to that date (in the period from January 2020 to June 2021) I did not hold any office in the Scottish Government or Scottish Administration and worked, on a self-employed basis, as Senior Counsel at the Scottish Bar. I did not play any role in political and administrative decision-making relating to the management of the pandemic in Scotland. I did provide some legal advice to clients on matters related to the pandemic during the period prior to my appointment as Lord Advocate. I therefore focus my comments in this statement to the 10-month period subsequent to my appointment as Lord Advocate, from 18th June 2021 to 18th April 2022.

Legal Professional Privilege and the Law Officer Convention

8. I also note that my comments are limited by reference to legal professional privilege and the 'Law Officer Convention'. The Scottish Ministerial Code (paragraph 2.38) [DB/001-INQ000102901], by which I am bound, provides that Ministers may acknowledge publicly that they have received legal advice on a particular topic, but must not divulge either who provided the advice or its contents (whether it is from the Law Officers or from anyone else). This applies to all forms of legal advice, including advice on a particular subject or advice associated with clearance of a document. This approach is required in order to take account of the public interest in maintaining: (i) the right to confidentiality of communications between legal advisers and their clients (sometimes referred to as legal professional privilege), and; (ii) the Law Officer Convention that the Scottish Government, like the UK Government, does not, other than in exceptional circumstances, disclose the fact

that legal advice has or has not been given to the Government by or sought from the Law Officers, or the content of any such advice. On the Law Officer Convention see *HM Treasury and Information Commissioner*, High Court [2009] EWHC 1811 [DB/002-INQ000222980] and *Erskine May Parliamentary Practice* 23rd Edition 2004, page 443.

Background, qualifications and role during the Covid-19 pandemic

9. My professional background is that I qualified at the University of Aberdeen and began my career as an Advocate in 1994, taking silk in 2007. I have been instructed in cases at all levels, including the Court of Session (Inner and Outer House), Court of Criminal Appeal, High Court of Justiciary, United Kingdom Supreme Court and the European Court of Human Rights. From 2002 to 2011, I served as an Advocate Depute in Crown Office and was appointed Principal Advocate Depute in 2009. As Principal Advocate Depute I was Scotland's most senior prosecutor, conducting many complex and high profile criminal prosecutions and appeals.
10. In terms of my role and responsibilities during the period from June 2021 to April 2022, and in particular my role in relation to; (i) decision-making, and (ii) the provision of information, analysis, data or advice in connection with the Scottish Government's response to the Covid-19 pandemic, the general position was as follows. A timeline of key decision-making has been provided by the Scottish Government [DB/003-INQ000131055].
11. The Lord Advocate is the senior of the two Scottish Law Officers. I am a Minister in the Scottish Government and the holder of a historic office which has a range of functions associated with the maintenance of the rule of law and the proper administration of justice. Under the Law Officers Act 1944 any function authorised or required, by any enactment or otherwise, to be discharged by the Lord Advocate may be discharged by the Solicitor General for Scotland if the Lord Advocate so authorises (section 2(1)). The Solicitor General is essentially the deputy Minister to the Lord Advocate. The role of Lord Advocate has four main components:
 - head of the systems of criminal prosecution and investigation of deaths ('CPID'),
 - principal legal adviser to the Scottish Government,
 - representing the Scottish Government in civil proceedings, and

- representing the public interest in a range of statutory and common law civil and constitutional functions.
12. I carried out these roles, in relation to matters concerning the Covid-19 pandemic, in a similar way as I do in relation to all areas of Scottish Government activity, and issues arising in my role as head of the systems of CPID. In relation to criminal prosecutions and investigation of deaths the Scottish Law Officers have always acted independently of other Ministers and, indeed, of any other person. That duty is expressly recognised in section 48(5) of the Scotland Act. This statement will focus on my role as principal legal adviser to the Scottish Government (as agreed with the Inquiry); the Crown Office and Procurator Fiscal Service ("COPFS"), of which I am the Ministerial head, is submitting a separate corporate statement to the Inquiry.
 13. I am a member of, and a Minister in, the Scottish Government (Scotland Act, section 44(1)(c)). As such I may exercise any of the functions of the Scottish Ministers - acts of Ministers bind me and vice versa (Scotland Act, section 52(3) and (4)). This collective responsibility does not apply to the "retained" functions of the Lord Advocate - principally my functions in relation to prosecution and investigation of deaths, my role as principal legal adviser and any other functions conferred upon the Lord Advocate by name (Scotland Act s.52(5)(b) and (6)). These functions are exercised by the Lord Advocate, and the Solicitor General for Scotland, alone.
 14. There is no concept of a Scottish "Cabinet" in the Scotland Act. The fact of a Cabinet, and the Ministers who are members of it, are matters for the First Minister. The Lord Advocate is not a member of the Cabinet but I see all Cabinet papers, and I (or in my absence the Solicitor General) attends Cabinet meetings when required. In practice this means where Cabinet is discussing a matter with a legal aspect or, for example, the funding of the COPFS.
 15. Accountability to the Scottish Parliament is a crucially important aspect of the Lord Advocate's constitutional role. If not an MSP, a Law Officer is nevertheless entitled to participate in the proceedings of the Parliament but may not vote (Scotland Act, section 27). I can therefore be questioned by MSPs about the exercise of my functions, although I am not required to answer questions or produce documents relating to the operation of the system of criminal prosecution in any particular case where it is considered that it might prejudice criminal proceedings or would otherwise be contrary to the public interest (Scotland Act, section 27(3)).

16. It is a fundamental part of the role of the Law Officers to ensure that the Government acts lawfully at all times (Scottish Ministerial Code, paragraph 2.30). We have the ultimate responsibility for advising the Scottish Ministers on all matters relating to the law of Scotland. I provide legal advice on the full range of the Scottish Government's responsibilities, policies and legislation, including advice on the legal implications of any Government proposals. However, I and the Solicitor General cannot and do not advise on every legal issue which may arise, including during the Covid-19 pandemic. The primary source of legal advice for the Scottish Government is the Scottish Government Legal Directorate ("SGLD").
17. The Scottish Ministerial Code (paragraphs 2.32–2.33) sets out guidance as to the circumstances in which the Law Officers should be consulted. The general principle is that the Law Officers must be consulted in good time before the Government is committed to significant decisions involving legal considerations. The process of obtaining a formal legal Opinion of the Law Officers, where legal advice is expressly sought in that form, will normally be a request on a reference from SGLD. Submissions to Cabinet Secretaries and Ministers raising legal considerations are usually copied to the Law Officers for information or awareness, and sometimes decision (as part of collective decision making). I am then usually briefed separately on the legal issues by SGLD (including by way of a general weekly update) and am able to intervene or seek further information as appropriate. These processes by which I conduct my role as principal legal adviser to the Scottish Government operated largely as normal during the Covid-19 pandemic, albeit frequently at an accelerated pace.
18. The Scottish Ministerial Code (paragraph 2.33) gives examples of the kind of situation in which the formal advice of the Law Officers should be sought:
 - the legal consequences of action by the Government might have important repercussions;
 - a legal adviser in the Scottish Government has doubts about the legality or constitutional propriety of proposed legislation or executive action;
 - Ministers, or their officials, wish to have the advice of the Law Officers on questions involving legal considerations; or
 - there is a particular legal difficulty that may raise sensitive policy issues.

In practice what this tends to mean is that the Law Officers may be asked for a formal Opinion where the matter is difficult, or where it may be politically or presentationally sensitive or high profile.

