Witness Name: W James Wolffe KC
Statement No.:
Exhibits: WJW3
Dated: 23 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. I have no party-political affiliation.

2. I have prepared this statement myself. My present specific recollection of the events of interest to the Inquiry is 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. I have relied to a very large extent on the 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 WJW3/number - INQ000000.

Scope of this statement

4. I received a letter from the Inquiry on 19 June 2023 setting out the issues and questions which the Inquiry wished me to address. In early July 2023 I submitted a draft statement to the Inquiry. That draft statement was prepared: (i) on the footing of advice which I had been given at that time that the Inquiry did not require me to address my responsibilities as head of the systems of prosecution and investigation of deaths; and (ii) on the basis (as was the position at that time) that the Scottish Government had not waived legal professional privilege and was maintaining the Law Officer Convention.

5. On 10 November 2023 I was advised that it was likely that I would require to produce a statement dealing with my Law Officer functions (i.e., the Law Officer functions within Scottish Government which are described in the Scottish Ministerial Code), on the basis that an arrangement was under discussion which would allow the Inquiry to view privileged material. A substantial piece of work was put in hand to identify documents which would assist me in that task. I asked that the position in relation to my head of systems functions be clarified. On 22 November 2023 I was advised that the Inquiry did wish me to address those functions so far as necessary to respond to the questions in the letter of 19 June. On 28 November 2023 I submitted a statement to the Inquiry which explained the position as it then stood.

6. On 13 December 2023, I submitted a draft statement which addressed my responsibilities as head of the systems of criminal prosecution and investigation of deaths. That statement has been finalized separately and submitted to the Inquiry. I refer to it as the "Head of System Statement". This separate statement addresses my Law Officer functions within Scottish Government, as described in the Scottish Ministerial Code. In respect of those functions, the Law Officers are bound by the professional obligations of confidentiality and confidence which apply to any professional legal adviser. Further, by longstanding convention ("the Law Officers Convention"), Governments in the UK do not disclose whether Law Officers have advised personally on any particular matter[1]. I am accordingly not at liberty to disclose matters arising in the context of the Law Officer functions except to the extent that the Scottish Government has waived legal professional privilege and the Law Officer Convention.

7. Whether or not to waive privilege is a matter for the Scottish Government. On 19 December 2023, I was formally advised that the Scottish Government had waived legal professional privilege and the Law Officer Convention in respect of the documents which it had produced to the Inquiry (except formal Law Officer Opinions) but not otherwise. On 22 December 2023 I was provided with an Inventory of over 1900 documents which I was advised had been produced to the Inquiry under redaction for legal professional privilege and an electronic database of those documents. I have proceeded on the basis that the Inventory contains all of the documents which have been produced to the Inquiry in relation to which the Scottish Government has asserted privilege and that I can therefore rely on the redactions which the Government had previously made to documents in this database as defining the scope of the material in relation to which privilege has been waived.

8. Because the Scottish Government's waiver of privilege is limited to information contained in documents which have been produced to the Inquiry, I am not free to disclose information which is covered by legal professional privilege, or my role in the exercise of the Law Officer functions, other than to the extent that

[1] See eg *HM Treasury v Information Commissioner* [2010] QB 563; the Convention is reflected in the provisions of the Scottish Ministerial Code.

privileged information is contained in those documents[2]. It follows that I am unable, in relation to the Law Officer functions, to answer the questions put to me by the Inquiry in its letter of 19 June 2023 except so far as I can do so under reference to information contained in the documents which the Scottish Government has produced to the Inquiry. The absence of comment in this statement on any particular matter (including in response to questions posed by the Inquiry) accordingly cannot be taken to justify an inference (one way or the other) about my personal involvement or more generally as regards the legal advice provided to the Government. Where I do refer in this statement to a particular matter, what I can say is limited by the scope of what is disclosed by the documents which have been produced and it cannot be assumed that I have set out the full extent of my involvement. Nor should the fact that an issue is, or is not, dealt with in this statement, or the balance of coverage in this statement, be taken necessarily to reflect the significance of that particular issue relative to other issues, rather than the availability of relevant information within the documents which have been provided to the Inquiry.

9. Other than in relation to the first period (January to March 2020), I have not generally sought to identify documents in the database which were simply addressed or copied to me. I was among the addressees of quite a number of documents which Scottish Government has provided to the Inquiry and was copied in on very many more. The exercise of identifying and referring in this Statement to each such document proved extremely time-consuming, and the position is apparent to the Inquiry from the document itself. Equally, my attendance at Cabinet meetings will be apparent to the Inquiry from the minutes of those meetings, and other than in relation to that first period (January to March 2020), I have not made detailed reference to that attendance.

10. I have sought to identify, and to reflect in this Statement, documents in the database which disclose substantive involvement on my part germane to the issues identified in the Inquiry's letter of 19 June. Time has not permitted me to

[2] I proceed on the basis that it is not for me to seek to assess whether the explicit waiver in relation to the content of the documents which have been disclosed carries, in relation to any particular matter, any implied waiver in relation to further information not contained in the document, and I proceed therefore on the basis that I am confined strictly to the information contained in the documents.

read every document in the database, so this statement should not be taken to be comprehensive. The documents contain references to and descriptions of legal advice provided by SGLD; I have taken it that the Inquiry wishes me to address (so far as I can) only my direct personal involvement. I would be happy to address any document which references involvement by me which I have not identified, or any other additional matter, so far as I can, should the Inquiry wish me to do so.

11. I take the view that, quite apart from my professional obligations of confidentiality, 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 and decisions made by Ministers.

12. The limitations which I have set out at paragraphs 6 to 11 apply throughout this statement.

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

13. I refer generally to my Head of System Statement for my background and qualifications, a general statement of the Lord Advocate's functions, the organizational context in which I worked, and my functions as head of the systems of criminal prosecution and investigation of deaths.

The Lord Advocate's Law Officer functions

14. The Lord Advocate and the Solicitor General for Scotland are *ex officio* members of the Scottish Government[3]. The role and responsibilities of the Law Officers within the Scottish Government are described in the Scottish Ministerial Code [WJW3/001 – INQ000102901][4] at paragraphs 2.30 to 2.43. I refer to the responsibilities set out in those paragraphs as "the Law Officer functions". In

[3] Scotland Act 1998, section 44(1)(c).
[4]. This is the 2018 edition, which was applicable during the relevant period.

fulfilling the Law Officer functions, the Lord Advocate is often described as the principal legal adviser to the Scottish Government.

15. The Solicitor General and I were supported in the exercise of our Law Officer functions by the Law Officers' Private Office ("Private Office") and by the Legal Secretariat to the Lord Advocate ("LSLA"). LSLA comprised a small team of lawyers, led by the Legal Secretary to the Lord Advocate. They supported the Law Officers in fulfilling their non-prosecutorial functions and were the primary interface between the Law Officers and the Scottish Government Legal Directorate ("SGLD"). Throughout my period of office my Legal Secretary was Colin Troup.

