



Law Society
of Scotland

Law Society of Scotland Response

The Independent Commission on UK Public Health
Emergency Powers Inquiry

March 2023



Introduction

The Law Society of Scotland

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Constitutional Law and Human Rights Sub-committee welcomes the opportunity to consider and respond to the Independent Commission on UK Public Health and Emergency Powers. The Sub-committee has the following comments to put forward for consideration.

General Comments

Introduction

In response to a House of Lords Inquiry during the pandemic we recommended a review of the law relating to health emergencies see: House of Lords Constitution Committee Inquiry into the *Constitutional Implications of Covid-19* <https://committees.parliament.uk/writtenevidence/10711/html/>

We took the view that legislation already exists to deal with circumstances related to pandemic disease and made reference to the fact that the Civil Contingencies Act 2004 applies to emergencies and creates a framework for civil protection in the UK.

The emergency powers in the Act allow for temporary regulations to deal with serious emergencies. Emergency powers under the Act are subject to rigorous safeguards and can only be used in exceptional circumstances.

The Public Health (Control of Disease) Act 1984 (amended by the Health and Social Care Act 2008) as respects England and Wales and the Public Health (Scotland) Act 2008 include quarantine, detention and medical examination, and other powers, for local authorities and Health Boards.

The preference of Government to have employed either Coronavirus specific legislation or Public Health Acts rather than Civil Contingencies legislation raises questions about the legislative framework which applies across the UK and its fitness to deal with future Public Health crises.

We can envisage the need for an updated law to deal with public health emergencies becoming a priority for all the UK Administrations and Legislatures in the near future.

In this connection we re-iterate our recommendation that the Four Governments consider the creation of a Standing Advisory Committee on Pandemics which, under an independent Chair would comprise medical, scientific, educational, research, and other experts drawn from the Four Nations and Ministerial Members from the Four Governments to keep under review developments in virology and epidemiology, oversee preparation for viral events including supply chains, stockpiling of medicines, vaccines, medical equipment and PPE, training of medical and nursing staff and preparation of educational tools to inform the public and general preparedness for future pandemics.

In considering those questions which ask about the impact of or on the rule of law of Covid-19 legislation, past, present or to come we seek to measure the legislation in the light of the principles identified by Lord Bingham as contributing to the rule of law:

1. The law must be accessible, intelligible, clear and predictable.
2. Questions of legal right and liability should ordinarily be resolved by the exercise of the law and not the exercise of discretion.
3. Laws should apply equally to all.
4. Ministers and public officials must exercise the powers conferred in good faith, fairly, for the purposes for which they were conferred – reasonably and without exceeding the limits of such powers.
5. The law must afford adequate protection of fundamental Human Rights.
6. The state must provide a way of resolving disputes which the parties cannot themselves resolve.
7. The adjudicative procedures provided by the state should be fair.
8. The rule of law requires compliance by the state with its obligations in international as well as national laws.

Not all of these principles apply to the Covid-19 legislation as such but we think that principles 1,3,4,5 and 8 are pertinent to the Commissions objectives.

For the purposes of the response to the Commission we will focus on the Emergency Powers legislation which applies in Scotland.

Questions

Topic 1: Existing legislative options during a public health emergency (pages 9-14)

1. The Commission's starting point is that any primary legislation designed to address public health emergencies must contain provision for urgent law making. Do you agree with this position? If not, why?

Our Comment

We agree with this position.

2. To what extent does existing primary legislation available for use in a future public health emergency allow for urgent law-making while: a. promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation; b. complying with the UK's international legal obligations, including those relating to human rights; and c. otherwise reflecting Rule of Law values?

UK Legislation

The primary legislation which currently exists and is available for use in a future health emergency in England or at UK level consists of two main Acts of Parliament; the Public Health (Control of Disease) Act 1984 (which does not apply in Scotland) and the Civil Contingencies Act 2004.

The Civil Contingencies Act 2004 (CCA) Applicability to the coronavirus Pandemic

The CCA has UK wide application and Part 2 contains the provisions regarding emergency powers.