19. As mentioned above, and by long-standing convention, the fact that the Law Officers have or have not advised, or been asked to advise, on a particular matter, and the content of any advice, is not disclosed publicly without our prior consent. The importance of this convention is recognised by the courts and is accorded some recognition in the exemption provided by section 29(1)(c) of the Freedom of Information (Scotland) Act 2002 for information relating to advice, or a request for advice, by the Law Officers (as well as in section 36(1) - confidentiality of communications in legal proceedings). I am therefore not in a position to comment on whether I issued formal Law Officer Opinions on questions relating to the Covid-19 pandemic during the period June 2021 to April 2022.
20. The Lord Advocate is a member of the Cabinet Sub-Committee on Legislation and I contribute in that and other ways (including by attendance at Ministerial Bill Management Meetings) to the planning, management and delivery of the Scottish Government's legislative programme. I oversee the drafting of Government Bills by Parliamentary Counsel in the Parliamentary Counsel Office ("PCO"). I maintain an interest in the development of the devolved Scottish statute book, including matters such as the accessibility of legislation. Before a Bill can be introduced in the Scottish Parliament by the Government, the Minister responsible must state that it is in his or her view within the legislative competence of the Parliament (Scotland Act, section 31(1)). This view is reached on the advice of the Law Officers. This is the only case in which the convention against revealing the Law Officers' involvement in legal advice is routinely departed from, although the legal advice itself is not disclosed. The Lord Advocate also has the power to refer a Bill to the Supreme Court within the four-week period after it is passed by the Parliament, for a decision on whether the Bill or any of its provisions are outside legislative competence (Scotland Act, section 33). I also have particular powers under the Scotland Act in relation to the resolution of legal questions about the devolved powers of Ministers and the Scottish Parliament (these are termed "devolution issues").
21. Much civil litigation involving the Scottish Ministers is conducted on behalf of Ministers by SGLD, who are responsible to the Lord Advocate for the conduct of all such litigation. In conducting civil litigation SGLD proceeds on the instructions of

individual Directorates subject to the overall supervision of the Law Officers. Any decisions as to the handling of a civil case involving the Scottish Government, including those that arose concerning Covid-19 issues, are for the Scottish Ministers collectively. By statute, a party raising an action against the Scottish Government may do so against the Lord Advocate as representing it and an action by the Scottish Ministers may run in the name of the Lord Advocate (Crown Suits (Scotland) Act 1857, section 1). With some exceptions this applies in general to any part of the Scottish Administration.

Cabinet and other decision-making forums

22. As noted above I attend Cabinet when required in my role as principal legal adviser to the Scottish Government. Cabinet was the principal decision-making forum dealing with, or impacting upon, the Scottish Government's response to Covid-19.
23. From June 2021 to April 2022 I (or the Solicitor General, in my absence) attended Cabinet on the following dates:

Date	Attendance	Covid Topic	Document Number
13 July 2021	Lord Advocate via Teams	Covid-19 Update, & Review of Measures paper - SCN(21)15	SCISCP273
3 August 2021	Lord Advocate via Teams	Covid-19 Update, & Review of Measures paper - SCN(21)18	SCISCP274
20 August 2021	Lord Advocate via Teams		This document is currently being processed and will be with the Inquiry shortly.
24 August 2021	Solicitor General via Teams	Covid-19 Update, & Review, Response and Recovery paper - SCN(21)25	SCISCP276

OFFICIAL - SENSITIVE

31 August 2021	Solicitor General via Teams	Covid-19 update & Covid-19 Next Steps paper - SCN(21)29	SCISCP277
7 September 2021	Solicitor General in person	Covid-19 paper	SCISCP115
14 September 2021	Lord Advocate in person	Covid-19 Update & Covid-19 Review & Response paper - SCN(21)37	SCISCP279
21 September 2021	Lord Advocate via Teams	Covid-19 update & Covid-19 Review & Response paper - SCN(21)(40)	SCISCP280
28 September 2021	Lord Advocate in person	Covid-19 update, Covid-19 Review & Response paper - SCN(21)44, Covid Vaccine Certification paper - SCN(21)46, Covid Recovery Strategy paper - SCN(21)45, Carer's Allowance Supplement (Scotland) Bill in paper - SCN(21)47.	SCISCP281
5 October 2021	Solicitor General in person	Covid-19 Update, Review of Covid-19 Measures paper - SCN(21)49	SCISCP282
12 October 2021	Lord Advocate via Teams	Covid-19 Update	SCISCP283
19 October 2021	Lord Advocate via Teams	Covid-19 Update, Covid-19: Guidance for Schools paper - SCN(21)55	SCISCP284
26 October 2021	Lord Advocate in person	Covid-19 Update, Covid-19 Review of Measures paper - SCN(21)(57)	SCISCP285
2 November 2021	Lord Advocate via Teams	Covid-19 Update, Covid 19 Review & Response paper - SCN(21)61	SCISCP286
16 November 2021	Lord Advocate in person	Covid-19 Update, Covid -19 Review of Measures paper - SCN(21)71	SCISCP288
23 November 2021	Lord Advocate in person	Covid-19 Update, Covid 19 Review & Response paper - SCN(21)74	SCISCP289
30 November 2021	Lord Advocate in person	Covid-19 Update, Covid-19 Review & Response paper - SCN(21)79	SCISCP290
7 December 2021	Lord Advocate in person	Covid-19 Update, Covid-19 Review & Review paper - SCN(21)85	SCISCP291

OFFICIAL - SENSITIVE

14 December 2021	Lord Advocate via Teams	Covid-19 Update, Covid-19 Review & Response paper - SCN(21)90	SCISCP292
21 December 2021	Lord Advocate via Teams	Covid-19 Update, Covid-19 Review & Response paper - SCN(21)94	SCISCP293
29 December 2021	Lord Advocate via Teams	Covid-19 Update, Covid-19 Review & Response paper - SCN(21)97	SCISCP294
5 January 2022	Solicitor General via Teams	Covid-19 Update, Covid-19 Review & Response paper - SC(22)01	SCISCP295
11 January 2022	Lord Advocate via Teams	Covid-19 Update, Covid-19 Review & Response paper - SC(22)03	SCISCP296
18 January 2022	Lord Advocate via Teams	Covid-19: Review and Response paper	SCISCP297
25 January 2022	Lord Advocate in person	Covid-19 Update, Covid-19 Review and response paper - SC(22)13, Coronavirus (Recovery and Reform)(Scotland) Bill paper - SC(22)15	SCISCP298 SCISCP086
1 February 2022	Lord Advocate in person	Covid-19 Update, Covid-19 Review and Response paper - SC(22)17	SCISCP300
8 February 2022	Lord Advocate in person	Covid-19 Update, Covid 19 Information Paper SC(22)21	SCISCP301
17 February 2022	Solicitor General via Teams	Covid-19: Strategic Framework	SCISCP110
22 February 2022	Lord Advocate in person	Covid-19 update, Covid-19: Strategic Framework and Review of Measures paper - SCM(22)27	SCISCP302
8 March 2022	Lord Advocate in person	Covid 19: Coronavirus Update paper – SC(22)33	SCISCP304
15 March 2022	Lord Advocate in person	Covid-19 Update paper - SC(22)38	SCISCP305
29 March 2022	Lord Advocate via Teams	Covid-19 Review of Measures Paper - SC(22)49	SCISCP307
31 March 2022	Lord Advocate in person	Decision Making on Covid-19 Over Recess paper - SC(22)52	SCISCP308

Primary Legislation

24. I considered the following Bills which became Acts of the Scottish Parliament:

- (i) Coronavirus (Extension and Expiry) (Scotland) Act 2021,
- (ii) Carer's Allowance Supplement (Scotland) Act 2021,
- (iii) Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Act 2022,
- (iv) Non-Domestic Rates (Coronavirus) (Scotland) Act 2022, and
- (v) Coronavirus (Recovery and Reform) (Scotland) Act 2022.

25. As noted above the fact that the Law Officers advise on the legislative competence of Government Bills introduced to the Scottish Parliament is an exception to the Law Officer Convention and is provided for in the Scottish Ministerial Code. Paragraph 2.41 of the Code says:

"The provision...preventing Ministers from divulging whether or not Law Officers provided legal advice does not apply in relation to Bills introduced in the Parliament because it is acknowledged publicly that the Law Officers advise on the legislative competence of Government Bills."