16. As paragraph 2.31 of the Scottish Ministerial Code recognizes, whilst the Law Officers have Ministerial responsibility for the provision of legal advice to the Scottish Government, most legal advice provided to the Scottish Government is tendered not by the Law Officers personally but by lawyers employed in SGLD. In addition, Scottish Parliamentary Counsel Office ("SPCO") contains specialist legislative drafters who draft Bills. SGLD is headed by the Solicitor to the Scottish Government, who, during the relevant period, was Ruaraidh MacNiven.

17. SGLD was, during the period of interest to the Inquiry, organized into Divisions (with further sub-division into Branches), along subject-matter lines. The Divisions were:

    (i) Children, Family and Education Division
    (ii) Commercial and Business Services Division
    (iii) Constitutional and Civil Law Division
    (iv) Criminal Justice, Police and Fire Division
    (v) Food, Health and Social Care Division
    (vi) Litigation Division
    (vii) Local Government and Economy Division
    (viii) Marine, Transport and Natural Resources Division; and
    (ix) Rural Affairs Division

Solicitors within the relevant subject-specific Division were the primary source of legal advice for policy officials and Ministers. Litigation Division was a cross-cutting Division, which handled litigation involving the Scottish Government across all policy areas.

18. As paragraph 2.34 of the Scottish Ministerial Code explains, requests for legal advice from the Law Officers might be made by way of a request for a formal Law Officer Opinion, or in other ways – for example, by inviting a response by Law Officers to briefing on a particular point. In addition to briefing from SGLD, the Law Officers are copied in on a very large number of documents for their portfolio interest, information or awareness (though they see only a fraction of the legal advice provided to Ministers and policy officials). Paragraph 2.36 of the Scottish Ministerial Code makes clear that the Law Officers are not to be taken as offering a legal view on such submissions if they simply note them.

The role of the Lord Advocate in relation to legislation

19. The Lord Advocate has specific responsibilities in relation to Scottish legislation[5]. Paragraph 3.4 of the Ministerial Code states that the Ministerial statement, required by statute, that a Bill to be introduced into the Scottish Parliament is within the legislative competence of the Parliament, must be cleared by the Law Officers. Before introduction of a Government Bill, the Law Officers must accordingly consider whether the Bill would be within the legislative competence of the Parliament, so that they can give that clearance. Separately, by convention, Law Officer consent is sought for any retrospective provision in a Government Bill. It is accepted that the role of Law Officers in clearing a Bill, being a requirement of the Scottish Ministerial Code, may be disclosed.

20. After any Bill (whether a Government Bill or not) has been passed by the Scottish Parliament, the Law Officers consider whether the Bill, as passed, is within legislative competence and whether to exercise the Lord Advocate's statutory

[5] General information about the processes for considering the legislative competence of Bills is in the public domain: C McCorkindale and JL Hiebert, "Vetting Bills in the Scottish Parliament for Legislative Competence" (2017) 21 Edinburgh Law Review 319-351.

power to refer the Bill to the UK Supreme Court[6]. In relation to the Coronavirus (Scotland) Acts 2020, it is a matter of public record that I did not exercise that power. If the Scottish Government wishes to expedite the process of Royal Assent, it requires the agreement of the Lord Advocate, as well as of the UK Law Officers and the Secretary of State for Scotland, since this involves truncating the period during which a reference to the Supreme Court or an order under section 35 of the Scotland Act 1998 can be made.

21. As Lord Advocate, I was a member of the Scottish Government Cabinet Subcommittee on Legislation ("CSCL"). CSCL approval was sought before the introduction of a Government Bill to the Scottish Parliament or the lodging by the Government of a Legislative Consent Memorandum in relation to a Bill before the UK Parliament which engaged Rule 9B of the Scottish Parliament's Standing Orders. Its agreement was also sought before the Government invoked Standing Order 9.21 to ask the Parliament to treat a Bill as an Emergency Bill.

Participation in decision-making and other bodies

22. I attended Scottish Government Cabinet meetings throughout the relevant period. As I have mentioned, I was also a member of CSCL. I was also generally but not invariably invited to Ministerial SGoRR meetings (i.e., meetings organized through the Scottish Government Resilience Room attended by Ministers). Where there was an appropriate level of representation from COPFS and SGLD Law Officers would not always attend such meetings personally. On 29 May 2020, I attended a "deep dive", led by the Deputy First Minister, with the SG Scientific Advisory Group [WJW3/002 – INQ000380470].

23. 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 a call, to which I refer below, with the Counsel General for Wales in relation to the proposed restrictions on international travellers. I did not, so far as I recall, personally have any direct

[6] Scotland Act 1998 section 33.

involvement in interaction between the Scottish Government and local authorities in relation to the management of the pandemic.

Wider context

24. The information which I provide to the Inquiry in this Statement and in my Head of System Statement reflects only activity in relation to the management of the pandemic which I am free to disclose. It does not reference activity in relation to management of the pandemic which I am not free to disclose; nor does it mention any of the other matters with which I had to deal, in the exercise of my official functions, during this period.

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

25. I cannot now specifically recall when I first became aware of the novel coronavirus in my official capacity. So far as I have identified from documentary material, the first reference in a document which I would have seen is dated 27 January 2020 (but probably prepared on 24 January 2020). The SCANCE paper for Cabinet on 28 January 2020 (at which I was in attendance) contained an entry describing "an evolving situation" following the outbreak of a novel coronavirus emanating from Wuhan [WJW3/003 – INQ000362660]. The SCANCE paper referred to a COBRA meeting which had been held on 24 January and described contingency plans which were being put in place. The minute of the Cabinet meeting discloses discussion of the issue [WJW3/004 – INQ000362667].

26. The SCANCE note for Cabinet on 4 February (which I also attended) noted that SGoRR had been activated and that the Scottish Government was preparing for the "reasonable worst-case scenario of a situation similar to an influenza pandemic". It noted that the four CMOs had advised raising the assessment level from low to moderate and goes on to state that "this does not mean that there is an increased risk to individuals in the UK, but instead that UK CMOs consider it prudent to escalate planning and preparation in case of a more widespread

outbreak". The minute of the Cabinet meeting records that Cabinet was advised that SGoRR was continuing to monitor the situation and that preparations remained in hand WJW3/005 – INQ000362662].

27. On 11 February 2020, my office was copied into an email string which disclosed that the Minister for Public Health, Sport and Wellbeing was seeking advice on powers to quarantine asymptomatic individuals and to compel screening [WJW3/006 – INQ000380708]. The email chain indicated that policy officials were working with SGLD on these points and would bring forward advice on any regulations that might be wanted in Scotland. My electronic diary indicates that I attended a SGoRR meeting on 17 February 2020. A briefing paper from the SGoRR Covid-19 lead [WJW3/007 – INQ000233538] for that meeting set out the reasonable worst-case scenario for a pandemic influenza-type disease. It stated that health and scientific advisers were continuing to work on a reasonable worst-case scenario for Coronavirus Covid-19 but that it was deemed prudent to use the existing Pan Flu reasonable worst-case scenario for initial planning purposes. The outputs from the SGoRR meeting [WJW3/008 – INQ000389187] included work on legislation as well as consideration of the impact on the criminal justice system.

