

Witness Name: W James Wolffe KC

Statement No.2

Exhibits: WJW2

Dated: 10 January 2024

UK COVID-19 INQUIRY

WITNESS STATEMENT OF RT HON WALTER JAMES WOLFFE KC

In relation to the issues raised by the Rule 9 request dated 16 June 2023 in connection with Module 2A, I, WALTER JAMES WOLFFE, will say as follows: -

1. My name is Walter James Wolffe. I am a Kings Counsel. I am an advocate and barrister. I hold part-time judicial office as a Judge of Appeal of Guernsey and Jersey and am the Investigatory Powers Commissioner for Guernsey. My professional addresses are the Advocates Library, Parliament House, Parliament Square, Edinburgh EH1 1RF and Brick Court Chambers, 7-8 Essex Street, London WC2R 3LD. I was Lord Advocate during part of the period of interest to the Inquiry. I remain a Privy Counsellor. I am not employed by the Scottish Government.
2. I have prepared this statement myself. My present recollection of the events of interest to the Inquiry is very limited and I have refreshed my memory both as to the general course of events, and as to specifics, by reference to documents provided to me by the Scottish Government and by the Crown Office and Procurator Fiscal Service ("COPFS"). I have relied to a very large extent on that

documentary record in preparing this statement. 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.

3. References to exhibits in this statement are in the form WJW2/number - INQ000000.

Scope and arrangement of statement

4. On 28 November 2023 I submitted a statement to the Inquiry. For the reasons I explained in that statement I was unable at that time to provide a response which took full account of my responsibilities as head of the systems of criminal prosecution and investigation of deaths. A significant piece of work has been done at short notice involving both Scottish Government and COPFS to ingather and provide me with the documents which now enable me to provide this Supplementary Statement.
5. This Supplementary Statement deals only with my responsibilities as head of the systems of criminal prosecution and investigation of deaths. It does not address my Law Officer functions (i.e. the Law Officer functions exercised by the Lord Advocate as a member of the Scottish Government, as described at paragraphs 2.30 to 2.43 of the Scottish Ministerial Code, 2018 edition), other than to confirm that I attended Cabinet meetings and was a member of the Scottish Government Cabinet Subcommittee on Legislation. So that this Supplementary Statement may be treated as a free-standing Statement, I have included material which covers ground which was also dealt with in the statement submitted on 28 November 2023.
6. For presentational reasons, I will deal with the matters identified in the letter to me in Annex B of the letter to me dated 16 June 2023 in the following order:
 - A. Background, qualifications and role during the Covid-19 pandemic
 - B. Initial understanding and response to Covid-19 (January 2020 to March 2020)

- G. Role in public health and coronavirus legislation and regulations
 - C. Role in relation to non-pharmaceutical interventions (“NPIs”)
 - D. Divergence
 - E. Role in relation to medical and scientific expertise, data and modelling
 - F. Role in Covid-19 public health communications
 - H. Key challenges and lessons learned
 - I. Informal communications and Documents
7. I take the view that the nature of the office of Lord Advocate and the functions of that office constrain the extent to which I should comment on the policy choices made by Ministers.

A. Background, qualifications and role during the Covid-19 pandemic

Qualifications and professional experience

8. I hold the Degree of LLB (First Class Honours) and a Diploma in Legal Practice from Edinburgh University and a Bachelor of Civil Law Degree (First Class) from Oxford University. I qualified as an advocate in 1992. I was an advocate in private practice at the Scottish bar from 1992 until 2007 and again from 2010 until I was appointed Lord Advocate, practising mainly in public and commercial law. Between 2002 and 2007 I was First Standing Junior Counsel to the Scottish Ministers. I took silk in 2007. I was called to the bar of England & Wales in 2013.
9. Between 2007 and 2010 I served as a full-time Advocate Depute, prosecuting serious crime in the High Court of Justiciary, conducting criminal appeals and otherwise fulfilling the functions of a public prosecutor. In 2010 I returned to private practice, although in the first year after my return to practice I was principally engaged as leading counsel for the Crown in the lengthy fatal accident inquiry into multiple deaths at Rosepark Care Home.
10. I was elected successively as Vice-dean (2013) and then Dean (2014) of the Faculty of Advocates combining the responsibilities of those offices with practice at the senior bar. Between 2013 and 2015 I represented the UK’s legal professions

as Head of the UK Delegation to the Council of European Bars and Law Societies. I served as Dean of Faculty from 2014 until my appointment as Lord Advocate. I was elected a Bencher of the Middle Temple in 2015.

11. In June 2016, on the advice of the First Minister and with the approval of the Scottish Parliament, Her Majesty the Queen appointed me to the office of Lord Advocate. In September of that year, I was sworn as a member of the Privy Council. In May 2021 I announced my intention to resign from office as Lord Advocate although I remained in post until the appointment of my successor on 18 June 2021.

12. I had, and have, no party-political affiliation.

Role and responsibilities during the period of interest to the Inquiry

13. I was Lord Advocate during part of the period of interest to the Inquiry – namely, between 1 January 2020 and 18 June 2021.

Functions of the Lord Advocate

14. The Lord Advocate is the senior Scottish Law Officer. The holder of the office is head of the systems of criminal prosecution and investigation of deaths in Scotland, functions which are exercised independently of any other person¹. I describe these systems in more detail below. The Lord Advocate also exercises numerous statutory functions which are conferred specifically on the holder of that office and which are therefore exercised by the office-holder *qua* Lord Advocate and not as a Scottish Minister. These include, notably, functions in relation to extradition and mutual legal assistance² and constitutional functions under the Scotland Act 1998 in relation to Scottish legislation³.