26. Paragraph 3.4 says:

"Ministers responsible for Bills being introduced in the Parliament should ensure that the Bill is accompanied by clear, informative and comprehensive explanatory notes, by an appropriate policy memorandum detailing the policy objectives of the Bill and the consultation which has been undertaken on it, and by an appropriate Financial Memorandum setting out the best estimates of the administrative and compliance costs arising under the Bill, as required by the Parliament's Standing Orders....A Bill must also be accompanied by a

statement, which will have been cleared with the Law Officers, that the Bill is within the legislative competence of the Scottish Parliament.”

27. I can therefore confirm that I, or the Solicitor General on my behalf, advised that all five Bills (i) – (v) listed above, were, on introduction, within the legislative competence of the Scottish Parliament.

Cabinet Sub-Committee on Legislation

28. As noted above I am a member of the Cabinet Sub-Committee on Legislation (“CSCL”). The members of the CSCL are as follows; Deputy First Minister, Minister for Parliamentary Business, the Lord Advocate and, following the Bute House Agreement, the Minister for Zero Carbon Buildings, Active Travel and Tenants’ Rights. CSCL has delegated authority from Cabinet to take decisions about legislative matters which do not require Cabinet clearance. The remit of the CSCL includes the following: approval of the provisional annual legislative programme, approval of policy content for Scottish Government Bills (unless subject to full Cabinet clearance), approval of policy changes in Bills, agreement to consultations which could lead to primary legislation, approving the early commencement of Bills, and reviewing the Parliamentary passage of Bills through stages 1-3.
29. Given its remit, the CSCL considered the Scottish Government’s legislative response to Covid-19 during the period from June 2021 to April 2022, particularly as regards proposed primary legislation in the Scottish Parliament. The CSCL meets periodically, I (or the Solicitor General on my behalf) attended CSCL meetings as follows (I have indicated which ones discussed the Scottish Government’s response to coronavirus):

Date	Person	Topic
8 September 2021	Lord Advocate	Not relevant to Covid-19
22 September 2021	Solicitor General	Not relevant to Covid-19
27 October 2021	Lord Advocate	Not relevant to Covid-19
24 November 2021	Lord Advocate	Not relevant to Covid-19
22 December 2021	Solicitor General	Not relevant to Covid-19
26 January 2022	Lord Advocate	The Coronavirus (Discretionary Compensation for Self-isolation)

		Bill and The Coronavirus (Recovery and Reform) (Scotland) Bill
3 March 2022	Lord Advocate	The Coronavirus (Recovery and Reform) Bill
27 April 2022	Solicitor General	Review of legislation paper (CSCL 22-08) including; (i) Non-Domestic Rates (Coronavirus) Bill and (ii) Coronavirus (Recovery and Reform) Bill
22 June 2022	Lord Advocate	Coronavirus (Recovery and Reform) Bill

30. The CSCL also considers matters based on the papers alone. The following relevant CSCL papers were considered in person or on paper in 2021; (i) Covid-19 (Self-Isolation) Bill: Policy Content and Consultation Approach, (ii) Coronavirus (Discretionary Compensation for Self-Isolation) Bill - Final Policy Content, (iii) Non-Domestic Rates (Coronavirus) (Scotland) Bill: Final Policy Content, and (iv) Final Policy Content of the Proposed Coronavirus Recovery (Scotland) Bill. In addition the following relevant papers were considered in 2022; (i) Coronavirus (Recovery and Reform) (Scotland) Bill - Strengthening Parliamentary Oversight, and (ii) Refinement to Early Commencement Policy for the Coronavirus (Recovery and Reform) (Scotland) Bill.
31. During the period June 2021 to April 2022, I did not attend any meetings of the Scottish Government Resilience Room ("SGoRR") which co-ordinates and supports the response when Scotland is faced with an emergency or major incident such as a storm, pandemic or terrorist attack. The precise role of SGoRR will vary depending on the nature of the emergency and guidance on that has been provided [DB/004–INQ000102911], but noting that SGoRR is not a decision-making body.
32. I did not participate in any UK-wide committees, groups or forums or in any committees, groups or forums within Scotland that extended beyond the Scottish Government itself. That would be in keeping with my role as principal legal adviser to the Scottish Government. However legal staff in SGLD, including the Legal Secretariat to the Lord Advocate, had regular engagement and contact with their

counterparts in the UK Government and the other Devolved Administrations on a wide range of Covid-19 related areas including legislation, regulations and live litigation. That liaison did not operate to achieve joint decision-making or to necessarily apply a consistency of approach across the 4 nations, but rather was an informal exchange of information on a lawyer-to-lawyer basis, such as discussions on approaches to drafting of regulations. I was briefed on these issues as relevant and necessary.

33. My role as principal legal adviser to the Scottish Government is very substantially conducted internally within the Government itself, subject to narrow exceptions (e.g advising Ministers on the certification of the legislative competence of Government Bills being introduced to the Scottish Parliament, as mentioned above). Therefore I did not have any role in respect of relationships and communications, including joint decision-making between the Scottish Government and the UK Government and with the other Devolved Administrations in Wales and Northern Ireland. Similarly I did not have any role in respect of the relationships and communications, including any joint decision-making, between the Scottish Government and local authorities within Scotland, during the period from June 2021 to April 2022.
34. In relation to my participation in meetings within the Scottish Government from June 2021 to April 2022 I would comment that the processes and procedures for the handling and management of the Covid-19 pandemic were already well-established by the time of my appointment. Therefore, from my perspective, it was a matter of adopting and utilising the existing arrangements rather than looking for any adjustments. I felt that, from my position as principal legal adviser, I was appropriately and properly involved in the Scottish Government's decision-making process. Like other Ministers, I was reliant on expert medical and scientific advice and data and used that to consider the reasonableness and proportionality of suggested legal measures and interventions. My frequent attendance at Cabinet (the prime decision-making forum) was fundamental in this regard. Cabinet was always updated on the clinical and scientific situation (usually by the Chief Medical Officer himself) and my views on legal matters and issues were, I felt, appropriately taken into account in the decision-making.

Initial understanding and response to Covid-19 (January 2020 to March 2020)

35. Regarding initial understanding of Covid-19 within the Scottish Government, Scottish Government readiness for the pandemic, initial strategy for dealing with Covid-19 and decision-making arrangements from January 2020 to March 2020 - as noted above I was appointed Lord Advocate on 18th June 2021 and therefore I offer no comment on this earlier period in the development of the pandemic.

Role in relation to non-pharmaceutical interventions ('NPIs')

36. I am asked regarding my role in relation to non-pharmaceutical interventions ("NPIs"). NPIs are a type of legal restriction which were applied in the interests of reducing the transmission of Covid-19. I offer no comments on the decisions to adopt a national lockdown in March 2020 and the second national lockdown in January 2021 because both lockdowns pre-dated my period in office from June 2021.
37. At the point at which I was appointed in June 2021 the Scottish Government had moved to a graduated "protection levels" approach which had been set out in the Scottish Government's Covid-19 Strategic Framework [DB/005 – INQ000131025] in October 2020. This approach was based on five protection levels 0-4 which would be adopted according to the virus prevalence.
38. This approach applied specific NPIs to different levels with increasing NPIs imposed at higher levels. The levels approach was applied on a local basis by Local Authority area (Scotland has 32 councils, including the 3 islands authorities). This was intended to ensure that measures adopted were proportionate for the level of prevalence in each Local Authority area, and each level was to deliver a degree of reduction in transmission of the virus (which was assessed by the R number). I understand that the effectiveness of each level in reducing said transmission rates was affected by broader factors, such as virus strain etc.
39. The process of de-escalating down the levels was in progress when I assumed office. Shortly after my appointment the Strategic Framework [CIP10339-01] was updated on 22nd June 2021, in order to; "suppress the virus to a level consistent with alleviating its harms whilst we recover and rebuild for a better future". The update reflected the position that a large proportion of the population had vaccine coverage. On the condition that all adults over 40 years of age had been offered two doses of the vaccine, Scotland would move "beyond level 0" but maintain some "Baseline

Measures” which came into effect on 9th August 2021. This approach was agreed by Cabinet on 22nd June 2021 (as can be seen from the table above, I did not attend that Cabinet).