28. The SCANCE paper for Cabinet on 18 February [WJW3/009 – INQ000078549] which I attended, contained an update on preparations and confirmed that SGLD were engaged in providing advice. The Cabinet minute [WJW3/010 – INQ000362661] records that the Cabinet Secretary for Health and Social Care reported on the SGoRR meeting of the previous day, and that extensive work was now under way, in collaboration with others, to prepare for any outbreak in Scotland. I also attended Cabinet on 25 February. The minute of that meeting records that the First Minister advised Cabinet that she would be chairing a meeting of SGoRR later that day to discuss Scotland's response to coronavirus. She foreshadowed a fuller discussion at the following week's Cabinet and emphasized the need for care in messaging to the public [WJW3/011 – INQ000362663]. The list of outputs from the SGoRR meeting later that day [WJW3/012 – INQ000233546], which my electronic diary indicates I attended, included, under the heading "Legislation": "requirement that Scotland is similarly

equipped to take powers as UKG. There is a need to ensure maximum flexibility, providing clauses if there are any doubts around existing Scottish powers".

29. I understand from the documents that there was a Ministerial SGoRR meeting on 2 March, but this does not appear in my electronic diary and the addressees of the meeting papers include the Head of COPFS Policy Unit and the Solicitor to the Scottish Government but not the Law Officers. I attended Cabinet on 3 March. The minute of that meeting discloses that the Cabinet Secretary for Health and Social Care provided an update. She explained that although containment remained the highest priority it was likely that the response would move into the delay phase in the near future, during which the principal tool was` likely to be social distancing. She indicated that this could include restrictions on large scale gatherings and sporting events, but that it would be important not to implement such measures prematurely [WJW3/013 – INQ000362735]. The Solicitor General attended the Cabinet meeting on 10 March.

30. On 13 March 2020, my Legal Secretariat was copied in on a submission to the Minister for Public Health. Sport and Wellbeing discussing the impact of Covid on work across the Health Improvement and Health Protection Divisions [WJW3/014 – INQ000378698]. Among the specific issues identified was the need to postpone implementation of the Human Tissue (Authorisation) (Scotland) Act 2019. That was the subject of a separate submission addressed to me, along with the Minister, inviting our agreement to postpone the implementation of that Act [WJW3/015 – INQ000260940]. My Private Office responded to advise that I accepted that recommendation [WJW3/016 – INQ000378697].

31. There was a Ministerial SGoRR meeting on 16 March. This meeting appears in my electronic diary. I attended Cabinet on 17 March [WJW3/017-INQ000362664]. The minute records that the First Minister described the situation as unprecedented and warned that it was likely to remain so for the foreseeable future. She is recorded as stating that the measures announced the previous day across the UK were not necessarily the end point. The minute sets out that the Cabinet Secretary for Health and Social Care and the CMO provided further information, and that it was stated that if the messaging about limiting

contact and gatherings proved ineffective, it would be necessary to move to compulsory measures. The subsequent discussion recorded in the minute was wide-ranging; and the points made included observations about the urgency of the work required to ensure that the necessary legislative measures were in place, and about the impact on the criminal justice system.

32. On 19 March I was copied in on exchanges about delaying commencement of Part 2 of the Management of Offenders (Scotland) Act [WJW3/018 – INQ000379315]. On 22 March, my office was copied in on briefing to the Cabinet Secretary for Transport on the contractual implications of Covid-19 for rail franchises [WJW3/019 – INQ000379143]; and my office was also copied in on subsequent exchanges and submissions on these matters [WJW3/020 – INQ000379121, WJW3/021 – INQ000379151, WJW3/022 – INQ000379178, WJW3/023 – INQ000379179, WJW3/024 – INQ000379150, WJW3/025 – INQ000379194]. On 23 March, I was copied in on a submission to the Cabinet Secretary for Rural Economy and Tourism on proposed hardship payments to sea fishery vessels of 12 metres and under [WJW3/026 – INQ000261459]. On the same date I was copied in on a submission to Ministers advising them of the guidance to be provided by the CMO to doctors on death certification, which inter alia followed from my decision (which I have referred to in my Head of System Statement) that deaths due to Covid-19 did not require to be notified to the procurator fiscal unless there was some other reason for notification [WJW3/027 – INQ000380674]. I was also copied in on a question which the Cabinet Secretary for Justice had asked about the effect of the provisions of the UK Coronavirus Bill for the disposal of bodies [WJW3/028 – INQ000380705].

33. My electronic diary discloses that there was a SGoRR meeting on the afternoon of 23 March. I attended Cabinet (remotely) on 24 March 2020. The minute records that there was a further update from the CMO and the Cabinet Secretary for Health and Social Care and a discussion which is recorded in the minute [WJW3/013 – INQ000362735]. The CMO advised: (i) there were 584 confirmed cases in Scotland and had been 16 deaths; (ii) it was likely that around 1000 times that number of cases were circulating in the community; (iii) numbers in Scotland were likely to increase very rapidly over the coming weeks; (iv) a sharp

increase could place considerable pressure on available ICU capacity and there was doubt whether sufficient ventilators could be brought into use quickly enough; (v) it was likely clinicians would be faced with difficult decisions in relation to admissions criteria over the coming weeks; (vi) the vital importance of social distancing in reducing the pressure on the NHS could not be emphasized enough; (vii) modelling based on the available data indicated that the strict application of social restrictions for a minimum of 13 to 16 weeks should have a measurable impact on the spread of the virus but variable restrictions would likely be needed for much longer; and (viii) social distancing remained the most effective means of reducing the spread of the outbreak and of reducing the peak number of infections ("flattening the curve") in order so that the NHS could cope with demand.

34. On 24 March, I received briefing from SGLD on an issue in relation to the use of time-expired but QA tested respirators and copied in on briefing to the Cabinet Secretary for Health and Social Care on the issue [WJW3/029 – INQ000380849]. I advised that the key issue was the attitude of the HSE, as the relevant regulatory authority [WJW3/030 – INQ000380778]. On 25 March I was copied in on a submission to the Cabinet Secretary for Justice about home detention curfew [WJW3/031 – INQ000379339].