¹ This long-established position is recognised in the Scotland Act 1998, section 48(5).

² Extradition Act 2003, section 191; Crime (International Co-operation) Act 2003.

³ Scotland Act 1998, sections 32 and 33, Schedule 6.

15. The Lord Advocate is also *ex officio* a member of the Scottish Government⁴. The role and responsibilities of the Law Officers within the Scottish Government at the relevant time are described in the Scottish Ministerial Code 2018 edition [WJW2/001-INQ000102901] paragraphs 2.30 to 2.43. I refer to the responsibilities set out in those paragraphs as “the Law Officer functions”. In fulfilling those functions, the Lord Advocate is often characterised as the principal legal adviser to the Scottish Government. In addition to the Law Officer functions, the Lord Advocate has (or at least had during my period of office), within the Scottish Government, Ministerial responsibility for the Civil Recovery Unit (which fulfils Scottish Ministers’ functions under the Proceeds of Crime Act) and exercises certain trust functions conferred by statute on Scottish Ministers.

Organisational context

12 The Lord Advocate is assisted, in the exercise of the responsibilities which I have described, by the Solicitor General for Scotland, who by statute may exercise the Lord Advocate’s functions⁵. During my period of office, the Solicitor General for Scotland was Alison di Rollo KC.

13 The Solicitor General for Scotland and I were supported by the staff of the Law Officers’ Private Office (“Private Office”) and the Legal Secretariat to the Lord Advocate (“LSLA”). Private Office comprised the small team of civil servants who provided administrative and practical support to the Law Officers and were the administrative interface between the Law Officers and both COPFS and Scottish Government. LSLA comprised a small team of lawyers, led by the Legal Secretary to the Lord Advocate, which supported the Scottish Law Officers in relation to their non-prosecutorial functions and was the primary interface between the Law Officers and the Scottish Government Legal Directorate.

14 As head of the systems of criminal prosecution and investigation of deaths in Scotland, the Lord Advocate has Ministerial responsibility for the work of COPFS.

⁴ Scotland Act 1998, section 44(1)(c).

⁵ Law Officers Act 1944, section 2.

COPFS is the agency which is responsible, in Scotland, for the prosecution of crime and investigation of deaths. COPFS employs staff - professional lawyers and others - who are engaged in the prosecution of crime and investigation of deaths in Scotland. COPFS is headed by the Crown Agent. During my period of office, the Crown Agent was David Harvie. Just as the Lord Advocate exercises functions as head of the systems of criminal prosecution and investigation of deaths independently of any other person, so COPFS acts independently of the Scottish Government.

The system of criminal prosecution

16. The system of criminal prosecution in Scotland is a unified system of which the Lord Advocate is the independent head. No person or body has power to initiate a prosecution in Scotland other than (in respect of proceedings on indictment) the Lord Advocate or an Advocate Depute exercising the Lord Advocate's functions, or (in respect of summary proceedings) a procurator fiscal or a procurator fiscal depute exercising the procurator fiscal's functions⁶. Procurators fiscal and their deputies are civil servants, employed by COPFS. Advocate Deputes are lawyers drawn from the wider legal profession as well as from within COPFS who hold a commission from the Lord Advocate which authorizes each of them to exercise the Lord Advocate's prosecutorial and death investigation functions.

16. The system for which the Lord Advocate is constitutionally responsible encompasses the investigation of crime as well as its prosecution in court. Whilst the police generally investigate alleged crimes on their own initiative, they are obliged to report their investigations to the procurator fiscal and to act in relation to the investigation of crime in accordance with any direction which the prosecutor may give⁷. The obligation on the police to report an accused person to the

⁶ A victim of crime may initiate a prosecution only with the consent of the Lord Advocate or the approval of the Court, but private prosecutions are exceptionally rare.

⁷ *R v. Manchester Stipendiary Magistrate ex parte Granada Television* [2001] 1 AC 300, 305B-F per Lord Hope of Craighead; *Johnston v. HM Advocate* 2006 SCCR 236, para. 117. The longstanding constitutional position is reflected in the Police and Fire Reform (Scotland) Act 2012, section 17(3); and the Crime and Courts Act 2013, Schedule 1, para. 6. In particular sensitive or significant cases, the prosecutor fiscal (and even an advocate depute) may be involved in directing the investigation from an early stage.

procurator fiscal is a safeguard both for the accused and for the public interest. The Lord Advocate has statutory power to issue directions to the Chief Constable in respect of the reporting of crimes to the procurator fiscal⁸. The Lord Advocate has empowered police officers to respond to minor offences by way of a recorded police warning instead of a report to the procurator fiscal. This is additional to the discretion which police constables retain to deal with very minor matters by taking no action or by issuing a verbal warning.

17. The Lord Advocate may issue guidance to the police in relation to other aspects of the investigation and prosecution of crime. Such, for example are the Lord Advocate's Guidelines on the Liberation of Persons Arrested and Charged. The Lord Advocate's powers to direct the police are confined to the investigation of crime. The Lord Advocate does not have power to direct the Chief Constable as to how he fulfils the other aspects of his responsibilities in relation to the policing of Scotland.