An argument was articulated during the debates on the Coronavirus bill that the CCA would have been sufficient to deal with the coronavirus pandemic: David Davies MP stated during the Committee Stage of the Coronavirus Bill after discussing the Public Health (Control of Disease) Act 1984 that, "*The other Act is the Civil Contingencies Act 2004. As the hon. Gentleman [Mr Bryant] said, the Government could have used that. The Government have argued, most recently last week at business questions, that this is the wrong sort of emergency—sort of like the wrong kind of snow—to fall under the remit of the Civil Contingencies Act. I have to tell the Government that they are plain wrong. I was here for the debates on the Civil Contingencies Act. I remember the arguments about what it would and would not apply to, and this is specifically the case. It is not just me. I am not a lawyer, but a number of public lawyers of my acquaintance think the Government are wrong. Most importantly—my right hon. Friend the Member for Sutton Coldfield (Mr Mitchell) alluded to this—we can call on an even greater authority. After business questions last week, I made a point of order to ask Mr Speaker if we could get the opinion of his counsel, Mr Daniel Greenberg. I will read the relevant paragraph to the House—it is only a couple of lines. He said:*

"The 2004 Act (which I wrote), including the powers to make emergency provision under Part 2, is clearly capable of being applied to take measures in relation to coronavirus."

The man who wrote the Act, the most authoritative source in this House, Mr Speaker's Counsel, who is completely impartial, says that the Government are wrong, and they could have used the Civil Contingencies Act.”

The Cabinet Office guidance states that the CCA should only be used for a “category three” emergency (the highest level), and only as a last resort. The examples it gives for such an emergency are major natural disasters or a Chernobyl-scale industrial accident.

The House of Commons Public Administration and Constitutional Affairs Committee report ***Parliamentary Scrutiny of the Government's handling of Covid-19***: [Parliamentary Scrutiny of the Government's handling of Covid-19 - Public Administration and Constitutional Affairs Committee - House of Commons](#) considered whether the CCA should have been used instead of the bespoke approach of the Coronavirus Act 2020. The Government proffered the following arguments in favour of not using the CCA:

- A. Although epidemics are included in the types of emergency for which the CCA might be used the circumstances were not appropriate for its use.
- B. The CCA, he argued, is designed to address sudden, unanticipated events rather than the gradual onset of an epidemic:
- C. the powers the CCA confers on Government are sweeping and it is specifically designed to be used when there is unexpected emergency rather than a developing threat.
- D. There was time for bespoke legislation to be passed by Parliament. There is a risk—the rule of law applies throughout—that using the CCA would have been and could have been challenged on the basis that its use was inappropriate in circumstances where some of the requirements for dealing with the Coronavirus were foreseen in advance.

These arguments appear to limit the circumstances in which the Act can be used. In addition to Mr Greenberg other legal experts took the view that the Government was incorrect. Professor Aileen McHarg, Professor of Public Law and Human Rights at Durham Law School, said it was not clear why the Government took this view of the Act, and that the COVID-19 emergency, and pandemic emergencies in general, clearly falls within this act. She set out that: “Section 19 clearly envisages an event that threatens severe damage to human welfare, including loss of human life and human illness, so it is within the scope of the Act”.

Our Comment

We take the view that the CCA could have been used to deal with Covid-19. Noting that Professor McHarg is a member of our Constitutional Law and Human Rights Sub-committee, we agree with her analysis that the Covid-19 pandemic is within the scope of the CCA. Differences between the Coronavirus Act 2020 and the CCA may indicate why the Government decided against deploying the CCA and decided in favour of a bespoke provision.

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

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

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

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

Promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation

Overview of the CCA

The CCA repealed the earlier Civil Defence legislation from the 1930s, 40s and 50s and the Emergency Powers legislation from the 1920s.

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

Our Comment

The CCA details what may or may not be included in emergency regulations and provides safeguards to prevent misuse. The Act expressly allows for emergency powers to have effect in a Part or region. We noted that “region” is defined with reference to the Regional Development Agencies Act 1998 which has been substantially repealed by the Public Bodies Act 2011. In that context we agree with recommendation

91 of the National Preparedness Commission *Independent Review of the Civil Contingencies Act 2004 and its supporting arrangements* to the effect that the Regional Nominated Coordinator role in the CCA Part 2 should be “removed at the next available opportunity as it is a legacy of the former regional arrangements”.

The CCA section 29 provides for consultation with and conferral of functions on the devolved administrations. We commend the so-called “triple lock” which must be met before emergency regulations can be made. The three tests are:

- that an emergency has occurred, is occurring or is about to occur;
- the provisions sought are necessary for the purpose of preventing, controlling or mitigating an aspect or effect of the emergency;
- the need is urgent, and existing legislation and other means would risk serious delay.

We take the view that the fact that emergency regulations under section 27(1) must be laid before Parliament “as soon as is reasonably practicable” and that they lapse if not approved within seven days, constitute a significant protection for the individual. Furthermore, we note that Section 27 regulations are amendable if a resolution of each House is passed to amend them and that under section 26 the regulations lapse after 30 days from the date on which they are made. In conclusion these protections in the CCA contain more stringent accountability provisions and better parliamentary control of executive action than the Coronavirus Act 2020.