35. The UK Coronavirus Act received Royal Assent on 25 March, and over the course of 25 and 26 March, there were exchanges, to which I was copied in [WJW3/032 – INQ000380211, WJW3/033 – INQ000380226 and WJW3/034 – INQ000380230] about the draft Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020. As I have mentioned in my Statement of 13 December 2023, I commented, from the perspective of my responsibilities as head of the system of prosecution on: (i) the level of fixed penalty notice; and (ii) the drafting approach to the defence of reasonable excuse. I was briefed on the Regulations by SGLD [WJW3/035 – INQ000380235]. On 26 March the finalised Regulations were issued to me, along with the First Minister and Cabinet Secretaries, for clearance [WJW3/032 – INQ000380211, WJW3/033 – INQ000380226, WJW3/034 – INQ000380230, WJW3/035 – INQ000380235,

WJW3/036 – INQ000380269 and WJW3/037 – INQ000380328]. My Legal Secretary responded, on my behalf, as follows [WJW3/038 – INQ000380275]:

> "The Lord Advocate has asked me to confirm that he is content to clear this instrument. He has made the following comment.
>
> 'This instrument involves the most severe restrictions on movement and on commercial and social activity in our history, and those restrictions are associated with extraordinary police powers of enforcement which will, in practice, oblige citizens to account to the police for any activity undertaken outside the home. None of us can view the need to impose such restrictions on liberty with equanimity. However, Ministers may properly conclude that these extreme and extraordinary measures are justified by the risks to life and health which, as a society, we currently face. The provision for regular review (which will require, on each occasion, to be undertaken in a manner which respects Convention rights) and the ability to remove particular restrictions when those restrictions are no longer justified, provides reassurance that individual restrictions will not be retained for any longer than can properly be justified.'"

36. On 28 March I was copied into a submission to the Cabinet Secretaries for Justice and Economy, Fair Work and Culture on marriage, civil partnership, baptism and funeral ceremonies [WJW3/039 – INQ000380759]. On 30 March I was copied in on a submission to the Minister for Public Health, Sport and Wellbeing (and the Minister's response) seeking agreement to a proposal in relation to abortion (to allow mifepristone to be taken at home) [WJW3/040 – INQ000380796].

37. At Cabinet on 31 March 2020 (which I attended remotely) the CMO and the Cabinet Secretary for Health provided a detailed update on the current situation. There was also discussion of a paper presented by the Cabinet Secretary for Finance on financial support for costs arising from the Covid pandemic and a

paper presented by the Cabinet Secretary for the Economy on the impact of the pandemic on Scotland's economy [WJW3/041 – INQ000362718].

Role in public health and coronavirus legislation and regulations

38. In my Head of System Statement, I explain the policy input which I had into the Coronavirus legislation and regulations in the exercise of my functions as head of the systems of prosecution and investigation of deaths. In this statement I refer, so far as I am at liberty to do so, to the role which I had in the exercise of the Law Officer functions which I fulfilled within Scottish Government. I propose to address this thematically, by reference to particular measures (and amendments to those measures) rather than chronologically. The general limitations and explanations which I have set out at paragraphs 6 to 11 above apply.

39. In addition to the involvement in relation to the passage of legislation to which I refer below, reports to the Scottish Parliament on the continuing necessity for restrictions under the Coronavirus Act 2020 and the Coronavirus (Scotland) Acts were submitted to me, as Lord Advocate, for clearance for my interests, e.g. [WJW3/042 – INQ000379338 and WJW3/043 – INQ000379914].

The Coronavirus Act 2020

40. The Inquiry has the CSCL Paper (of which I was one of the addressees) of 19 March 2020 on the Legislative Consent Memorandum for the UK Coronavirus Bill [WJW3/028 – INQ000380705].

The Coronavirus (Scotland) Act 2020

41. On 22 March 2020, I was copied in on a submission to the Cabinet Secretary for Health and Social Care identifying potential provisions for inclusion in the emergency Coronavirus Bill to be introduced into the Scottish Parliament [WJW3/044 – INQ000380788]. I was also copied in on the Cabinet Secretary's response [WJW3/045 – INQ000380734, WJW3/046 – INQ000380735,

WJW3/047 – INQ000370836, WJW3/048 – INQ000380737]. On 23 March 2020 I was copied in on a submission to the Cabinet Secretary for Constitution, Europe and External Affairs identifying possible subjects for inclusion in the Bill [WJW3/049 – INQ000380761]. I was copied into subsequent exchanges in relation to evictions [WJW3/050 – INQ000380550].

42. On 28 March 2020 I received a submission, as a member of CSCL, inviting CSCL to agree the policy content of the Bill and to the invocation of Emergency Procedure [WJW3/051 – INQ000380822]. The minute noted that I required, separately to agree to those provisions in the Bill which might be said to operate retrospectively. On 29 March 2020, I communicated my agreement to the policy content of the Bill, that it progress under Emergency Procedure, that expedited Royal Assent should be sought and that the Bill should come into force the day after Royal Assent [WJW3/052 – INQ000380598] I observed:

> "This is an exceptional Bill. It has very significant effects including significant changes to the criminal justice system and impacts on Convention rights. In ordinary circumstances such measures would not be appropriate for emergency procedure and expedited Royal Assent and commencement. However, faced with the exceptional threat to human life and health which, as a society, we face collectively, and the exceptional impact which responding to that threat is having and is likely to have for some time on ordinary social activity, the Lord Advocate is content to agree the policy content of the Bill and the measures to expedite its Parliamentary progress and commencement.
>
> The Lord Advocate would like to record his appreciation of the extraordinary work which has been undertaken by policy officials, SGLD and PCO to prepare this very complex Bill with remarkable speed.
>
> The Lord Advocate can also confirm that he has approved the retrospective effect of the measures referred to at paragraph 22 of the paper."

43. Separately, I cleared the Bill for introduction in accordance with paragraph 3.4 of the Scottish Ministerial Code. Following the Bill's passage, I did not exercise my power to refer it to the UK Supreme Court.

The Coronavirus (Scotland) (No. 2) Act 2020

44. I was also involved, in the exercise of my Law Officer functions, in the preparation and passage of the Coronavirus (Scotland) (No. 2) Act 2020.

45. I was copied in on a minute of 24 April 2020 recording the approach which was to be taken to identifying content for this Bill [WJW3/053 – INQ000379164, WJW3/054 – INQ000379165, WJW3/055 – INQ000380817 and WJW3/056 – INQ000380818]. During the preparation of the Bill, I was copied in (for comment) on a briefing dated 27 April to the Cabinet Secretary for Health and Social Care on the potential to include in the Bill provisions for the compulsory purchase of care homes [WJW3/057 – INQ000380859] and endorsed a recommendation not to include such powers in the Bill [WJW3/058 – INQ000380774 and WJW3/059 – INQ000380590].

46. I was one of the addressees of the CSCL paper dated 2 May 2020 seeking agreement to the policy content of the Bill and to it proceeding by an expedited procedure [WJW3/060 – INQ000380552] and I confirmed my agreement [WJW3/061 – INQ000398978]. The CSCL paper records various further aspects of my involvement in this Bill:

(i) I was considering whether the proposed 7-day notice period for termination of student lets would be compatible with Convention rights.

(ii) It was anticipated that the Law Officers would be providing advice on an EU law issue relating to the provisions for carer's allowance supplement.