17. When the Crown has received a report from the police and any further investigations instructed or undertaken by the Crown have been completed, a prosecutor will consider: (i) whether there is sufficient evidence in law that the accused has committed a crime; and (ii) if so, what prosecutorial action is appropriate in the public interest. Prosecutors in Scotland have powers, in appropriate cases, to offer an accused an alternative to prosecution: a warning, diversion from prosecution, a "fiscal fine" (which is a fixed penalty offered by the procurator fiscal), payment of compensation to the victim, a combined fixed penalty and compensation, or an offer to undertake a certain number of hours of unpaid work⁹. Prosecutors are obliged to exercise their decision-making functions in accordance with policies promulgated by the Lord Advocate, notably the published Scottish Prosecution Code and internal case marking instructions.

18. The Lord Advocate is able to promote a consistent, coherent and proportionate response to criminality across the system of prosecution: (i) through the Lord

⁸ Criminal Procedure (Scotland) Act 1995, section 12.

⁹ The fiscal fine, compensation offer, work offer and combined offer are provided for in sections 302, 302A and 302ZA of the Criminal Procedure (Scotland) Act 1995.

Advocate's power to direct the Chief Constable in respect of the reporting of crimes; and (ii) through the promulgation of prosecution policy. The Lord Advocate is supported, in relation to all matters connected with policy, by the COPFS Policy Unit.

The system of investigation of deaths

19. As head of the system for the investigation of deaths, the Lord Advocate is constitutionally responsible for the arrangements for the investigation of sudden, unexplained and suspicious deaths. Non-criminal death investigations are undertaken on behalf of the Lord Advocate by the Scottish Fatalities Investigation Unit, a specialist unit within COPFS. Central to the system is the responsibility of medical practitioners to report sudden, unexplained and suspicious deaths to the procurator fiscal so that staff in COPFS can consider and undertake any further inquiries or investigations which may be justified by the particular circumstances. Following investigation, the Lord Advocate (in practice, generally an Advocate Depute exercising the Lord Advocate's functions) may initiate a fatal accident inquiry.

Participation in decision-making and other bodies

20. During the period of the Covid pandemic, I attended Scottish Government Cabinet meetings and I was also a member of the Scottish Government Cabinet Subcommittee on Legislation. I was generally, though not invariably, invited to Ministerial SGoRR meetings (i.e., Ministerial meetings of the Scottish Government Resilience Room). SGoRR meetings often engaged my head of system functions (as well, potentially, as my Law Officer functions). Depending on the subject-matter and circumstances, it might be sufficient for me to ensure that there was an appropriate level of representation from COPFS and/or SGLD rather than for a Law Officer to attend personally.

21. I do not recall personally having any direct interaction with UK Government or with the devolved administration in Northern Ireland in relation to the management of the pandemic. I had, so far as I have been able to identify, one call with the Counsel

General for Wales in relation to the management of the pandemic, but that was in the context of my Law Officer functions. So far as I can recall, I did not personally have any direct involvement in interaction between the Scottish Government and local authorities in relation to the management of the pandemic.

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

22. This Statement address the issues raised in this section only in relation to my functions as head of the systems of prosecution and investigation of deaths.

23. I cannot now specifically recall when I first became aware of Covid in my official capacity. The documentary record arises in the context of my Law Officer functions.

24. My electronic diary, which has been made available to me by Scottish Government, discloses that I was invited to Ministerial SGoRR meetings relating to Covid on 17 February 2020 and 25 February 2020, and to a further Ministerial SGoRR meeting on 16 March 2020. The output from the SGoRR meeting on 17 February [WJW2/002-INQ000233538] anticipated large scale disruption to the courts and justice system due to reduced court staffing levels and illness in the prison system [WJW2/003-INQ000389187] and identified the Justice Board as the body which would take the lead in planning for that contingency. The Crown Agent was a member of the Justice Board, along with senior Scottish Government officials and the executive leaders of other key institutions in the justice sector.

25. On 2 March 2020, I received a detailed briefing from the Scottish Fatalities Investigation Unit seeking approval to begin preparations to derogate from the usual requirement to notify infectious diseases [WJW2/004-INQ000389188]. On 16 March, the Solicitor General for Scotland and I had a meeting with the Crown Agent at Crown Office to discuss Covid contingency measures. On the following day, 17 March 2020, the Solicitor General, the Crown Agent and I had a meeting with the Lord President and the Lord Justice Clerk to discuss Coronavirus planning. On that date, the Lord President announced that no new criminal jury

trials would commence, or new juries empaneled, until further notice. Steps were thereafter taken by the Crown in co-operation with the courts to adjourn most summary trials until June. Most sheriff courts were closed, with essential sheriff court business (such as the first appearance of accused persons from custody) being confined to ten “hub” courts.