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

CCA regulations can make provision of any kind that an Act of Parliament or by Royal Prerogative could make (other than amending CCA Part 2 or the Human Rights Act 1998 (the HRA)). They are subject to a requirement that the Monarch or Minister make a statement: (a) specifying the nature of the emergency, and (b) declaring that the person making the regulations is satisfied that — (i) all the conditions in section 21 are met, (ii) the regulations contain only provision which is appropriate for the purpose of preventing, controlling or mitigating an emergency, (iii) the effect of the regulations is in due proportion to the emergency, (iv) the regulations are compatible with the Convention rights under the HRA 1998 and (v) in the case of subsection (2) regulations (those made by a Minister), there would be delay arranging an Order in Council.

Our Comment

The emergency regulations engage ECHR Art 2 by aiming to protect human life, health or safety, treat human illness or injury or protect or restore the provision of services relating to health. The compatibility statement is a clear indication of the importance of Convention Rights compliance.

The regulations may not a. require a person to serve in the military, b. prohibit a strike or other industrial action...c. create an offence triable on indictment or punishable with imprisonment for a period exceeding

three months, or (ii) with a fine exceeding level 5 on the standard scale, or d. alter procedure in relation to criminal proceedings.

Taking a broad assessment, we conclude that the human rights protections in the CCA are significant and embed protection for human rights in a way in which the Coronavirus Act 2020 does not.

Otherwise Reflecting Rule of Law values

Our Comment

We have assessed the extent to which the CCA reflects Lord Bingham's *Rule of Law* and principles 1,3,4,5, 6, 7 and 8.

Generally, we take the view that the CCA complies with the Rule of Law principles. For example, the legislation is relatively clear and accessible, use of Ministerial discretion is closely monitored by Parliament, there is explicit protection for Human Rights and Ministers cannot proceed with regulations which lack convention Rights compliance. Furthermore, the rule of law is specifically acknowledged in section 22(5) which provides that "any person making emergency regulations must under have regard to the importance of ensuring that Parliament, the High Court and the Court of Session are able to conduct proceedings in connection with the regulations, or action taken under the regulations". The intention is therefore to ensure that there is adequate parliamentary and judicial oversight of both the content of the regulations and of action taken under them.

Recent CCA Reviews

The CCA has been the subject of reviews a. The Cabinet Office *Post-Implementation Review* and b. the National Preparedness Commission *Independent Review of the Civil Contingencies Act 2004 and its supporting arrangements*. Neither review mentions the rule of law. In this section we highlight the recommendations dealing with CCA Part 2.

- a. The Cabinet Office *Post-Implementation Review* (PIR) concluded that:

The Act continues to achieve its stated objectives. Duties are placed upon local responders, with the principle of subsidiarity ensuring they retain the flexibility to collaborate in a way that is suitable to their specific needs. The recommendations... aim to strengthen the fulfilment of the Act's objectives, but there is no case at this stage for a fundamental overhaul of the legislation...the evolving risk landscape, as well as work on the Integrated Review commitments to consider strengthening LRFs and develop a National Resilience Strategy, may create a need for further changes to the Act in future.

The PIR took into account devolved issues and confirmed that the Government "has worked with the Scottish Government, to ensure that any changes proposed which impact on Scotland are in accordance with existing resilience structures, and accountability and assurance arrangements. Any future amendments, or improvements, to arrangements in Scotland could be made by amending [The Civil Contingencies Act 2004 \(Contingency Planning\) \(Scotland\) Regulations 2005 \(legislation.gov.uk\)](#), and

updating the set of comprehensive guidance documents, *Preparing Scotland* [The national guidelines, Preparing Scotland \(ready.scot\)](#)".

Our Comment

We noted that the PIR considered that the primary conditions placed on the use of Part 2 powers are deliberately stringent, preventing misuse of the power and ensuring that, wherever possible, any legislation required to respond to an emergency goes through Parliament in the normal way.

We also noted Paragraph 83 which reveals how the UK Government views emergency legislation, "There will be times, however, where new legislation is required to respond to an emergency. In recent years the government has carefully considered using CCA powers to help deal with some of the most serious of emergencies, such as the coronavirus pandemic. Ultimately though, the Part 2 emergency powers have not needed to be used. However, the government cannot foresee every eventuality, and therefore the CCA powers remain an important option of last resort to ensure that Ministers have the tools they need to respond to the most serious of emergencies."