(iii) I had approved the retrospective element of: (a) provisions for termination of student lets; (b) provisions for additional dwelling supplement; and (c) provision to preserve the effect of bail undertakings if the accused did not appear.

(iv) CSCL approval was subject to my consent to the retrospective element of: (a) provisions in relation to non-domestic rates relief; (b) provisions for carer's allowance supplement; and (c) provisions relating to time to pay a confiscation order.

(v) I had highlighted legal issues in relation to proposals in relation to care homes, which had not been included in the Bill (Annex C of the submission).

47. I cleared the Bill for introduction as required by paragraph 3.4 of the Scottish Ministerial Code.

48. During the passage of the Bill, I advised on a Government amendment which would empower Ministers, in an emergency, to close down a care home in advance of an application to the court. I asked that the Cabinet Secretary be made aware of the speed with which an urgent application to the court was capable of being made and to consider the necessity of the proposed measure in light of that information. On the basis of her assessment that a pre-emptive power to intervene to protect life and health remained necessary, I was prepared to accept that the provision would be within the legislative competence of the Scottish Parliament, subject to further amendments being made at Stage 3 [WJW3/062 – INQ000380593 and WJW3/063 – INQ000380605]. I also considered, and cleared, a Government amendment in relation to emergency powers of direction of care homes [WJW3/064 – INQ000380741].

49. Following the passage of the Bill, I did not exercise my power to refer it to the UK Supreme Court.

Coronavirus Expiry and Extension Bill and Carer's Allowance Supplement Bill

50. I was one of the recipients of a CSCL Paper dated 25 May 2021 [WJW3/065 – INQ000380895] inviting CSCL agreement a Coronavirus Legislative Programme Package of two Bills to be introduced in June (a Coronavirus Expiry and

Extension Bill and a Carer's Allowance Supplement Bill), and a Coronavirus-related permanence Bill to be introduced in October 2021.

Domestic Regulations [The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 SSI 2020 No 103 and amendments; The Health Protection (Coronavirus)(Restrictions and Requirements)(Scotland) Regulations 2020 SSI 2020 No 278 and amendments; The Health Protection (Coronavirus)(Restrictions)(Local Levels) (Scotland) Regulations 2020 SSI 2020 No 344 and amendments]

51. I have referred in my Head of System Statement and above to my role in the preparation and clearance of the 2020 Regulations on 25 and 26 March 2020. In what follows I address the subsequent amendment of these Regulations. Ministers required to review the need for the restrictions and requirements set out in the Regulations every 21 days. The procedure identified towards making the amending Regulations included reference to requiring my approval [WJW3/066 – INQ000380326] and I was copied into exchanges on the proposed amending Regulations [WJW3/067 – INQ000380335, WJW3/068 - INQ000380205, WJW3/069 - INQ000380238, WJW3/070 - INQ000380239, WJW3/071 - INQ000380278, WJW3/072 - INQ000380345, WJW3/073 - INQ000380347, WJW3/074 - INQ000380348, WJW3/075 - INQ000380202, WJW3/076 - INQ000380348, WJW3/077 - INQ000380251, WJW3/078 - INQ000380317 and WJW3/079 - INQ000380394] - the No. 2 Amendment Regulations SSI 2020 No. 126. I do not propose to refer to the documentation before the Inquiry into which I was copied relating to subsequent amendments, but to focus on substantive involvement which I had which is apparent from the documents before the Inquiry.

52. In April 2020 I was copied in on a submission to Ministers advising them on a proposal to identify domestic abuse as a specific "exemption" within Regulation 8 of the 2020 Regulations. The policy advice to Ministers was not to amend the Regulations but to produce guidance. I agreed (from the point of view of my head of systems responsibilities) with that approach [WJW3/080 - INQ000389224]. A person leaving the home in order to escape domestic abuse already clearly had

a "reasonable excuse" in terms of Regulation 8(4)(m). There was a risk that an express provision specific to domestic abuse might raise questions about other criminal offences which were not the subject of express provision. At the same time, I indicated that guidance and messaging in relation to domestic abuse would be welcome.

53. On 1 May 2020 I was copied in on a briefing to the Cabinet Secretary for Justice of 6 May on the question of granting police powers of entry to domestic premises with a view to enforcing the Regulations; and I responded to that briefing to state that, given the ECHR implications, I would like to see an analysis of the need and justification for a new provision of that nature before it was included in Regulations[WJW3/081 – INQ000378433 and WJW3/082 – INQ000378434]. On 15 May I was copied in on briefing to the Cabinet Secretary for Justice which advised him that it was unlikely that the question could be resolved for inclusion in the next set of Regulations, but that officials would continue to engage with SGLD on the point [WJW3/081 – INQ000378433].

54. I was copied in on a submission to the First Minister and others dated 29 June 2020 recommending that the legal prohibition on leaving the place where you live without a reasonable excuse be lifted from the beginning of Phase 3 of the Route Map [WJW3/083 – INQ000380440 and WJW3/136 – INQ000380332]. The submission stated that I had recently noted in correspondence with SGLD "the need for Ministers 'to consider (sooner rather than later) whether the basic structure of the Regulations remains consistent with the public health guidance". Paragraphs 7 and 8 of the submission explained that the number of "reasonable excuses" had expanded significantly, such that there was an increasing risk that the public health guidance would appear to be out of step with the basic criminal prohibition in the Regulations, and that this bore on the Government's assessment of the continued justification for framing the regulations around a default prohibition on leaving the home.

55. A submission to Ministers dated 26 August 2020 on enhancing compliance and enforcement addressed the proposed creation of an offence directed against large household gatherings [WJW3/084 – INQ000380323]. The submission

noted that my views had been sought on a proposed offence based on a three household/8-person limit. I had expressed concern about the practicalities of policing an offence which depended on the police forming a reasonable suspicion that there were people from "over three households" in a private dwelling. The submission recorded that, on the basis that an offence directed against large household gatherings was appropriately framed, I was content that the police should have powers of entry to enforce the proposed offence. I was copied in on Ministerial responses [WJW3/085 – INQ000380371 and WJW3/086 – INQ000380392].

56. On 10 September 2020 the First Minister announced that regulations would be brought in to limit the number of people who could gather socially to six people from two households. A submission dated 18 September 2020 to the Cabinet Secretary for Justice discussed the question of whether the police should be given powers of entry to enforce this limit [WJW3/087 – INQ000378358]. The submission recorded that I had only been prepared to endorse the grant of powers of entry to enforce the provision in relation to house parties of 16 or more on the basis that this was targeted narrowly on the most risky behaviour. It advised the Cabinet Secretary that a proposal to grant wider powers of entry would require Law Officer agreement and that it might be difficult to provide sufficient evidence that such a move would be proportionate given how rarely the power in relation to the "house party" offence had been used and in the absence of clear and strong medical and scientific evidence as had been available in relation to the larger gatherings.