26. As I recall it, COPFS had fortuitously deployed some additional funding which had been provided by Scottish Government towards the end of 2019 on the acquisition of a considerable number of additional laptops and phones. This equipment was arriving literally as the country was “locking down” and was to enable COPFS, in the five-week period from mid-March, to distribute over 1,500 laptops and more than 140 smart phones to staff. With the support of its IT Department (which deserves enormous credit for the work it did then and subsequently), COPFS effected a remarkable shift to remote working.
27. On 18 March 2020, the Solicitor General, the Crown Agent and I had a meeting with the Cabinet Secretary for Justice at the Scottish Parliament. I briefed the Cabinet Secretary on the approach which the Crown and the Court Service anticipated taking in relation to the criminal justice system in response to the pandemic and on the need for legislation to support its continuing functioning [WJW2/005-INQ000389189]. I discuss this further at Section G below.
28. On 19 March 2020 the Chief Constable and I issued a Joint Statement which stressed our common commitment to keep people safe from harm and to deal effectively with those who break the law [WJW2/006-INQ000389190]. On that date and again on 23 March, according to my electronic diary, there were Ministerial SGoRR meetings. On 24 March 2020, I made a Statement to the Scottish Parliament, advising the Parliament of the impact of the pandemic on the criminal justice system. That statement and my responses to questions from MSPs can be found in the Official Report [WJW2/007-INQ000389191]
29. The same day I had a call with the President and Chief Executive of the Law Society of Scotland, in the course of which they expressed concern about the position of lawyers and others who would continue to require to attend court in the context of the anticipated lockdown regulations. A few days later, I raised with the

Domestic Abuse lead in the COPFS Policy Unit the additional risks which lockdown presented in respect of domestic abuse and the need *inter alia* for firm public messaging. She responded that the imminent anniversary of the Domestic Abuse (Scotland) Act 2018 would be used as an occasion, to be co-ordinated with Scottish Government and Police Scotland, for public [WJW2/008-INQ000389192] communications activity.

30. During March 2020, I contributed, from the perspective of my responsibilities as head of the system of criminal prosecution, to the policy consideration by the Scottish Government of criminal justice measures in the Coronavirus (Scotland) Act and Coronavirus Regulations. I address this in Section G below. I also approved the issue of directions and policy guidance in March 2020, as follows:

(i) Use of custody and investigative liberation/bail

31. I approved a Revised Guideline to the Police on Liberation of Persons Arrested and Charged [WJW2/009-INQ000389193] and Guidance to Prosecutors on Bail, both of which were issued on 20 March 2020 [WJW2/010-INQ000389194]. The purpose was to give guidance to the police on the approach to be taken to detention of accused persons in custody in the context of the pandemic, and to prosecutors in relation to the approach which the Crown should take to applications for bail [WJW2/011-INQ000389195]. I approved the issue of a further amended Revised Guideline to the Police issued 30 March 2020 [WJW2/012-INQ000389196]. The purpose of this second Revised Guideline was to extend the period during which the police could release an accused person on an undertaking, in circumstances where court capacity was severely restricted. The purpose was to reduce the risk of undertaking conditions (intended to protect the public, victims or witnesses) expiring, as they would in the then state of the law (which was modified in the Coronavirus (No 2) (Scotland) Act 2020) if the accused did not appear, and the sheriff did not grant an apprehension warrant.

(ii) *Fixed penalty notices.*

32. I approved the issue on 30 March 2020 of the Lord Advocate's Guidelines on the operation of the Fixed Penalty Notice scheme under the Coronavirus Regulations 2020 [WJW2/013-INQ000389197]. These gave directions to the police in relation to the reporting to the procurator fiscal of alleged offences under the Regulations. I instructed that it would generally be appropriate for the police to issue a fixed penalty notice where they would otherwise have considered submitting a report to the fiscal for a minor fixed penalty offence. The directions made clear that police officers retained discretion to take no action or to issue a verbal warning. They also made clear that a fixed penalty notice was not appropriate (and the case should be reported to the fiscal) where it was clear that the offending was motivated by a deliberate intention repeatedly to frustrate Covid restrictions and/or there was a substantial risk of the actions resulting in harm to an individual, a group of individuals or society as a whole. The directions also stated that the police should report the accused to the procurator fiscal for a fifth offence, following a fourth breach of Covid Regulations [WJW2/014-INQ000389198]. I took the view that an accused who had already committed multiple breaches of the Regulations should be reported to the fiscal once the potential fixed penalty reached the level of the maximum fiscal fine (which was increased to £500 in the Coronavirus (Scotland) Act 2020).

(iii) *Notification of Covid-related deaths*

33. At the outset of the pandemic, I directed that deaths due to Covid-19 (or presumed to be due to Covid-19) did not require to be reported to the fiscal unless there was some other substantive reason for reporting the death. This direction was given effect through a letter issued to medical practitioners by inter alia the Chief Medical Officer and the Crown Agent on 24 March 2020 [WJW2/015-INQ000389199]. As I explain below, I later adjusted the approach, to require certain categories of Covid-related deaths to be reported to the procurator fiscal.

(iv) Prosecution of public order offences

34. I authorized the issue on 30 March 2020 of guidance to prosecutors on public order offences in the context of Covid-19 [WJW2/016-INQ000389200]. Whilst recognizing that the police would where possible engage, explain and encourage compliance with public health restrictions, I considered that a robust prosecutorial response would be required should there be any serious incidents of public disorder threatening public health or public safety, particularly where public order offences were being committed deliberately in an attempt to avoid or frustrate the public health restrictions.