40. The baseline measures were retained to achieve the Scottish Government’s strategic aim to suppress the virus to a level consistent with alleviating the broader harms of the crisis. The baseline measures were as follows:
- (i) face coverings in indoor public settings (with some exemptions),
 - (ii) hospitality and entertainment venues were still required to collect contact details of customers for test and protect,
 - (iii) businesses, service providers and places of worship were required to have regard to Scottish Government guidance,
 - (iv) capacity limits at stadia, and
 - (v) the Covid-19 Certification Scheme.
41. Between December 2021 and February 2022, some NPIs were reintroduced to address the new variant, Omicron. The Strategic Intent was updated for the last time in the Strategic Framework Update [UKIDMHSC175] published on 22nd February 2022, to; “manage Covid-19 effectively, primarily through adaptations and health measures that strengthen our resilience and recovery, as we rebuild for a better future”.
42. Regarding the extent to which I, as Lord Advocate, played a role in the imposition of, easing of, or establishing exceptions to, the following NPIs, I will firstly discuss the general decision-making process in which I was involved, and secondly, provide some examples.

General decision-making processes

43. As mentioned above the Lord Advocate is not a member of Cabinet but I see all the Cabinet papers in advance and attend Cabinet if it is discussing a matter with a legal aspect. Cabinet government operates similarly in Scotland as it does at the UK Government level, and importantly, it operates on the basis of collective responsibility as set out in the Scottish Ministerial Code (paragraphs 2.1-2.9). This means that all decisions reached by the Scottish Ministers, individually or collectively, are binding on all members of the Scottish Government. The principle of collective responsibility requires that Ministers should be able to express their

views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This, in turn, requires that the privacy of opinions expressed and advice offered within the Government should be maintained. As noted above one of only two exceptions to the doctrine of collective responsibility is the Lord Advocate's retained functions, including decisions taken by me in my capacity as head of the systems of CPID; in this case the Lord Advocate acts independently of other Ministers.

44. Decisions regarding the imposition of legal restrictions (or their lifting) were made at Cabinet, or on some occasions by the First Minister alone, (acting with the specific delegated authority of Cabinet to do so).
45. The then Deputy First Minister and Cabinet Secretary for Covid Recovery (Mr Swinney) would usually present a Covid-19 paper to Cabinet which included: the current issues and state of the pandemic; relevant data and modelling the future state of the pandemic (from the National Incident Management Team); medical information; impacts across the 'Four Harms'; measures proposed or due for review; an account of any relevant Parliamentary proceedings; and legal analysis. These papers would usually make specific recommendations regarding which decisions Cabinet should take. Given my role as principal legal adviser to the Scottish Government, I did not engage in political decision-making and choosing specific options. Rather, my role was to ensure that all options being considered by the Government were lawful and compliant with our obligations under the ECHR, and to provide legal support and context to Cabinet colleagues in their decision-making.
46. Cabinet usually convened on Tuesday mornings. Final Cabinet papers were circulated on Monday and, depending on the circumstances, they were sometimes issued late at night. This was sometimes necessary because the most up-to-date information (usually data) concerning the state of the pandemic required to be included in order to make relevant decisions. However, irrespective of how late Cabinet papers were issued, I always received briefing on them from my legal officials, in advance of Cabinet. In addition, in terms of the development and drafting of Cabinet papers, in advance of circulation to Ministers, I understand that drafts of all relevant Cabinet Papers would be shared with solicitors in the SGLD to ensure that all legal comments were properly incorporated. Then the Cabinet Paper would require to be submitted to the lead minister (usually the former DFM or FM) before being circulated to all Cabinet attendees.

47. A 'Four Harms Approach' was already in place when I assumed office. This approach was established in the Framework for Decision Making [DB/006 - INQ000131025] and the four harms were as follows:
- (i) direct Covid-19 harm,
 - (ii) other health harms caused by the pandemic,
 - (iii) societal harm and
 - (iv) economic harm.
48. This approach required officials to consider and provide information in relation to how long the measure had been in place and what escalating societal and / or business harms were also being caused, exacerbated or alleviated. An evidence-based approach was adopted in decision-making. Evidence regarding certain harms was available in some circumstances but this was circumstance-dependent because of the pace of developments.
49. My impression of the Scottish Government's decision-making during the Covid-19 pandemic (noting that I came to it some 15 months into the pandemic) was that it had become more refined over time, and that by June 2021 the process was settled. The relevant data and evidence was provided to Cabinet, who were supported by the Chief Medical Officer ("CMO") and Public Health Scotland to make any relevant decision. Officials did not make recommendations that went against public health or clinical advice. At Cabinet, the CMO would usually speak to the clinical and statistical information to provide Ministers and other attendees with an update regarding the pandemic. Cabinet then weighed up the impacts on different rights and harms in order to reach decisions about the appropriate course of action.
50. As principal legal adviser, I did not see my role as involving offering comment on matters such as, the potential wider health, social and economic impacts of NPIs, or the state of public attitudes towards the restrictions. The Scottish Ministerial Code (paragraph 2.30) notes "the overarching duty on Ministers to comply with the law" and that: "It is part of the role of the Law Officers (the Lord Advocate and the Solicitor General for Scotland) to ensure that the Government acts lawfully at all times." My role during the Covid-19 pandemic was geared towards fulfilling that stricture, including by ensuring that "decisions are informed by appropriate analysis of the legal considerations and that the legal implications of any course of action are considered at the earliest opportunity" (Scottish Ministerial Code, paragraph 2.30). I

therefore endeavoured to satisfy myself, on the basis of the information and evidence available at the time, that the options presented to Cabinet were lawful, and specifically if any measures recommended were necessary and justifiable in pursuing a legitimate aim and proportionate in seeking to achieve that aim.

51. Decisions taken at Cabinet were recorded by the Cabinet Secretariat in official Cabinet Minutes (referred to as “Conclusions”), which would be circulated in advance for approval at the next Cabinet meeting. Following Cabinet, the First Minister would announce the decisions made in Parliament, or at her daily Covid-19 briefing.

Examples of NPIs made or lifted during my time as Lord Advocate

52. The following table provides several examples of NPIs which were either put in place or lifted, during the period June 2021 to April 2022:

Local and regional restrictions		
	Levels restrictions which operated on a local authority basis	Example - Scotland moved beyond level 0 on 9 th August 2021. Some protective measures remained such as the use of face coverings indoors and the collection of contact details as part of Test and Protect. Discussed at Cabinet on 3 rd August 2021 and decision delegated to FM.
	Restrictions on intra UK travel	Example – On 18 th June 2021 restrictions were imposed on travel between Scotland and Manchester/ Salford.
Working from home		
	Working from home	Example - From 31 st January 2021 businesses could resume hybrid working arrangements.
Reduction of person-to-person contact / social distancing		
	Physical distancing	Example – On 22 nd June 2021 changes were made to rules regarding weddings, hotels and hospitality venues including indoor and outdoor physical distancing limits.