57. The papers provided to the Inquiry include an email response dated 29 October 2020 from the Cabinet Secretary of Justice to a submission concerning powers of entry in relation to household gatherings. The submission itself does not appear to be contained in the Inventory of documents which I understand to define the scope of the waiver of privilege. The Cabinet Secretary's response agreed to a proposed extension of powers of entry but noted "important notes of caution" from me of which Scottish Government and Police Scotland should be mindful.

58. A submission of 9 November 2020, on the first review of levels [WJW3/088 – INQ000379554], includes content (para. 15) which responds to concerns which I had apparently expressed in relation to the outdoor socializing rules in Level 1 areas.

59. In early 2021, a judicial review was brought in the Court of Session, challenging the enforced closure of places of worship[7]. I drew the attention of Cabinet, at its meeting of March 2021 [WJW3/089 – INQ000362991], to issues which had arisen in the context of that case – namely that at a procedural hearing the previous day, counsel had been unable to give the Court an assurance that all relevant documents had been produced, and that it had, further, been discovered that a document previously provided to counsel as the relevant "four harms" assessment had been misidentified. The latter issue would require to be reported to the Court and could have consequences for the conduct of the case. The discussion recognized that further work required to be done to enhance the Government's document management, search and production processes. A later submission, following the outcome of the case identified various learning points in relation to these matters [WJW3/090 – INQ000379367].

60. On 11 May 2021, I responded to a submission on easing restrictions on 17 May 2021 as follows [WJW3/091 – INQ000380150]:

> "The Lord Advocate has noted this submission. He appreciates the difficult balancing exercise that is required at every stage of the process of easing restrictions. He has the following comments:
>
> The Lord Advocate notes that a particular option for easing indoor in-home socialising restrictions appears to have been selected but it is not clear that alternative options (less intrusive measures) have yet been fully addressed. The review of the socialising restrictions – and particularly of the powers of entry to private dwellings – should be completed this week as a matter of urgency to ensure that the restrictions in place from 17 May

[7] *Philip v. Scottish Ministers* 2021 SLT 559.

are proportionate to the circumstances. This is particularly pertinent to the consideration of the relaxations around physical distancing and the impacts of those.

In relation to the powers of entry it seems particularly important to review the powers given the information provided from Police Scotland to police powers policy colleagues. As Police Scotland have only regularly been using powers of entry where they have reasonable grounds for suspecting a party of 16 or more people and given their preference to work with a power attached to gatherings of such a size, as it "seems proportionate and enforceable to them" at this time, it seems prudent to consider adjusting the powers of entry as soon as possible.

Input from clinicians of course needs to obtained and a four harms assessment undertaken in light of the information from Police Scotland but it is recommended that the input and assessments are urgently prioritised this week to ensure the restrictions in place from 17 May are justified, necessary and proportionate.

In relation to the decision to allow snooker halls and bowling alleys to re-open the Lord Advocate notes the rationale provided – he notes however that many of these arguments could be applied to e.g., soft play centres. There appears to be a need to further explain and justify this position as to why snooker halls and bowling alleys are to be prioritised in these circumstances."

61. On 12 May 2021, I was copied in on a submission to the Cabinet Secretary for Justice [WJW3/092 – INQ000379148] seeking his agreement to adjust the provisions on police powers of entry so that police would have a power to enter private dwellings only when they had reason to suspect a gathering of more than 15 persons. The submission noted that "Law Officers had asked that we consider the proportionality" of the provisions on powers of entry "against the background of the pandemic, the practical operation of such powers of entry and the range of

less restrictive alternatives that could be deployed". The Cabinet Secretary agreed to this recommendation [WJW3/093 – INQ000378228].

62. I was provided with further information in relation to the last point in this response, to which I responded further [WJW3/094 – INQ000379456]:

> "The Lord Advocate has noted the further submission you have provided on this. He acknowledges the issue of limited headroom and the fact that some prioritization of easings may be required. As has been noted before, however, where such decisions engage fundamental rights, it is critical that there is robust justification for decisions. He emphasizes the importance of the production of up to date four harms assessments and impact assessments (which consider fundamental rights) in respect of these proposals. Unless a robust justification for differentiating between those leisure and entertainment venues which are being opened and those which are not can be produced, it will be necessary for Ministers to consider the reopening of other leisure and entertainment venues (including soft play and funfairs) in early course."

63. A submission to the First Minister dated 13 May 2021 in relation to allowing marches and parades to restart [WJW3/095 – INQ000379931 and [WJW3/096 – INQ000379333] discloses that I had given substantive advice. First, in the context of a proposition that Ministers should act consistently with their approach in relation to other comparable events, I had highlighted the care required in making direct comparisons without clear acknowledgment that different considerations apply where fundamental rights are at stake. Secondly Law Officers had raised concerns that the numbers to be permitted on marches were still relatively small (50 people at level 2) and that this remained therefore a significant restriction on public protest. However, I was prepared to accept that the proposal was lawful, in a context where there was a lack of data, a desire to act cautiously, an ongoing requirement to keep the position under review, and static protests were not subject to a restriction on numbers and duration. As regards this last point the fact that the public was able to assemble and express

views, albeit not in the form of a march, helped to alleviate concerns about interference with the right to protest.

64. In response to a submission dated 21 May 2021, I raised three comments, to two of which officials responded on 31 May [WJW3/097 – INQ000379890]. I advised, in relation to a proposal to remove physical distancing requirements when walking a bride or groom down the aisle at weddings, that officials needed also to consider other comparable traditions. And I advised that a proposal that funfairs should remain closed (whilst allowing amusement arcades, which on the face of it posed greater risk, to open) would require a clear justification, not least in a context of a threatened judicial review. Officials provided me with a detailed explanation why they considered that the practice of walking a bride or groom down the aisle could be distinguished from other wedding practices. As regards funfairs, officials advised that further analysis had been undertaken, including a four harms assessment and that a recommendation to allow funfairs to open would be submitted to Ministers. I was copied in on a submission to the Deputy First Minister of 1 June which, in response to my advice, offered two options [WJW3/098 – INQ000379627]. I responded to state that I supported option 2, which would address the concerns which I had previously expressed about rationality and proportionality. The decision was made to allow funfairs to operate from 5 June [WJW3/099 – INQ000379577].

65. A submission dated 11 June 2020 dealing with the strategic framework for moving beyond Level 0 [WJW3/100 – INQ000379479] records, in the Annex (paras. 49-51), advice which I had provided. First, that though decisions on strategy were for Ministers they must be informed by appropriate expert and clinical advice. Secondly, any gateway condition must be properly informed by clinical advice as to the appropriate indicators to apply to next steps. Thirdly, a gateway condition should not fetter proper decision-making or be a substitute for the relevant legal tests. Fourthly, the obligations to review restrictions and to remove them as soon as they are no longer necessary or proportionate remain. Fifthly, SGLD and I had raised concerns about the physical distancing proposals, and the need to ensure that the approach was justified given the significant economic impacts (which engaged fundamental rights). Sixthly, I had advised in

particular that consideration should be given to the removal of physical distancing requirements in Level 0 areas and to the immediate removal of distancing requirements outdoors.