Subsequent developments

35. Subsequent changes or developments included the following.

(i) Establishment of the Covid Deaths Investigation Team

36. As I have explained above, at the outset of the pandemic, I relieved the medical profession from the requirement to report Covid-related deaths to the procurator fiscal, unless there was some other reason requiring the death to be reported. In April 2020, I requested briefing from COPFS as to how the Crown might balance, on the one hand, the general policy of not requiring all Covid-related deaths to be reported, whilst also equipping itself to respond appropriately to cases which might, for example, justify a discretionary fatal accident inquiry. I received advice and concluded that the reporting requirements should be revised to require two categories of Covid-related death to be reported to the procurator fiscal, namely: (i) deaths where there were reasonable grounds to suspect that the deceased may have contracted Covid at work; and (ii) deaths where the deceased was in a care home. COPFS established a specialist Unit (the Covid Deaths Investigation Team) in order to receive those reports. On 13 May 2020, I made a statement to the Scottish Parliament advising the Parliament of these developments [WJW2/017-INQ000285945] The policy was given effect through a letter issued to medical practitioners by the CMO and the Crown Agent [WJW2/018-INQ000222907]

(ii) *Guidance on the prosecution of coughing and spitting offences*

37. In July 2020 I approved Guidance to Prosecutors to the effect that there was a presumption that cases which involved spitting or coughing or attempting to spit or cough on others should be marked for petition proceedings [WJW2/019-INQ000389201]. My recollection is that this followed incidents of such behaviour directed towards police officers. I took the view that this prosecutorial approach reflected the gravity of such behaviour, and its effect on the victim, in the context of the risks presented by a highly infectious and potentially lethal virus.

(iii) *Use of custody and investigative liberation*

38. In July 2020, the Guideline to the Police on Liberation of Persons Arrested and Charged was revised [WJW2/020-INQ000389202] again. In September 2020, a joint report of HM Chief Inspector of Prosecution and HM Inspector of Constabulary reported that the revised Guideline had had a positive impact on custody decision-making, through prompting culture change. Fewer cases were being reported from custody and there was a much greater use of liberation on undertakings [WJW2/021-INQ000182915]. However, in October 2020, I was provided with data which showed a worrying increase in the number of cases involving breaches of undertaking; a minute which I sent to the Cabinet Secretary of Justice at that time explained the position [WJW2/022-INQ000389203]. In June 2021, just before I demitted office, I approved a further amendment to the Guideline to return it effectively to the pre-Covid position [WJW2/023-INQ000389204].

The criminal justice system generally

39. The effect of the pandemic on the operation of the criminal court system was profound. The timeline of events in relation to the use of the criminal courts is helpfully summarized in Exhibit 1 to Audit Scotland's report, *Criminal Courts Backlog*, May 2023 [WJW2/024-INQ000215053]. I describe below, in Section G, consideration given in March and April 2020 to options for restarting solemn trials. A Criminal Justice Board (on which the Crown Agent served) was established to

oversee the system response and from June 2020 the Board was engaged in the “Recover, Renew, Transform” Programme. Given my understanding of the Inquiry’s area of interest, I have not revisited the subsequent developments in relation to the operation of the criminal justice system, but I can do that if the Inquiry would find that helpful.

G. Role in public health and coronavirus legislation and regulations

40. In this Statement I will address the issues raised in this section only in relation to the exercise by me of my functions as head of the systems of prosecution and investigation of deaths. I also had involvement in the legislation and regulations in the exercise of the Law Officer functions.

Coronavirus (Scotland) Act 2020

41. As I have mentioned above, on 18 March 2020, I briefed the Cabinet Secretary for Justice on legislative measures which would support the continuing operation of the criminal justice system [WJW2/005-INQ000389189]. On 20 March 2020, Anthony McGeehan, Head of COPFS Policy Unit confirmed to Scottish Government that the COPFS “core asks” were to enable the remote participation by any party at any stage of the proceedings and electronic service of documents. He later noted that I had been briefed and had added to the “core ask” the expansion of section 259 of the Criminal Procedure (Scotland) Act 1995 (which allows evidence to be given by written statement). He also reported that I had highlighted that effective delivery of the changes would require appropriate legal aid provision [WJW2/025-INQ000389205].

42. Provision was, in due course, included in the Coronavirus (Scotland) Act 2020 to address the following matters:

- Increasing the maximum level of fiscal fine (Schedule 4, para. 7 of the 2020 Act)

- Allowing for electronic serving and lodging of documents and warrants (see Schedule 4, para. 1 of the 2020 Act)
- Removing the need for “wet” signatures (see Schedule 4, para. 1 of the 2020 Act)
- Expanding the opportunity to take evidence by written statement (Schedule 4, para. 11)
- Allowing custody cases to be dealt with on an all-Scotland basis, by video-link from police cells (Schedule 4, paras. 2, 3, 4, 8, 9)
- Suspending statutory time limits (Schedule 4, para. 10)

43. One of the measures effected by the Coronavirus (Scotland) Act 2020 was an increase to £500 in the maximum level of the fiscal fine. An Operational Instruction was issued to prosecutors in relation to this change [WJW2/026-INQ000389206]. The key policy point which the Instruction was intended to communicate was that the increase in the level of fiscal fine should allow fiscals to take action (by way of a fiscal fine) other than prosecution in a wider range of cases, where such action was assessed as appropriate in the public interest. The change was not intended to result in up-tariffing. Guidance was also issued to prosecutors in relation to the use of the amended section 259 of the 1995 Act [WJW2/027-INQ000389207].