	Coronavirus vaccination certificates	Example – On 1 st October 2021 the Scottish Government announced it will introduce coronavirus vaccination certificates as a requirement for entry to certain events and higher risk venues, such as nightclubs, music festivals and some football grounds.
	Closure of Nightclubs	Example – On 23 rd December 2021 it was announced that Nightclubs were to close from 27 th December, subject to 3 week review.
Self-Isolation restrictions		
	Self-isolation for key workers	Example – From 23 rd July 2021 it was announced that essential staff in critical roles will be allowed to return to work to maintain lifeline services and critical national infrastructure.
	Self-isolation in relation to international travel	Example – On 28 th July 2021 Scottish Government announced fully vaccinated people from the EU and US will be able to travel to Scotland without quarantining from Monday 2 nd August.
	Testing and self-isolating	Example - From 6 th January 2022 new cases can end their self-isolation if they do not have a fever and test negative on a Lateral Flow test on Day 6 and again at least 24 hours later. Anyone who tests positive on a Lateral Flow test will no longer be asked to take a PCR test to confirm the result.
The use of face coverings		
	In public places	Example – It was announced on 15 th March 2022 that legal requirements to wear face coverings on public transport and most indoor public settings will continue until at least early April. The remaining legal requirements for businesses and service

		providers were to end on Monday 21 st March.
	In education establishments	Example - Scottish Government announce secondary school pupils and staff will not be required to wear face coverings in classrooms from 28 th February 2022.
The use of border controls		
	Restrictions on international travel	Example – QR Code digital vaccination certificates for international travel are available from 3 rd September 2021.
	Traffic light system for international travel	Example – On 26 th August 2021 it was announced that Canada and the Azores (an autonomous region of Portugal) will be added to the travel green list.
	Travel light system for international travel simplified	Example – On 17 th September 2021 it was announced that the Green and Amber classifications will merge, but the Red list will be retained for those countries deemed to have high Covid-19 case rates or variants of concern.
	Requirements related to vaccine certification	Example – On 22 nd November 2022, it was announced that vaccines from the World Health Organisation emergency use list (Sinopharm, Sinovac, Covaxin) will be recognised as eligible vaccines for the purposes of international travel. Travellers vaccinated with these products will be eligible for quarantine-free travel into Scotland if they have a certificate of vaccination status from a country listed in the regulations.

53. A judicial review was raised against Scottish Ministers by Fubar Stirling Limited and others regarding the vaccine certification scheme. The Petitioners were owners of “late night premises”. Lord Burns refused the Petitioners’ request for interim interdict

on 29 September 2021. The petition was subsequently sisted and then withdrawn in early 2022.

54. Another judicial consideration of NPIs, was before I was Lord Advocate, in the case of KLR and RCR International Ltd & Others v the Scottish Ministers regarding the levels approach. Lord Ericht refused a motion for interim suspension on the 11th December 2020. [DB/007 - INQ000222981].
55. There have been no other judicial reviews against the Scottish Government relevant to the NPIs imposed during my time in office.

Impact of NPIs on Vulnerable Groups

56. In my view the Scottish Government did endeavour to give sufficient consideration in its decision-making to the impact of NPIs on 'at risk' and other vulnerable groups in light of inequalities pre-dating the pandemic. This included consideration, when relevant and subject to the required pace of decision-making, of those groups within the nine protected characteristics under the Equality Act 2010: age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation.
57. For example, the Scottish Government undertook various impact assessments in relation to policies concerning NPIs, including: Business and Regulatory Impact Assessments; Equality Impact Assessments; Fairer Scotland Duty Assessments; Child Rights and Wellbeing Impact Assessments, and Island Communities Impact Assessments. In addition some of this consideration resulted in legislative provision being made for vulnerable and at-risk groups such as the Carer's Allowance Supplement (Scotland) Act 2021, as mentioned above, which increased the amount of carer's allowance supplement payable to further support carers in response to the effects of coronavirus.
58. However it is also important to acknowledge considerations and decisions that contained flaws. For example, shortly before my appointment as Lord Advocate, there had been a successful judicial review against the Scottish Government regarding the closure of places of worship - *Reverend Dr William JU Philip and Others v the Scottish Ministers* [2021] CSOH 32 [DB/008 - INQ000222982]. This decision, issued by the Outer House of the Court of Session on 24th March 2021 had

held that the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No.11) Regulations 2021 constituted a disproportionate interference with the ECHR article 9 right to freedom of thought, conscience and religion of ministers and church leaders of Christian churches, and a Roman Catholic priest, and with their constitutional rights, and were outwith the devolved competence of the Scottish Ministers (noting therefore that this judicial review concerned ECHR and not the Equality Act 2010).

59. In terms of identifying any key areas which I consider worked well, and any key areas in which I consider there were issues, obstacles or missed opportunities, with regards to the NPIs implemented in Scotland, my general reflection is that there was adequate information and advice on which to base decision-making, that information sharing and communication was appropriate, with coordination amongst relevant teams and directorates, and that this was underpinned by good planning (so far as possible in a dynamic pandemic) and a solid strategic overview. My role was specific and bespoke as principal legal adviser to the Scottish Government, but from that perspective I considered that Ministers, in arriving at decisions and judgments in relation to NPIs, did so on the basis of the evidence, data and analysis available to them. I always considered that I had sufficient information, briefing and analysis of the legal issues to conduct my particular role.

Divergence

60. In relation to divergence between the Scottish Government's approach to the pandemic and that of the UK Government I note that by the point of my appointment as Lord Advocate in June 2021 much of the divergent approach, as it is termed, was already established and had been operating since March 2020 and subsequently. Therefore I did not play any role in the adoption of a divergent approach and the principles and rationale behind it.
61. Within that context I would offer the following views. Cabinet considered data relating to Scotland's specific position regarding the prevalence and spread of the virus, which, in turn, reflected Scotland's varied geography, climate, demographic profile, population density and morbidities. In particular the need for a divergent approach *within* Scotland should be noted in order to ensure proportionate and rationale decision-making given the differences between remote rural and island communities and urban areas. This was reflected in the Levels approach, which was already in

place in June 2021, and which had been adopted to ensure that any measures imposed were necessary and proportionate for each of the 32 Local Authority areas (including the 3 Islands Authorities). Divergent decisions as between the Scottish Government and the UK Government reflected those factors and also the inherent institutional differences between the various UK jurisdictions such as, and principally from my perspective, the distinct Scottish legal system including the different court structures, legislative provisions and system of criminal prosecution, of which I am the head, and also the existence of a national police force in Police Scotland, as compared to regional police forces in England. There are also distinct institutional and structural arrangements in other areas such as Scotland's local government system and education system, including, on a micro-level, different school holidays compared to the rest of the UK, and varying school holidays amongst the 32 Local Authority areas within Scotland. All of these intrinsic factors would justify, and at times require, divergence as part and parcel of political and administrative decision-making.

62. I would also note, from a legal perspective, that divergence has a clear statutory and constitutional underpinning by the Scotland Act 1998. The Scottish Parliament and Scottish Government are creatures of statute with their responsibilities and functions largely set out in the Scotland Act 1998, as amended, principally by the Scotland Acts of 2012 and 2016. Many of the areas of public policy central to the Covid-19 pandemic are devolved to the Scottish Parliament such as public health and the National Health Service in Scotland, education, the justice system and local government. That constitutional bifurcation facilitates divergence and that applies in challenging times as well as good. The devolved system therefore envisages that decisions regarding public health will be made by the Scottish Government, accountable to the Scottish Parliament, and this is reflected in the legislation regarding civil contingencies such as the Civil Contingencies Act 2004 (Contingency Planning) (Scotland) Regulations 2005 (SSI No. 494) made under devolved powers in the Civil Contingencies Act 2004.

Role in relation to medical and scientific expertise, data and modelling

63. I comment as follows regarding (i) my role, if any, in facilitating, enabling access to, or providing information and advice to key decision-makers in relation to medical and scientific expertise in relation to Covid-19 or data or modelling in relation to Covid-19; (ii) reflections on the use of that medical and scientific, and data and modelling

expertise; and (iii) whether the Scottish Government was restricted or prevented from understanding the full scientific picture.