We considered the PIR recommendations, 88. The powers continue to be fit for purpose as an option of last resort and the 'triple lock' conditions on their use provide robust and necessary safeguards that should not be amended, 89. Wherever possible, the government should continue to rely on sector or issue specific emergency legislation and powers which provide bespoke and tailored solutions to certain risks or incidents, as opposed to the broad powers in the CCA. We note that the wider landscape of emergency powers is being considered as part of the development of the Resilience Strategy and that no changes should be made to the emergency powers set out in Part 2 of the CCA.

As regards Part 2 the PIR stated, "The provisions to create special temporary legislation, as set out in Part 2 of the CCA, continue to provide government with the capability needed to respond to emergencies in a timely but proportionate manner. Part 2 of the CCA therefore remains a suitable option of last resort. Should further legislative change to the CCA be required to deliver on these ambitions, this will be carefully considered and could take place outside of the five-yearly statutory review cycle."

We can agree with most of these recommendations although we take issue with recommendation 89 which stands out as re-enforcing the policy approach which led to the rushed creation of the Coronavirus Act 2020 rather than the deployment of the CCA as a stop-gap which would have provided immediate emergency powers whilst allowing time for the development of more tailored legislation.

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

The NPC believes that "There are no current systematic, routine arrangements to monitor the performance of all bodies with legal duties, and of the way in which those bodies act in partnership. UK Government departments should be subject to the same disciplines of accountability for their performance, to the UK Parliament. Ministers and Accounting Officers of designated departments should have personal

accountability for the performance of their organisations against the duties placed on their departments and associated standards captured in an amended Act or future legislation. Given current machinery of government structures and roles, accountability for cross-government activity should sit with the National Security Adviser or a nominated Deputy who should be appointed as the ‘UK Government Chief Resilience Officer’, a single, identifiable senior official who cares and is seen to care about the quality of resilience in the UK. In addition to the UK Government Chief Resilience Officer a designated Cabinet Office Minister for the quality of resilience in the UK should be set out in...future legislation.”.

On matters relating to accessibility and clarity the NPC found that “designation of Lead Government Departments is valuable and should continue – and indeed be reinforced with legal duties... and stronger arrangements for validation and assurance of performance, and sharpened accountabilities... It is equally clear, however, that the distribution of responsibilities between the Cabinet Office, DLUHC and DCMS is not...”.

Our Comment

The NPC made some interesting recommendations with which we agree that Civil Protection terminology should be refreshed and made a more accessible, user-friendly, reference document. It should then be used consistently to inform the writing of all single- and multi-agency doctrine and guidance (recommendation 78). We take the view that this recommendation if adopted could enhance the accessibility of guidance.

Recommendation 80 concluded: As part of updating doctrine and guidance, the UK Government should examine whether legal and other developments, including the recommendations of public Inquiries, mean that some areas of current non-statutory guidance, especially on safeguarding, humanitarian assistance and emergency co-ordination structures, should now be made statutory.

We take the view that recommendation 80, if adopted, would bring areas of non-statutory guidance within the purview of parliamentary scrutiny.

The Public Health (Scotland) Act 2008 (PHSA)

Promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation

Overview of the PHSA

Our Comments

The [Public Health etc. \(Scotland\) Act 2008 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2008/24) includes quarantine, detention and medical examination, and other powers, for local authorities and Health Boards.

Statutory Duties under the PHSA

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

Scottish Ministers have the power to intervene if health boards or local authorities are failing to protect public health and may in writing direct the board or the authority to exercise the function; or to exercise it in such a manner, within such period and subject to such other conditions as they consider appropriate. Scottish Ministers can also direct that a function of a health board or local authority should be exercised by a person specified in the direction. The person referred to in the direction can be (a) a health board; (b) the common services agency; (c) a local authority; (d) an employee of a health board; the agency; or a local authority; (e) a member of staff of the Scottish Administration; (f) such other person Ministers consider appropriate. The direction must specify (a) the function of the board or authority to which it applies; (b) the person who is to exercise the function; (c) the period for which the direction applies; (d) the extent to which that person is to exercise the function; and (e) any other conditions they consider appropriate.

Part 2 of the PHSA concerns notifiable diseases and organisms listed in schedule 1. Scottish Ministers may by regulation amend either list, for example with the addition of Coronavirus disease which was added by [The Public Health etc. \(Scotland\) Act 2008 \(Notifiable Diseases and Notifiable Organisms\) Amendment Regulations 2020 \(S.S.I. 2020/51\)](#).