44. One of the recommendations which I made to the Cabinet Secretary at the meeting on 18 March was to permit solemn cases to be determined by a judge sitting without a jury. Provision to this effect was included in the Coronavirus (Scotland) Bill but dropped by Ministers when it became apparent that it would not secure Parliamentary support. I recommended this measure because it seemed to me to be imperative to maintain so far as possible the administration of criminal justice – a core responsibility of the state – provided that this could be done in a manner which secured a fair trial to the accused [WJW2/028-INQ000389208]. I was conscious that public health restrictions which would be incompatible with conducting jury trials (given the particular difficulties in maintaining social distancing) were liable to be in place for a lengthy period. This would not only cause significant delays in individual cases but would give rise to a rapidly increasing backlog of serious cases which, with the passage of time, would become ever larger and more and more difficult to recover. I was acutely aware of the corrosive

impact which delay in criminal proceedings has on all of those involved - in particular on the complainer and the accused - as well as on public confidence. From the point of view of my responsibilities as head of the system of criminal prosecution, I considered that in these exceptional circumstances created by the pandemic, where solemn cases would not be able to be brought to trial before a jury potentially for some considerable time, the Government and the Parliament should be prepared to contemplate allowing such cases to be tried before a judge sitting without a jury. Ministers accepted this recommendation, and a provision was included in the Bill to this effect. All Stages of the Bill were due to be taken on 1 April 2020. I intended, wholly exceptionally, to speak in the debate on the Bill in support of the proposal and spoke personally by telephone to opposition justice leads to explain that support. However, by the morning of 1 April it was plain that the proposal would not secure Parliamentary support and Ministers decided to drop it from the Bill.

45. On 14 April 2020, the Scottish Government published a discussion paper on the various options which had been identified for restarting solemn trials. By that time, judge-only trials were not Ministers' favoured option [WJW2/029-INQ000389209]. During April, I attended round-table events with the Cabinet Secretary for Justice, stakeholders and MSPs to discuss the options for restarting solemn trials [WJW2/030-INQ000389210, INQ000389211, INQ000389212, INQ000389213, INQ000389214, INQ000389215] and [WJW2/031-INQ000389216]. I also had a discussion with the Chair of the Scottish Criminal Bar Association to discuss what could be done to prepare solemn cases even if they could not be brought to trial. On 12 May 2020, the Lord President commissioned the Lord Justice Clerk to chair a Short-term Working Group to consider the practicalities of restarting jury trials when public health guidelines permitted such a move. The Working Group recommended, in due course, that juries should sit at locations remote from the courtroom, where they could be socially distanced but could view the proceedings via a live link. This recommendation was adopted and was the basis upon which jury trials were restarted later in 2020.

Coronavirus (No. 2) (Scotland) Act 2020

46. The Coronavirus (No. 2) (Scotland) Act 2020 addressed the problem which I mentioned above, which had been identified by COPFS, in relation to the expiry of undertaking conditions (Schedule 2, para. 6). In addition, during the preparation of the Bill, I was one of the addressees of a submission asking whether the Bill should change the definition of “child” in the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 to cover any person under 18, as was the case in other parts of the UK [WJW2/032-INQ000389217. I was not convinced that the proposed amendment was appropriate, particularly as regards Regulation 7 in a context where the law did not, as a general rule, give the parent of a 16- or 17-year-old child parental responsibilities and rights [WJW2/033-INQ000389218] and [WJW2/034-INQ000389219, INQ000389220, INQ000389221, INQ000389222 and INQ000389223] for a fuller statement of the COPFS position. Ministers initially took the same view, though, in the event, Regulation 9 (though not the general definition of “child”) was amended during the passage of the Bill.

Coronavirus Regulations: general

47. The Coronavirus Regulations created new criminal offences and provided for their enforcement. In the ordinary course, COPFS Policy Unit would be asked by Scottish Government to comment from an operational perspective on such measures and I was generally concerned during the pandemic to ensure that Scottish Government obtained appropriate input from an operational perspective from COPFS in relation to the successive changes to the Regulations notwithstanding the speed with which these were being made.

Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020

48. When, in March 2020, the Scottish Government was considering the terms of the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, I made two comments from the point of view of my functions as head of the system of criminal prosecution. First, I recommended that the Government should fix the

amount of fixed penalty notices in a manner consistent with the existing regime in Scotland for antisocial behaviour offences, essentially because this would minimize the need to modify existing systems to accommodate a new regime. Secondly, I recommended that instead of providing that it would be an offence for someone to be outside their dwelling without a reasonable excuse (i.e., so that the absence of reasonable excuse formed part of the offence), the regulations should characterize a reasonable excuse as an explicit defence. The concern, from the point of view of the Crown in relation to the enforcement of the proposed offence, was that if the absence of reasonable excuse formed part of the offence itself, it would be necessary to prove this by corroborated evidence.

49. The Government accepted the latter point, and this was reflected in Regulation 8(4). In relation to the level of fixed penalty notice, Ministers decided to align with the UK Government's regulations. Accordingly, the Coronavirus Regulations created criminal offences and allowed the police to respond to such offences by service of a fixed penalty notice. The regime provided for the amount of the notice for a first offence to be £60 (reduced to £30 if paid within 28 days), the amount doubling with each successive offence up to a maximum of £960.

Fixed penalty notices

50. In May 2020 Scottish Government advised COPFS Policy Unit that Home Office was considering increasing the maximum fixed penalty notice fine to £3200. A member of the COPFS Policy Unit responded to advise that he was not aware of any context in Scotland which would justify an increase. He was not aware of fines being handed down by the Scottish courts anywhere near the proposed level. Further, this was not an issue which, so far as he was aware, had been raised by the police [WJW2/036-INQ000389225].
51. In August 2020, I was copied in on a submission which suggested consideration of changes to the fixed penalty regime under the domestic regulations. I responded to the effect that COPFS and agencies involved in enforcing the regime should be consulted [WJW2/037-INQ000389226]. On 16 October 2020 I received two submissions relating to the fixed penalty regime.