64. Given my role as principal legal adviser to the Scottish Government these questions are of limited relevance to me. Advice about legal matters was received by Ministers, as the key decision-makers within the Scottish Government, relating to the impact of NPIs. That advice was given in the context of, and sometimes taking account of (when relevant) medical and scientific and data and modelling expertise; but any such advice would not have been about medical and scientific expertise and data and modelling expertise. Given my limited and focused involvement in anything directly relating to medical and scientific expertise or data and modelling expertise I have no reflections on what worked well or areas in which there might have been issues, obstacles or missed opportunities. Similarly, I offer no comments on whether the Scottish Government was restricted or prevented from understanding the full scientific picture.

Role in Covid-19 public health communications

65. My reflections on public communications and behavioural management in the response to Covid-19, and the impact of alleged breaches of the rules and standards by Ministers, officials and advisers and the collateral impact on public confidence in the Scottish Government's response to Covid-19 are as follows.
66. In my role as principal legal adviser to the Scottish Government during Covid-19 from June 2021 to April 2022 I only had a very limited role in public communications and behavioural management in the response to Covid-19 and do not have any significant comments to offer on these matters. For example, I occasionally cleared press lines to issue on behalf of the Scottish Government where they involved commenting on legal issues, legislation or litigation. As regards alleged breaches of rules and standards I note that this statement does not cover my role as the head of the system of criminal prosecution in Scotland. These matters may be covered in the corporate statement to the Inquiry from COPFS. I note that prosecutions for breaches of the Covid-19 legislation were decided upon and conducted by Advocate Deputes and Procurators Fiscal within COPFS. COPFS is the sole prosecuting authority in Scotland and, on behalf of the Lord Advocate, decides in every case whether there is sufficient evidence to prosecute and whether a prosecution is in the

public interest. COPFS applied these usual prosecutorial standards and processes during the pandemic.

67. I have no specific comment to make other than to note that the promotion and upholding of the rule of law, internally within the Scottish Government, and externally to the wider community in Scotland, is an important part of my role as Lord Advocate, including as head of the system of criminal prosecution. I consider it profoundly important that the law is followed by all people within the community, including in particular Government Ministers, elected representatives from Scotland in both the Scottish Parliament and the UK Parliament, officials and advisers. In 2010, one of the UK's most distinguished jurists, Lord Bingham, published his renowned work, "*The Rule of Law*". In that Lord Bingham identified the core principle of the rule of law as being: "that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts." Lord Bingham continued to outline 8 principles which he saw as being the core components required to support the rule of law. One of these principles is, I think, particularly relevant to the situation arising during the Covid-19 pandemic and issues of alleged breaches of rules and standards by persons prominent in public life – that "Laws should apply equally to all."

Role in public health and coronavirus legislation and regulations

68. As mentioned above, the Lord Advocate is responsible for the provision of legal advice to the Scottish Government and a central part of this is related to the development and delivery of legislation, both primary and secondary. Legislation, required to enact Ministerial policy decisions, was discussed between the Scottish Government and the UK Government, at both Ministerial and official level. However, I was not personally involved in those discussions.
69. The key, overarching pieces of primary legislation related to Covid-19 were as follows:
- (i) the Coronavirus Act 2020 (passed by the UK Parliament),
 - (ii) the Coronavirus (Scotland) Act 2020, and
 - (iii) the Coronavirus (Scotland) (No. 2) Act 2020 (both passed by the Scottish Parliament).

70. The Module 2A Director General Strategy and External Affairs statement submitted on 28th February 2023 includes a description of the Scottish Parliament's legislative procedures including:
- (i) primary legislation,
 - (ii) secondary legislation, and
 - (iii) the process (known as the Legislative Consent Convention and previously known as the Sewel Convention) by which the Scottish Parliament consents to UK legislation which relates to devolved matters or alters the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers.
71. A list of coronavirus legislation has been provided to the Inquiry [DB/009-INQ000131091]. I was not involved in providing advice to Cabinet or making any decisions in relation to the Coronavirus Act 2020, the Coronavirus (Scotland) Act 2020 or the Coronavirus (Scotland) (No. 2) Act 2020 because those pieces of legislation were developed and enacted before I became Lord Advocate. However, the powers which were provided for in those statutes were, to some extent, still available for use by the Scottish Ministers in June 2021 when I came into office.
72. The process for the legal clearance of Government Bills has been discussed above. Essentially before a Bill can be introduced in the Scottish Parliament by the Government, the Minister responsible for the Bill must state that it is, in his or her view, within the legislative competence of the Parliament – and this statement will have been cleared with the Law Officers. Primary legislation contains powers for Ministers (or sometimes other responsible authorities) to make secondary legislation, known as Scottish Statutory Instruments ("SSI"). SSIs are commonly known as secondary, delegated, or subordinate legislation and come in various forms including regulations, orders, rules or schemes.
73. Acts of the Scottish Parliament can only create secondary legislation powers for the Scottish Ministers (or other responsible authorities) which can be used within devolved competence. Through Cabinet, CSCL and the Bill introduction process the Law Officers are sighted on secondary legislation powers proposed to be included in primary legislation. In the Covid-19 context, Cabinet would discuss a proposed approach and how it should be achieved; through primary legislation, secondary legislation or in guidance, and I would be part of that decision-making process. The drafting of SSIs is conducted by lawyers in the SGLD or the PCO (whose principal

role is to draft Scottish Government Bills for introduction in Parliament). Around 350 to 500 SSIs are drafted and made each calendar year (472 in 2020; 496 in 2021 and; 387 in 2022). The scale of the Covid-19 related secondary legislation work can be seen from the numbers of SSIs that have 'Coronavirus' in their title (which may, of course, not capture all SSIs which made Covid-19 related provision): 108 in 2020; 117 in 2021; and 27 in 2022. Although the Lord Advocate has overall Ministerial responsibility for the work of SGLD and PCO in this regard, I do not routinely review SSI drafting, which is directed towards implementing the policy intention whilst ensuring well-drafted, accessible secondary legislation.

The Coronavirus Act 2020

74. The Coronavirus Act 2020, an Act of the UK Parliament, was subject to a Legislative Consent Memorandum [DB/010 - INQ000131052] and Motion in the Scottish Parliament. The Scottish Parliament gave consent to the devolved provisions within the Bill on 24th March 2020. Some of the provisions of this Act applied to Scotland, including most importantly section 49, the power for the Scottish Ministers to make health protection regulations. This Act was enacted prior to my appointment, but I understand that the UK and Scottish Governments worked collaboratively on the legislation. The Coronavirus Act 2020 did not include a statutory reporting requirement and therefore the Scottish Government put in place devolved reporting arrangements for provisions which the Scottish Parliament consented to.

The Coronavirus (Scotland) Act 2020

75. The Coronavirus (Scotland) Act 2020 included a wide range of provisions which were intended to facilitate the provision of public services at a time when individuals were either not permitted or not encouraged to leave their house unnecessarily. For example some provisions: (i) allowed children's hearings panels to sit with fewer members; (ii) suspended physical attendance at court, in some circumstances and; (iii) extended the notice period for evictions. For its parliamentary passage, the Bill for the Act was designated an emergency Bill, completing all of its parliamentary stages in one day, and was passed on 1st April 2020 and receiving Royal Assent and becoming an Act on 6th April 2020.