Doctors are placed under statutory duties to inform health boards by providing details about a patient who the doctor has reasonable grounds to suspect has a notifiable disease or a “health risk state” ie an infection or contamination. The health board in turn must inform the common services agency and Public Health Scotland. Similar notification duties are imposed on a director of a diagnostic laboratory if a notifiable organism is identified.

Public Health Incidents

Part 3 contains provisions dealing with public health investigations (PHI) covering infectious diseases and contamination. A PHI can be carried out by an investigator appointed by Scottish Ministers, a health board competent person; the common services agency, Public Health Scotland, a local authority competent person, two or more of these persons acting together. The investigator can exercise powers relating to entry to premises (section 22), other investigatory powers (section 23), and the power to ask questions (section 24).

The powers apply only where there are reasonable grounds to suspect that certain defined circumstances are likely to give rise to a significant risk to public health. Part 3 also makes provision about offences and the compensation for any loss or damage caused during an investigation.

Part 4 – Health Board public health functions replaced the powers of local authorities in connection with infected people. Powers transferred to health boards included: the exclusion of persons from a wide range of settings including work and school; application to a sheriff for an order for a person to be medically

examined; and the removal and detention in hospital of a person with a serious infectious disease or who is contaminated.

Health boards have the power to restrict activities so to reduce the spread of contamination and infection and to quarantine individuals. There is also a power to require a person to be disinfected, disinfested or decontaminated where there is a significant risk to public health.

With the exception of exclusion orders and restriction orders, all health board powers will be exercisable only where the health board has obtained an order from a sheriff. The procedures for applying for and granting orders contain safeguards with regard to personal freedom, include a right of appeal, restrictions on duration and regular reviews. It will be an offence to breach the terms of any order.

Part 5 – Public Health Functions of Local Authorities contains powers to order a range of public health measures in relation to premises and things, including disinfection, disinfestation and decontamination to prevent the spread of infectious disease or contamination.

Part 7 – International Travel provides the Scottish Ministers with a wide regulation making power to implement international health regulations and otherwise protect public health from risks arising from vehicles arriving in or leaving Scotland, including examination, quarantine and detention of individuals regulations and to comply with International Health Regulations 2005 [International Health Regulations \(2005\) – Third edition \(who.int\)](#).

The PHSA also covers Mortuaries, Regulation of Sunbeds, Statutory Nuisances, information disclosure and penalties for offences under the Act. It sets out the procedures that will apply to the making of subordinate legislation.

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

Our Comments

We note that the Scottish Government was satisfied that the provisions of the Bill which resulted in the PHSA were compatible with the ECHR. Both the Cabinet Secretary for Health and Wellbeing, Nicola Sturgeon MSP and the Parliament’s Presiding Officer, Alex Ferguson MSP certified that the bill was “within the legislative competence of the Scottish Parliament”. Legislative competence imports compatibility with Convention rights.

The Policy Memorandum, paragraphs 90-98 sets out the effects on Human Rights commenting on the provisions concerning quarantine, detention, medical examination, local authority powers to enter and undertake works and the powers of entry in respect of public health investigations.

The purpose of the PHSA is to protect the public from significant public health risks and the Convention itself envisages that certain rights can lawfully be interfered with on public health grounds.

The provisions relating to quarantine (sections 39-40), detention (sections 41-47), and medical examinations (sections 33-36) engage Articles 5 (Right to liberty and security) and 8 (Right to respect for private and family life) the Convention.

Article 5 provides that no one shall be deprived of his liberty save in the following cases, and in accordance with procedure prescribed by law. The “following cases” includes “(e) the lawful detention of persons for the prevention of the spreading of infectious diseases...”. The criteria for such detention were considered in the case of *Enhorn v Sweden* [2005] E.C.H.R. 56529/00.

Article 5.4. provides that “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”. The provisions relating to quarantine and detention comply with Article 5. The deprivation of an individual’s liberty occurs only if it is determined that such deprivation is necessary to prevent the spread of disease.

Article 8 of the Convention provides:

- “1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

The provisions in the Act relating to detention, quarantine and medical examination engage Article 8 but the Government concluded that any interference is for a legitimate aim, namely that of the protection of health and as such can be justified and raises no issue of incompatibility with the Convention.

The right to appeal (sections 60-65) ensures that any decisions made in relation to detention, quarantine or medical examination is available at every stage of proceedings thus ensuring the lawfulness of the procedure.

Consideration was also given to the human rights implications arising from the provisions relating to the powers to enter premises in Part 3 in connection with public health investigations, and in Part 5 in connection with the powers of a local authority to enter premises to disinfect, disinfest or decontaminate the premises or anything in them.