- (i) One related to potential increases in the level of fixed penalty notices. I responded to the effect that input should be obtained from Police Scotland [WJW2/038-INQ000389227]. I took the view that the submission did not contain sufficient justification for considering that an increase in the level of fixed penalty notices would be likely to enhance compliance. I was aware at that time of evidence emerging from the Police Scotland Independent Advisory Panel which indicated that the level of acceptance and payment of Covid-related fixed penalty notices was similar to that of non-Covid fixed penalty notices. I was concerned, from the point of view of my responsibilities as head of the system of criminal prosecution, that increasing the level of fixed penalty notices could affect the perceived legitimacy of the regime and have a paradoxical effect of reducing compliance. In the event, the police did not support change, and Scottish Government decided not to increase the fixed penalty notice amounts at that time.
- (ii) The other submission proposed inter alia that the power to issue fixed penalty notices should be extended to environmental health officers. I was content with this proposal on the basis that Ministers would use their powers of direction to align with the enforcement of fixed penalty notices by the police. Ministers confirmed that this would be done [WJW2/038-INQ000389227].

52. Thereafter, Scottish Government Justice Department officials liaised with Police Scotland and COPFS to explore the possibility of creating “aggravated” offences, which would attract higher fixed penalty levels. Police Scotland considered that any increase would have a limited impact. COPFS was concerned both about how “aggravated” offences would be defined and about likely difficulties of obtaining corroborated evidence. The number of cases being reported to the Crown for breaches of the Regulations was not large and increasing the fixed penalty notice level, even if it reduced non-compliance to some extent, would not therefore be justified to reduce pressure on the criminal justice system. In fact, the Compliance Advisory Group and the Police Scotland Independent Advisory Group considered

that higher fines would not help compliance; indeed, it was thought that the introduction of higher fine levels would be liable to undermine the policing by consent approach which had been taken throughout the pandemic. In March 2021, I agreed with the Cabinet Secretary for Justice that the issue of higher fixed penalty notice amounts should no longer be pursued, and the Cabinet Secretary minuted the First Minister to that effect [WJW2/039-INQ000389228].

Fixed penalty notices: international travel regulations

53. In May 2020, I received a submission from SGLD in relation to the proposed international travel regulations, which reported the UK Government's intention to apply a fixed penalty notice of £1000 to breaches. I responded to the effect that I favoured maintaining consistency with the domestic regulations unless there was a very good reason to justify a divergent approach. By early June, Ministers had decided that the fixed penalty notice level for breaches of self-isolation requirements under the international travel regulations would be £480, but that the penalties for breaches of the information requirements would match those in the domestic regulations. One issue was that Border Force, which was to be given power to levy fixed penalty notices, was (in contrast to Police Scotland) not subject to my direction. For that reason, I minuted the First Minister recommending that the maximum fixed penalty leviable by Border Force should be £480. I also informed her that COPFS was working urgently with Border Force with a view to enabling Border Force to report allegations of breaches of the regulations directly to the procurator fiscal [WJW2/040-INQ000389229].

Coronavirus Regulations: case marking instructions

54. Internal Case Marking Instructions were issued to prosecutors in relation to various offences created by. Coronavirus Regulations. These would, in the ordinary course

of events, be approved either by the Solicitor General or myself before they were issued.

C. Role in relation to non-pharmaceutical interventions (“NPIs”)

55. In this Statement I address the issues raised in this section only in relation to the exercise by me of my functions as head of the systems of prosecution and investigation of deaths. So far as I can recall I had no input into the policy consideration of NPIs in that capacity, other than insofar as I was responsible for any input which COPFS may have had (or which I may have had personally) on operational aspects of the enforcement of NPIs.

D. Divergence

56. In this Statement I address the issues raised in this section only in relation to the exercise of my functions as head of the systems of prosecution and investigation of deaths.

57. The provisions of the Coronavirus (Scotland) Acts in relation to the criminal justice system were necessarily tailored to specific features and needs of the Scottish criminal justice system. COPFS, the Scottish courts and Police Scotland took approaches which differed in some respects from the approaches taken by equivalent institutions elsewhere. The principal area of divergence in which I anticipate that the Inquiry will be interested and in which I was directly involved from the perspective of my responsibilities as head of the system of criminal prosecution was in relation to the financial level and use of fixed penalty notices.

58. As I have explained, I had policy input, from the point of view of my responsibilities as head of the system of criminal prosecution, into decisions by Scottish Government in relation to the financial level of fixed penalty notices. I remain of the view that the general approach which I took as the pandemic continued was justified, I did not see convincing evidence in support of increasing the amount of

fixed penalty notices. There was a reasonable basis for apprehending that increasing the amount of fixed penalty notices could undermine the approach which Police Scotland had been taking to the policing of the pandemic and, by affecting the legitimacy of the regime, have the paradoxical effect of reducing compliance. Insofar as the evidence now available indicates that there was greater use of fixed penalty notices in areas of relative deprivation [WJW2/041-INQ000389230], increasing the financial amount which could be levied by fixed penalty notice might well simply have resulted in higher levels of non-payment and/or a disproportionate impact on those least able to afford to pay.