Coronavirus (Scotland) (No. 2) Act 2020

76. The Coronavirus (Scotland) (No.2) Act 2020 provided further modifications to the law, considered necessary during this emergency period. For example some provisions: (i) enabled a person with a student residential tenancy to terminate the accommodation agreement with their landlord (where certain requirements were met); (ii) extended some time limits in criminal proceedings, and; (iii) amended the law in relation to bankruptcy. This Bill was also designated an emergency Bill and was passed by the Scottish Parliament on 20th May, before receiving Royal Assent on 26th May 2020.
77. Both the Coronavirus (Scotland) Act 2020 and Coronavirus (Scotland) (No.2) Act 2020 required the Scottish Government to review the necessity of the provisions and report on their operation to the Scottish Parliament every two months. These reports were laid in Parliament within 14 days of the end of each two-month reporting period. These reports were drafted by policy officials and the portfolio Minister for each policy area would decide whether they were content with the continuing necessity of the provisions in their area. All portfolio Ministers' views, included in the report, were passed to the DFM who cleared the report as a whole. When the reports were sent to the DFM for clearance to be laid in the Scottish Parliament, they would also be copied to me. SGLD would review these reports from a legal perspective and provide briefing to me regarding the legality and proportionality of continuing or ending the provisions. This allowed me to satisfy myself that Ministers were always being presented with lawful options and recommendations.

The Coronavirus (Extension and Expiry) (Scotland) Act 2021

78. The Coronavirus (Extension and Expiry) (Scotland) Act 2021 was passed by the Scottish Parliament on 24th June 2021 and received Royal Assent on 4th August 2021. This Act expired some provisions of the two previous Scottish Coronavirus Acts, suspended the effect of others, and extended the remainder which were still required until the end of March 2022. In addition, on 22nd March 2022, the UK Parliament agreed to extend some provisions within the UK Coronavirus Act 2022, and the Scottish Parliament gave its legislative consent to the approach taken in September 2022. When the Scottish Ministers wanted to extend provisions in the Scottish coronavirus legislation by secondary legislation, they were required to lay before the Scottish Parliament a report detailing their Statement of Reasons.

79. Whilst the two Scottish Covid Acts were in place by the time I came into office, the Coronavirus (Extension and Expiry) Act 2021 was introduced the same day that I was appointed (18th June 2021); it was treated as an emergency Bill, and passed on the 24th June 2021. A report was published in September 2021 to meet the requirements of sections 5 (Report on certain matters relating to Act) and 6 (Reporting on status of eviction provisions) of the Coronavirus (Extension and Expiry) (Scotland) Act 2021. As discussed above, before a Minister introduces legislation into the Scottish Parliament, he or she makes a statement that the Bill is within the legislative competence of the Parliament (Scotland Act, section 31(1)). Therefore the previous Law Officers confirmed, in their view, that this Bill was within the legislative competence of the Scottish Parliament.

Other Primary Legislation

80. There was also other, more bespoke, Covid-19 primary legislation during the period June 2021 to April 2022:

- (i) The Carer's Allowance Supplement (Scotland) Act 2021 was passed by the Scottish Parliament on 7th October 2021 and provided for an increased payment to those in receipt of Carer's Allowance Supplement in December 2021.
- (ii) The Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Act 2022, was passed on 9 February 2022, to extend the provision of the UK Coronavirus Act 2022 which removed the duty on health boards to compensate those employees who need to isolate.
- (iii) The devolved provisions in the Coronavirus Act 2020 would have automatically expired on 24th March 2022, however in accordance with s.89(1), Ministers exercised their powers under section 90 to extend the expiration of these provisions. The Coronavirus Act 2020 (Alteration of Expiry Date) (Scotland) Regulations 2022 (SSI No. 40) extended the expiry date by six months to 24th September 2022. By the time these provisions expired in September 2022 the required provisions that were still necessary had been enacted in the Coronavirus (Recovery and Reform) (Scotland) Act 2022, which underwent its parliamentary passage from January to June 2022.
- (iv) The Non-Domestic Rates (Coronavirus) (Scotland) Act 2022 was passed by the Scottish Parliament on 21st June 2022 (having been introduced on 14th December 2021) and received Royal Assent on 28th

July 2022. This Act made provision about the effect of coronavirus on the calculation of the net annual value and rateable value of lands and heritages for the purpose of non-domestic rates.

Secondary legislation

81. The majority of legislation which enacted Ministerial decisions taken at Cabinet were in the form of secondary legislation. Decisions required to be made regarding how NPIs would be made and implemented. For example, did the measure require to be made on a legal basis in regulations, with the force of law, or would it be sufficient to set out recommendations in guidance advising individuals to behave in a certain way. Deciding which means was appropriate depended on the severity of the pandemic (at that time) and the impetus for individuals to act in a certain way. To assist with the legality and proportionality of rules set out in legislation, a review provision was included at certain intervals to ensure the relevant NPI was assessed as remaining necessary and proportionate.
82. SSIs concerning Covid-19 were regularly made using the “made affirmative” parliamentary procedure. This procedure is the quickest in terms of making and bringing legislation into force, compared to the principal alternatives of affirmative and negative procedure, but it also provides the least time for parliamentary and public scrutiny before coming into force. The made affirmative procedure allows SSI's to come into force before they are laid in the Scottish Parliament. Usually these regulations were accompanied by Scottish Government guidance which was published online. I understand that after November 2020 the Parliamentary Bureau of the Scottish Parliament agreed a new process for SSIs to increase the Scottish Parliament's opportunity to scrutinise them. This included the Parliament receiving advanced notice of the draft regulations and guidance before they came into force. There is an obvious balance to be struck, especially during a crisis period such as the Covid-19 pandemic, between having the facility to make legislation expeditiously but acknowledging the downside of the diminution in parliamentary scrutiny and accountability, in advance of the SSI coming into force.

International Travel Regulations

83. During the full course of the Covid-19 pandemic from 2020 to 2022 there were 78 SSIs made by the Scottish Ministers concerning various categories of International

Travel regulations, largely using powers in the Public Health etc. (Scotland) Act 2008. These regulations made provision for traveling into and out of the Common Travel Area (“CTA”) which is a long-standing arrangement between the UK, the Crown Dependencies (Bailiwick of Jersey, Bailiwick of Guernsey and the Isle of Man) and Ireland. Under the CTA, Irish citizens and UK nationals can move freely and reside in either jurisdiction and enjoy associated rights and privileges, including the right to work, study and vote in certain elections, as well as to access social welfare benefits and health services. I understand that the main sets of International Travel regulations were usually preceded by meetings with UK Government officials. These regulations were subject to a statutory review every 28 days and the decision to continue the measures implemented in regulations was informed by clinical, policy and legal factors.

84. Shortly before my appointment the ‘traffic light’ approach was adopted in May 2021. Overseas States and territories were categorised according to their prevalence of the virus (red, amber or green) and different NPIs were applicable to these different categories. Public guidance was provided to inform individuals of the legal requirements when traveling to Scotland. In the latter stages of the pandemic, less stringent rules were applicable to those who had received a recognised vaccine.

Coronavirus Health Protection Regulations

85. The Coronavirus Act 2020, of the UK Parliament, provided a power for Scottish Ministers to make regulations to protect health (section 49 and schedule 19). This power contained provision enabling the Scottish Ministers to make regulations for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Scotland (whether from risks originating there or elsewhere). This regulation power was covered by the Legislative Consent Motion approved by the Scottish Parliament in relation to the UK legislation, because it adjusted the executive competence of the Scottish Ministers.
86. The Scottish Ministers used their powers in section 49 and schedule 19 of the Coronavirus Act 2020 to make numerous sets of Health Protection regulations, including to: provide for lockdowns; restrict gatherings; mandate the wearing of face coverings; restrict domestic travel within the Common Travel Area; close businesses; and limit capacity at venues and stadia. Many of these measures were imposed before my time in office. These Health Protection regulations were legally required to be

reviewed every 21 days and the Scottish Ministers consistently reviewed the operation of such Covid-19 legislation to ensure that it remained necessary and proportionate. Reports regarding the necessity of the measures which were detailed in regulations were scrutinised by the Scottish Parliament, specifically its committee on Covid-19.