66. On 16 June 2021, the Solicitor General's Private Secretary responded with the following comments by the Law Officers on the revised strategic intent:

> "The revisal of the strategic intent to suppression of the virus to manageable levels is appropriate given the changing nature of the epidemic and its management; it is also a significant move. Given this revisal of the strategic intention and also that the package of measures within each level for the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations was designed to suppress R below 1, and R is now estimated to be between 1.2 and 1.4 it is important that those measures are reviewed and fully assessed against the new strategy. This illustrates the dynamic nature of the proportionality test and highlights the importance of the review to determine whether measures remain necessary and proportionate to the aim.
>
> A strategic review will impact on all measures and proposals so that the proposals around physical distancing (as well as the ongoing review of the social gatherings restrictions) should be assessed against that. It is noted that the proposal is to bring forward outdoor relaxations for physical distancing prior to indoor relaxations based on the difference in risk of transmission. However, it will be important also to give consideration to the possibility of aligning physical distancing relaxations to the appropriate levels as the Lord Advocate has highlighted - the question of whether relaxations of physical distancing may be brought forward for those areas currently on level 0 measures. The submission references an evidence paper which has been prepared by officials, supporting the physical distancing recommendations. However, that is not included in the submission and it is important that is presented with the recommendations to ensure that it may be considered by Ministers as the decision makers.

The Lord Advocate has also commented previously that the impact of the physical distancing rules are significant on businesses and other venue operators, engaging fundamental rights and with criminal sanctions attaching to compliance. It is important therefore that there is a clear and convincing rationale for the continuing maintenance of physical distancing requirements – including a clear and satisfactory explanation for why these are maintained in public settings when these requirements have been removed in private (noting that private unregulated settings have consistently been said to be riskier than public regulated settings).

As regards the baseline measures the Law Officers have drawn attention to the importance of the distinction between guidance that is truly voluntary and restrictive measures, whether they are characterized as legal measures or not. Going forward it will be important that clarity is carried through in terms of their design as well as their presentation."

International Travel Regulations [The Health Protection (Coronavirus) (International Travel) (Scotland) Regulations 2020 and amendments; The Health Protection (Coronavirus) (Public Health Information for Passengers Travelling to Scotland) Regulations 2020]

67. On 10 May 2020 I was copied in on a submission about changes under consideration by the UK Government, which included proposed restrictions on international travellers [WJW3/101 – INQ000380677] and was copied in on further exchanges about the issue [WJW3/102 – INQ000380802, WJW3/103 – INQ000380768, WJW3/104 – INQ000380784 and WJW3/105 – INQ000380727] As these reported, there were significant legal concerns about the proposed isolation requirements for asymptomatic individuals [WJW3/106 – INQ000380574]. The UK Government had sought to justify these by reference to a joint statement by the CMOs, but I took the view that this did not provide a sufficient evidence base for the proposed restrictions. My view was set out in a briefing to the First Minister [WJW3/106 – INQ000380574, WJW3/105 –

INQ000380727 and WJW3/107 – INQ000380728]. The First Minister responded to express concern that the Scottish Government was being a "barrier" to measures which (as she understood it) other countries had adopted and suggested a call between Law Officers [WJW3/108 – INQ000380811, WJW3/109 – INQ000380573 and WJW3/110 – INQ000380567]. My electronic diary discloses that on Sunday 17 May I had a call with the Counsel General for Wales which concerned this issue. On that date, I was copied in on a readout from a call between the First Minister and Mr Gove in which Mr Gove was recorded as having indicated that the Attorney General would be happy to speak to me. The readout asked my Private Secretary to set up that call [WJW3/108 – INQ000380811]. In the event it did not take place, I believe because the Attorney General was either not available or disinclined.

68. A. briefing of 20 May 2020, records that I had been provided with additional information and was giving further consideration to the main measures in the proposed Regulations [WJW3/111 – INQ000380563, WJW3/112 – INQ000380686]. A further submission of 21 May 2020 (which was copied to me [WJW3/113 – INQ000380573]) summarised my advice as follows [WJW3/114 – INQ000380570].

(i) There appeared to be a lawful basis for the bright line approach to self-isolation for international travellers. The measures could be justified on a precautionary basis provided they were rationally connected to the protection of life and health and remained proportionate.

(ii) There was a real risk that the measures, as proposed by the UK Government, amounted to a deprivation of liberty for the purposes of Article 5 ECHR. To reduce that risk, I considered that it would be highly desirable to remove the qualification that only in "exceptional circumstances" would individuals be free to leave self-isolation to obtain basic necessities such as food and medical supplies (in other words, I advised that individuals should be able to leave self-isolation for such purposes without requiring to satisfy an "exceptional circumstances" test).

(iii) Unless there was expert advice to the contrary, it would be necessary (to avoid breach of Article 8) to clarify that individuals travelling together would be permitted to self-isolate together.

(iv) I noted the significant qualifications of the self-isolation requirement arising as a result of the list of exemptions, the permission to travel within the UK to the proposed place of self-isolation, and the permitted reasons for leaving isolation. I advised that it would be necessary to have expert advice that these qualifications of the requirement to self-isolate did not cumulatively undermine the policy rationale.

69. On 22 May 2020 my Deputy Private Secretary intervened in an email string which included a submission to the First Minister on the enforcement of these proposed Regulations, in order to advise that I was urgently considering enforcement issues with COPFS, and attaching, for the benefit of the copy list, a full copy of the Opinion which I had issued in relation to the Regulations [WJW3/115 – INQ000380572]. He confirmed later that afternoon that I had noted the submission to the First Minister in relation to enforcement and penalties. I advised that proposed surveillance arrangements would increase the risk that the requirements would be held to be a deprivation of liberty and stated that I favoured maintaining consistency with the domestic regulations unless there was a good policy reason for any difference [WJW3/115 – INQ000380572 and WJW3/116 – INQ000380725]. I was copied in on subsequent exchanges between the Cabinet Secretary for Justice and the First Minister [WJW3/117 – INQ000380660 and WJW3/118 – INQ000380804].