These powers engage Article 1 Protocol 1 which provides:

- “1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

A state can only justify an interference with the enjoyment of possessions if it can show that a fair balance has been struck between the public interest and the rights of the person entitled to the enjoyment of the

property: *Beyeler v. Italy* [GC], § 107; *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the Former Yugoslav Republic of Macedonia* [GC], § 108.

The powers in Parts 3 and 5 were justified by the Government due to the public interest in investigators being able to carry out effective public health investigations, or to prevent the spread of infectious disease by disinfecting property, and any interference with the peaceful enjoyment of possessions is a proportionate interference with property rights.

Safeguards are built into the legislation to minimise the impact on individuals and there is provision for compensation to be paid in certain cases where there has been loss or damage to property.

In terms of compliance with Article 8(1) the European Court of Human Rights has taken the view that house searches or visits to and seizures on business premises may comply with the requirements of Article 8, *Keslassy v. France* (dec.); *Société Canal Plus and Others v. France*, §§ 55- 57.

Otherwise Reflecting Rule of Law values

Our Comment

We have assessed the extent to which the PHSA reflects Lord Bingham's *Rule of Law* and principles 1,3,4,5, 6, 7 and 8. We take the view that the PHSA complies with the Rule of Law principles. The legislation is relatively clear and accessible. Furthermore, provisions introduced into the PHSA by the Coronavirus (Recovery and Reform) (Scotland) Act 2022 limit the regulation and declaration making powers so that regulations under section 86A(1) can only be made whilst a public health declaration has effect. The Scottish Ministers must consult the Chief Medical Officer on the declaration. The declaration must be public and approved by the Scottish Parliament unless it is not practicable to do so. In which case the Scottish Ministers must make a statement explaining why parliamentary approval is not practicable. In these circumstances the declaration has effect for 28 days unless it is approved by the Parliament. Regulation and decision-making powers include an obligation on Scottish Ministers and others to consider that a restriction or requirement is proportionate. Furthermore, the regulations under section 86A(1) must be reviewed by Scottish Ministers every 21 days after coming into effect.

The PHSA provides that any interference should be for the legitimate aim of protecting public health and given that there are adequate procedural safeguards including in sections 60-65 a range of appeals against orders for medical examination, exclusion and restriction orders, quarantine and hospital detention, exclusion and restriction.

In our view sections 86A-J ensure that rule of law components are complied with such as Scottish Ministers and public officials exercising powers conferred for the purposes for which they were conferred and that human rights must be complied with and disputes resolved fairly. These sections ensure that there is adequate parliamentary and judicial oversight of both the content of the regulations and of action taken under them.

3. What, if any, changes should be made to the existing legislative framework for public health emergencies to facilitate urgent law-making while also satisfying (a), (b) and (c) above?

Our Comment

Some of the recommendations of the two reviews of the CCA could enhance the existing legislative framework. The outcome of the two Covid-19 Inquiries may also produce recommendations which will result in improvements on the existing framework.

We consider that any changes to the law should comply with certain principles, namely that there should be adequate pre-legislative consultation, proper parliamentary scrutiny of any resulting bill and compliance with the rule of law and human rights law and, where appropriate due respect of the position of the devolved legislatures and administrations.

Topic 2: Legislation enacted during the Covid-19 pandemic (pages 14-18)

4. During the Covid-19 pandemic, bespoke primary legislation was made by the UK and Scottish Parliaments. How far did these pieces of legislation allow for urgent law-making while also: a. promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation; b. complying with the UK's international legal obligations, including those relating to human rights; and c. otherwise reflecting Rule of Law values

The Bespoke Pandemic Legislation

UK Legislation

The Coronavirus Act 2020

The [Coronavirus Act 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk) was the main bespoke primary legislation passed by the UK Parliament. In terms of section 100, 49 sections apply to the whole UK, 5 sections apply only to England Wales and Scotland and 16 sections and 8 Schedules apply only to Scotland.

We note that the bill was enacted, in the words of the Joint Committee on Human Rights “despite the fact it included some of the most sweeping powers seen in modern times and interferes with human rights on an unprecedented scale”.

The areas covered by the Act include:

- a) Modification of duties relating to health and social care considering reprioritisation of NHS resources;
- b) Treatment of the deceased;
- c) Access to education and childcare;
- d) Sick pay: The situation for self-employment;

- e) Port suspensions;
- f) Powers of the Secretary of State, police and immigration officers as concerns potentially infectious persons;
- g) Restrictions on events and gatherings; and
- h) Court proceedings and access to justice.