Directions by Local Authorities

87. On 27th August 2020, the Scottish Ministers made the Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Regulations 2020 (SSI No. 262) to give local authorities the power to make directions in respect of premises, events and public outdoor spaces. Again, the agreed policy and approach adopted in these regulations was established before I became Lord Advocate but their expiry date was extended on several occasions by subsequent SSIs until their final expiry in September 2022. These regulations required to be reviewed every 42 days.

Proportionality of Covid-19 legislation, including in relation to enforcement

88. The Covid-19 legislation discussed above gave additional powers to police officers to enable them to enforce the necessary public health measures. The policing of NPIs was required to ensure: (i) public obedience and confidence; (ii) that the NPIs had the desired effect of reducing the 'R' number; and (iii) compliance with the rule of law. Issues concerning the enforcement of Covid-19 legislation may be further covered in the corporate statement from COPFS to the Inquiry.

89. Police Scotland were established as the national police service of Scotland in accordance with the Police and Fire Reform (Scotland) Act 2012 and the Scottish Government does not operationally direct Police Scotland. I understand that the Scottish Government engaged directly with Police Scotland throughout the Covid-19 pandemic about what powers the police required to ensure public compliance with the NPIs. Police Scotland established Operation Talla, the objectives of which were to; preserve life; maintain law and order; prevent crime and; maintain core policing services during the pandemic. Police Scotland adopted a 'four E's' approach to enforcement - Engage, Explain, Encourage and only then Enforce. The Chief Constable stated that the four E's approach was appropriate to ensure policing in line with its principles of policing by consent, and in accordance with the following human rights principles - lawfulness, necessity, and proportionality. The police were

given various powers in coronavirus legislation, such as powers of entry into domestic premises and powers of dispersal.

90. Under the coronavirus legislation, a fixed penalty notice (“FPN”) regime was applicable. The level at which to set the fixed penalties was decided at Ministerial level, principally by the then Cabinet Secretary for Justice (Humza Yousaf) and the then First Minister (Nicola Sturgeon). The level of FPN was lower than that applicable in England and Wales and this approach was based on advice received from Police Scotland and COPFS that a higher level was unnecessary. Police Scotland provided information that they required to use FPNs in only 6% of instances, which highlights that in the majority of cases the issuing of a FPN was not required. In relation to the powers given to police officers to implement Covid-19 restrictions, the impact on human rights was carefully considered and all powers were assessed to be necessary and proportionate, and were used in an appropriate manner.
91. Specifically in relation to the levels approach amongst local authorities within Scotland and travel restrictions with other parts of the CTA, the Chief Constable noted that he did not consider it appropriate to establish roadblocks or checkpoints, and instead he was content to rely on the high level of voluntary compliance. In line with the general principle noted above, this was an operational decision for the Chief Constable. In addition, and as provided in detail in the Covid-19 legislation, Local Authority officials (predominantly Environmental Health Officers and Trading Standards Officers) had enforcement powers in relation to business premises (this is discussed further in the Director General Education and Justice Statement 2 dated 23 June 2023 at paragraphs 87-88).
92. In addition, I am aware that Mr John Scott KC (now Lord Scott) was commissioned to Chair an independent Advisory Group regarding Police Use of Temporary Powers which reported directly to Police Scotland in order to maintain and reflect the principle of operational independence. I understand that the Advisory Group concluded that the police had used their powers during the Covid-19 pandemic proportionately, and in a human rights compliant manner. Their substantive findings were published on 25th August 2021 and the key aspects are detailed in the Scottish Government Director General Education and Justice Statement 2 at paragraph 158.

Key challenges and lessons learned

93. I comment as follows regarding evidence given to the Scottish Parliament and UK Parliament, any internal and external reviews, and any key issues or junctures which I have not addressed elsewhere including any recommendations I would suggest to improve the response to a future pandemic.
94. I have not provided any oral or written evidence to the Scottish Parliament or any of its Committees or to any Committees of the UK Parliament in relation to key challenges and lessons learned from the Covid-19 pandemic, as part of any investigation or inquiry on their part into Covid-19 issues. However in the context of giving evidence to the Criminal Justice Committee of the Scottish Parliament on 22nd December 2021 [DB/011 - INQ000000] about the general issue of 'Prosecution of Violence against Women and Girls' I commented on the significant consequences for the criminal justice system caused by the pandemic and in particular the increased delays in cases calling for trial. I noted the particular impact in the High Court of Justiciary where, as of 30th September 2021, 837 serious sexual offences case were indicted and awaiting trial, and noting the disproportionate impact on female victims and witnesses. In addition, I provided further information to the Convener of the Criminal Justice Committee by letter on the 20th January 2022 in relation to Court Backlogs, Victim Support, Discontinuations and Evidence by Commission [DB/012 - INQ000000].
95. I have not contributed to any internal or external reviews or lessons learned exercises concerning the Covid-19 pandemic. The Scottish Government have established a statutory inquiry under the Inquiries Act 2005 to examine the handling of the Covid-19 pandemic in Scotland. As is set out in the Scottish Ministerial Code (paragraphs 5.11 and 5.13) the Lord Advocate should be consulted where it is proposed to appoint a judge or legal officer to a public inquiry, and that occurred with the appointments of Lady Poole and then Lord Brailsford to chair the Scottish Covid-19 Inquiry.
96. In terms of key challenges, lessons learned and recommendations to improve the response to a future pandemic I would note that most of the key issues and junctures pre-dated my appointment in June 2021. The role of principal legal adviser is important, but focused, in that I was contributing to the management of the pandemic by others within the Scottish Government rather than doing it yourself. I would also comment that ensuring the rule of law is more - not less - important in a time of crisis

and necessarily expedited decision-making. Decision-making at pace is challenging, including in ensuring that proper account is taken of legal considerations. In addition, there is a need to be able to make, and amend, regulations quickly, whilst also balancing that facility with Parliamentary scrutiny and accountability, and ensuring that there is sufficient public information about new and amended regulations, especially when breaches of them can lead to criminal or civil sanction for individual members of the public. Identifying lessons learned and making recommendations for future pandemics is also a key part of the Scottish Government's rationale for establishing the Scottish Covid-19 Inquiry, as reflected in its Terms of Reference.

Informal communications and Documents

97. I am asked regarding the use of informal WhatsApp and other messaging platforms, texts or messages used by me, Ministerial colleagues, senior officials and special advisers to the First Minister to discuss Covid-19 issues, and make decisions; and the extent to which such informal messaging were recorded and retained.
98. I did not use WhatsApp or other messaging platforms, texts or messages to have communications with the First Minister and other Ministers, senior officials or special advisers. I have no knowledge if others had WhatsApp groups etc. in order to communicate.
99. A WhatsApp Group was established for myself and my Private Office on 25th April 2022, noting that this is outwith the specified period requested for my statement, which ends on 18th April 2022. Therefore I did not use WhatsApp during the specified period for this statement. The name of the WhatsApp Group is "Team LA". This WhatsApp Group is used to alert me to emails which I have received, which require my urgent attention, usually outwith routine working hours. On these occasions, I would consider the relevant email correspondence which has been sent to me and reply by email. In addition, the Whatsapp group is also used for logistical purposes, for example, to confirm a pickup time or location when traveling. The messages in that WhatsApp group were set to automatically disappear after 5 days until the 3 November 2023.
100. All of the communications that I was involved in within Government were done in the normal ways, albeit to a much faster pace than usual. Communication was essentially through the email system - that is submissions and briefings to Ministers,

comments in response from Ministers, clearance of decision submissions; and also meetings of Ministers either in Cabinet, preceded by Cabinet papers, or ad hoc discussions about particular matters.

101. I did not make or keep any contemporaneous diary or notes from June 2021 to April 2022 relating to my involvement in, or views about, the Scottish Government's response to Covid-19. As advised above, I was not involved in any informal or private communications about the Scottish Government's response to Covid-19.

Statement of Truth

102. 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:

PD

Dated: 30th November 2023