59. The use of fixed penalty notices was subject to my directions to the police in relation to the reporting of offences under the Regulations. The directions, generally, sought to balance the power and responsibility of the police to enforce the Regulations by way of fixed penalty notices with a requirement to report the case to the procurator fiscal where the circumstances were liable to justify a sanction at the level of the maximum fiscal fine or above. In the event, as I understand it, only 108 fixed penalty notices at the £480 level (ie for a fourth offence) were issued in Scotland between March 2020 and May 2021 [WJW2/041-INQ000389230] so the requirement to report a fifth offence to the procurator fiscal seems unlikely to have been significant.

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

60. My functions as head of the systems of prosecution and investigation of deaths did not, so far as I can recall, involve me in the matters raised in this section.

F. Role in Covid-19 health communications

61. As I have explained, the Chief Constable and I made a public statement at an early stage of the pandemic, with a view to providing reassurance to the public that they would continue to be protected from crime; and I have mentioned COPFS

communications in relation to domestic abuse. My functions as head of the systems of prosecution and investigation of deaths did not involve me in Covid-19 health communications.

62. I would be very surprised indeed if alleged and actual breaches of rules and standards by Ministers, officials and advisers, and indeed Parliamentarians, did not have an adverse impact on public confidence. I have no data which would enable me to gauge that effect, which I suspect is likely to have been affected by the particular circumstances of each case, and on how the case was handled.

H. Key challenges and lessons learned

63. I address the issues raised in this section only in relation to the exercise by me of my functions as head of the systems of prosecution and investigation of deaths.

64. I made the following oral statements to the Scottish Parliament.

- (i) On 24 March 2020, I made the statement to which I have referred above about the effect of Covid on the criminal justice system [WJW2/007-INQ000389191]
- (ii) On 21 April 2020, I responded to an oral parliamentary question about the impact of Covid on the prosecution of crime in Scotland [WJW2/042-INQ000222975].
- (iii) On 13 May 2020, I made the statement to which I have referred above advising the Parliament that I had decided to establish the Covid Deaths Investigation Unit within COPFS, and to require the reporting of two categories of Covid-related deaths [WJW2/017-INQ000285945].

65. I provided written information to the Justice Committee of the Scottish Parliament as follows:

- (i) On 15 May 2020 I received a letter from the Convenor of the Justice Committee seeking information about the use of fiscal fines in light of the increase in the maximum level provided for in the Coronavirus (Scotland) Act 2020 [WJW2/043-INQ000389231]. I replied to that letter on 8 June, providing data for the early months of the pandemic [WJW2/044-INQ000389232. I subsequently wrote updating that information [WJW2/045-INQ000389233, WJW2/046-INQ000389234, WJW2/047-INQ000389235, WJW2/048-INQ000389236, WJW2/049-INQ000389237].
 - (ii) On 20 May 2020 I wrote to the Convenor of the Justice Committee updating the Committee generally about the impact of the pandemic for my responsibilities in relation to the prosecution of crime and the investigation of deaths [WJW2/050-INQ000389238].
66. My electronic diary discloses that on 16 September 2020, the Solicitor General, the Crown Agent and I had a virtual meeting with Adam Tomkins MSP, who had become Convenor of the Justice Committee towards the end of August.
67. In July 2020, I commissioned HM Inspector of Prosecution for Scotland to carry out an inspection (to be undertaken with HM Inspector of Constabulary) on four of the emergency criminal justice measures, namely: (1) electronic signature and electronic transmission of documents; (2) remote electronic attendance of parties at court; (3) the national jurisdiction of the sheriff court (which enabled cases to be initiated in any sheriff court); and (4) the Lord Advocate's Guidelines on Liberation by the Police during Covid. The Inspectors' report was produced in September 2020 [WJW2/021-INQ000182915] and speaks for itself.
68. The key challenge posed by the pandemic, from the perspective of my responsibilities as head of the systems of criminal prosecution and investigation of deaths in Scotland, was to seek to maintain, so far as possible, the administration of justice. COPFS effected a remarkable shift to remote working, and was able to continue to fulfil its functions throughout the pandemic. The then Crown Agent and the leadership of COPFS, as well as all of the prosecutors and staff who worked in the Service during that period, deserve great credit in that regard.

69. The greatest challenge was in relation to the wider system because of the inevitable constraints on the functioning of the courts. The pandemic gave rise to very significant delays in individual cases and a very substantial backlog, which the various measures taken (including the innovative decision to use remote centres for jury trials) were only able to mitigate to some extent. In 2021, Ministers provided a financial package designed to enable the criminal justice system to increase the throughput of cases. Nevertheless, the impact of the backlog has been considerable, and has had consequences lasting well beyond the end of the pandemic [WJW2/023-INQ000389204].

I. Informal Communications and Documents

70. I made virtually no use of WhatsApp during the pandemic; I have identified only one message relating to the pandemic (reporting a conversation between the Solicitor General and an advocate depute) in a short string with the Solicitor General which has been provided to the Inquiry. I made some use of text messages; the relevant message strings have been provided to the Inquiry. Almost all incoming and outgoing communications which I had were mediated through my Private Office and LSLA. In late February 2020, my Private Secretary set up an “electronic box” and from that date I no longer required to receive a daily box of hard copy papers. I did not keep a private diary or any other private record and retained no papers relating to the management of the pandemic.

Statement of Truth

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

Personal Data

Signed: _____

Dated: _____ 10 January 2024 _____