The Act includes powers to make further provision by statutory instrument, and other measures such as directions which can have profound effects on rights.

The Parliamentary Passage

The Coronavirus Bill Second Reading, Committee Stage and Third Reading all took place on 23 March 2020. The Second Reading lasted from 4:01pm-8:00pm: [Coronavirus Bill - Hansard - UK Parliament](#) . In Committee of the whole House the debate lasted from 8:01pm-10:00pm Report Stage concluded shortly before Third Reading which concluded at 10:16pm. Proceedings in the House of Lords were taken at pace with the Bill being introduced and being given a Second Reading on 24 March 12:06pm-2:13pm and 3:38pm-6:10pm and Committee, Report and Third Reading taking place on 25 March. The bill received the Royal Assent on 25 March.

It is clear that there was considerable activity in Government in advance of the introduction of the bill which led to the Coronavirus Act 2020 but the understandable pace of the parliamentary passage meant that scrutiny of the bill was inadequate and the opportunity for amendment (except Government amendments) was limited. Indeed, only one non-government amendment was passed: new clause 1 on the postponement of General Synod elections.

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

Our Comment

Lord Bethell acknowledged towards the end of the Second Reading in the House of Lords that the bill... *“is an incredibly technical Bill; it is nearly 400 pages long. It was drafted on the hoof, at pace and in quick time.”* [Coronavirus Bill - Hansard - UK Parliament](#). This comment by a Government Minister indicates an approach to law making which, while understandable in the pandemic circumstances of 2020, should not be allowed to recur. Law making practices which are not sound invite the risk that the legislation by which they were made will be subject to challenge and ultimately fail in their objectives.

Parliamentary Control

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

Expiry After 2 Years

Section 89(1) stated that the legislation would expire after a two-year period from the date on which the act was passed.

Section 90 empowers a “relevant national authority” (a Minister of the Crown, Scottish Ministers, Welsh Ministers or a Northern Ireland Department) to alter the expiry date of the Act.

Regular Reporting

Section 97 provided that the Secretary of State must lay before Parliament a report every two months, after the Act is passed detailing the Part 1 provisions which are in force and including in the report a statement that the Secretary of State is satisfied that the status of those provisions is appropriate.

Six-month Parliamentary Review

Section 98(3) provided that a Minister of the Crown must make arrangements for a motion that “the temporary provisions of the Coronavirus Act 2020 should not yet expire”, should be debated and voted on by the House of Commons after each six-month review period.

One Year Status Report

Section 99 states that after the one-year status report is laid before Parliament, a Minister of the Crown must make arrangements for: a motion in neutral terms, to the effect that the House of Commons has considered the one-year status report, to be moved in that House by a Minister of the Crown within the period of 14 Commons sitting days beginning with the day after the end of the sixth reporting period, and a motion for the House of Lords to take note of the one-year status report to be moved in that House by a Minister of the Crown within the period of 14 Lords sitting days beginning with the day after the end of the sixth reporting period.

Scotland specific provisions

We also had concerns about Section 10 and schedule 9 which made temporary changes to mental health legislation, specifically the Mental Health (Care and Treatment) (Scotland) Act 2003, the Criminal Procedure (Scotland) Act 1995, and associated subordinate legislation. Scotland's existing mental health legislation contains a number of safeguards to protect the fundamental rights of those subject to the legislation, and in particular the rights of individuals' arising from Articles 3, 5, 6 and 8 ECHR. We took the view that schedule 9 had the potential to remove or reduce these safeguards, leading to potential significant human rights violations.

Scottish Legislation

During the pandemic the Scottish Parliament enacted:

- a. The Coronavirus (Scotland) Act 2020,
- b. The Coronavirus (Scotland) (No 2) Act 2020,
- c. The Coronavirus (Extension and Expiry) (Scotland) Act 2021.

a. The Coronavirus (Scotland) Act 2020

The [Coronavirus \(Scotland\) Act 2020 \(legislation.gov.uk\)](https://www.legislation.gov.uk) was the principal relevant Scottish legislation, contains many provisions of importance to life in Scotland, including law relating to evictions, moratoriums on diligence (enforcement), children and vulnerable adults, justice matters, alcohol licensing and public bodies and a number of other areas. That Act contains provisions requiring Scottish Ministers to report on the necessity of such legislation rather than, as in England and Wales, the appropriateness of the status of the legislation.

Our Comment

Parliamentary Passage

The Act was a significant measure which touched on many aspects of life and limited many rights. It contained 17 Sections and 7 Schedules and was considered under Rule 9.21 of the Standing Orders of the Parliament relating to Emergency Bills. It was introduced on 31 March 2020 and went through all three stages on 1 April. It received the Royal Assent on 6 April.