70. On 4 June 2020 my Legal Secretariat was copied in on the submission to the Cabinet Secretary for Health and Social Care inviting her to make the Regulations [WJW3/119 – INQ000380616]. My full Opinion (the contents of which, as I understand it, are not encompassed within the Scottish Government's waiver of privilege) was annexed to that submission. Annex D of the submission contains a helpful table describing the variances between the proposed Regulations and those for the other parts of the UK. As paragraph 10 of the submission explains, the proposed Regulations departed from the UK

Government Regulations in respect of the circumstances in which a person could leave a place of self-isolation to obtain food, basic necessities and medical assistance. This was to mitigate the risk that, otherwise, the requirements for self-isolation could amount to a deprivation of liberty for the purposes of Article 5 ECHR. The submission noted that Wales was taking a similar (though not identical) approach. Paragraph 18 of Annex A to the submission further explained that the provisions had been drafted to maximise the effectiveness of the requirements whilst ensuring that they did not breach the ECHR. Paragraph 12 of the submission noted in summary the different approach which was proposed to enforcement. This was further elaborated in paragraph 18 of Annex A to the submission. The submission also included as an Attachment a separate submission on the Health Protection (Coronavirus) (Public Health Information for Passengers Travelling to Scotland) Regulations 2020, which noted certain differences from the UK Government position, notably in relation to enforcement, which reflected inter alia the different institutional arrangements for the investigation and prosecution of crime in Scotland. I was also copied into email exchanges responding to questions which the First Minister had asked about the enforcement provisions and which reference my views [WJW3/120 – INQ000380751 and WJW3/121 – INQ000380644].

71. There was a discussion of these measures at Cabinet on 23 June 2020 (which I attended remotely). The discussion is recorded in the Cabinet minute [WJW3/122 – INQ000362679]. The Cabinet Secretary for Justice reported that the UK Government was considering an approach which differentiated between countries of origin and was also considering further sectoral exemptions. He described two approaches to differentiating between countries of origin which were under consideration: one based on public health risk, and another which would take into account economic importance, international relations and willingness to reciprocate. Paragraph 47 of the minute records that there were legal and public health risks associated with the latter approach. Paragraph 49(b) references advice about the potential legal issues and the need for further legal consideration of any proposed exemptions, particularly to ensure that they served the overall public health purpose of the regulations.

72. A submission to Ministers dated 2 July 2020 [WJW3/123 – INQ000378371] containing proposals for "exemptions to quarantine" on arrival in the UK records (para. 9) that I was content that a "differential approach in terms of applying an exemption to lower risk countries is reasonable as long as this is firmly based on a public health justification" but that I had noted that the methodology and approach had to be one which the Scottish Government, advised by the CMO, would be prepared to rely on and apply consistently. Annex A to the submission set out further explanation of the legal position. I was copied into Ministerial responses [WJW3/124 – INQ000378764, WJW3/125 – INQ000378482, WJW3/126 – INQ000378282 and WJW3/127 – INQ000378468].

Miscellaneous Regulations etc

73. The documents produced to the Inquiry disclose involvement by me in the consideration given to various other statutory provisions passed in the context of the pandemic. For example:

(i) ***The Education (Miscellaneous Provisions) (Coronavirus) (Scotland) Regulations 2020, SSI 2020 No 128***

In April 2020 I was asked to advise as to whether Regulations to address the difficulty which local authorities were experiencing in dealing with placing requests could operate retrospectively [WJW3/128 – INQ000380749] and provided advice on the approach which should be taken to these Regulations [WJW3/129 – INQ000380750].

(ii) ***The Release of Prisoners (Coronavirus) (Scotland) Regulations 2020 SSI 2020 No 138***

The Inquiry has a submission to the Cabinet Secretary for Justice dated 24 April 2020 which discloses that I had been asked to advise on the approach to be taken, in the context of provisions for early release of prisoners, to prisoners with symptoms of coronavirus [WJW3/130 – INQ000380793].

(iii) ***The Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment Rules 2020 SSI 2020 No 175***

A submission to the Cabinet Secretary for Justice dated 25 August 2020 [WJW3/131 – INQ000379511] recorded that the provisions in these Rules allowing prisoners to have access to mobile phones, given the restrictions on visits imposed by the pandemic, had followed Law Officer advice.

(iv) ***The Social Care Staff Support Fund (Coronavirus) (Scotland) Regulations 2020 SSI 2020 No. 188.***

A briefing for the Cabinet Secretary for Health and Social Care dated 19 June 2020 noted that SGLD had sought my advice on the potential retrospective application of the regulation-making powers and that I had advised on that issue [WJW3/132 – INQ000380568].

74. The documents produced to the Inquiry disclose involvement by me in other matters related to the Coronavirus legislation. For example, on 13 April 2020, I was sent a note by the Cabinet Secretary for Health and Social Care, raising with me an issue in relation to applications to the sheriff for orders under the Adults with Incapacity (Scotland) Act 2000 [WJW3/133 – INQ000380733]. I responded to remind the Cabinet Secretary that relevant powers had been taken in the Coronavirus (Scotland) Act 2000, which it was open to her to commence by regulations, and to suggest that any issue about the apparent de-prioritisation by the courts of guardianship applications should be raised with the Cabinet Secretary for Justice [WJW3/133 - INQ000380733, WJW3/134 – INQ000380779 and WJW3/135 – INQ000380552].

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

75. It will be apparent to the Inquiry from the documents which have been produced to it that I was an addressee of, or was copied in on, a very large number of documents relating to NPIs. I do not propose to list or detail that material. The position, so far as I would be in a position to disclose it, is apparent on the face of the documents. I have referred above, under reference to the various statutory regimes, to substantive input which I had to the changing regime including NPIs.

Divergence

76. As the Inquiry will be aware, it was a central feature of the devolution scheme enacted in the Scotland Act 1998, and as it existed during the period with which this Statement is concerned, that executive functions within devolved competence were transferred to the Scottish Ministers[8] and that UK Government accordingly did not, as a general rule, retain such powers or functions in relation to matters within devolved competence as regards Scotland. Scottish Ministers were responsible for deciding how to exercise the executive powers and functions which rested with them. They were politically accountable for the exercise of those functions to the Scottish Parliament and could be held legally accountable in that regard in the courts.

77. In the exercise of the statutory functions and other responsibilities which rested with them, it was, of course, as a matter of legal analysis, for Scottish Ministers to decide whether alignment with, or divergence from, decisions made by Governments for other parts of the UK was sound policy either generally or on any given issue. It will be for policy Ministers to explain the approach which they took in that regard. There were two areas of divergence between the legal regime applicable in Scotland and the legal regime applicable in England, in which I was personally involved, and on which I consider that I can properly comment.

[8] Scotland Act 1998, section 53.

(i) *The level of Fixed Penalty Notices.* This is a matter upon which I had policy input into Ministers' decision-making from the perspective of my responsibilities as head of the system of criminal prosecution. I have commented on it in my Head of Systems Statement.

(ii) *The International Travel Regulations.* There were certain points of divergence between the Scottish Regulations and those made by the UK Government. As I have explained above, these differences reflected the Scottish Government's legal analysis.

Informal Communications and Documents

78. I made virtually no use of WhatsApp in the context of work during the pandemic – I have identified only one WhatsApp message referencing the pandemic (reporting on a conversation with an Advocate Depute) in a very short WhatsApp string with the Solicitor General for Scotland. I made some use of text messages; the relevant messages 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 pandemic.

Statement of Truth

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

Signed: PD

Dated: _____23 January 2024_____