In other circumstances we would have highlighted the need to scrutinise the legislation carefully and not to sacrifice that scrutiny for speed. However, the nature of Covid-19 and the fast-evolving threat it posed to the community at large was potentially devastating. The bill was judged to merit emergency procedure at the time.

This means that there should be close scrutiny of how the legislation worked in practice, The Parliament provided mechanisms to ensure that scrutiny took place such as the establishment of the COVID-19 Committee. We also welcomed the creation of the independent, judge led [Scottish Covid-19 Inquiry \(covid19inquiry.scot\)](#). The Society has been appointed as a Core Participant in the inquiry see the [Inquiry's Core Participant Protocol](#).

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

The Scottish Government was satisfied that the provisions of the Bill which resulted in the Coronavirus (Scotland) Bill were compatible with the ECHR. Both the Cabinet Secretary for Constitution, Europe and External Affairs Michael Russell MSP and the Parliament's Presiding Officer, Rt Hon Ken MacIntosh MSP certified that the bill was "within the legislative competence of the Scottish Parliament". Legislative competence imports compatibility with Convention rights.

The Scottish Parliament COVID-19 Committee's consultation: Coronavirus Acts: third report to Scottish Parliament considered issues in connection with human rights compliance.

Our Comment

We expressed significant concerns on the emergency powers applicable to vulnerable adults in Section 4 and Schedule 3, paragraph 11 of the Act. This provision was not commenced and expired under the Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020. We were satisfied with this outcome.

Paragraph 11 also contained the so-called 'stop the clock' provisions for guardianship orders under the Adults with Incapacity (Scotland) Act 2000. We highlighted our concerns regarding the 'stop the clock' provisions, particularly in relation to orders granted subject to short time limits in order to comply with Article 5 EHCR. Whilst we acknowledge that these provisions were enacted against the challenging background of the emerging pandemic, and may have been necessary at that time, we suggested that continued restrictions on the rights of adults subject to interventions under the 2000 Act were no-longer required. A compelling set of circumstances would be needed to justify these provisions being reinstated at a future date.

We were also most concerned at the Justice provisions in section 5, Schedule 4, Part 5, paragraph 11 which would permit regulations to provide for the most serious cases to be heard by a court sitting without a jury and expressed that concern to Ministers and MSPs in our briefings on the bill. The Scottish Government withdrew Part 5 of the schedule as the Stage 1 debate on the bill opened.

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

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

Our Comment

We commented on a number of provisions in the bill which resulted in the Coronavirus (Scotland) (No.2) Act 2020 especially in the area of criminal justice and compliance with convention rights. The Coronavirus (Scotland) Act 2020 made changes to several time periods and the Government identified additional areas that require change. Some of these measures did not specify a fixed time period and we believed that it is important that they did so, to provide clarity and ensure compliance with human rights.

We supported custody arrangements on the basis that otherwise there would be a need for Police Officers to carry out the duties required to operate the video-linked custody courts. The change minimised the movement of persons and freed up police resources for front line duties. We supported the change regarding undertakings by the accused in so far as providing that a warrant should not be obtained where the accused has contacted a solicitor or the court indicating that they cannot for COVID-19 related reasons appear in person.

Parliamentary Passage

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

We welcomed the respect for human rights in the Policy Memorandum accompanying the bill which and we highlighted some particular features. Provisions engaged the ECHR in a number of respects including Article 5 which asserts the right to liberty and security of the person and that no one should be deprived of liberty except in accordance with a lawful procedure (Art 5(1)(e)) and Article 6 (right to a fair trial). Provisions also engaged Article 8 (Right to respect for private and family life) and Article 1 of Protocol No. 1 (protection of property) and Article 14 (protection from discrimination). The Scotland Act 1998 provides that Legislative and Executive competence require compliance with Convention rights contained in the ECHR.

When legislating for emergency laws, it is even more important to take care that such compliance is satisfied. The Human Rights Act 1998 applies to the acts of public authorities under the Bill, e.g. the Scottish Courts and Tribunals Service and we encourage public authorities which undertake coronavirus functions to ensure that compliance with Convention rights. We expected that human rights and the rule of law would be fully respected when applying the provisions of the coronavirus legislation. We also wished to ensure that scrutiny of legislation is carried out properly and that Government is held to appropriate account for its actions.

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

The Scottish Government was satisfied that the provisions of the Bill which resulted in the Coronavirus (Scotland) (No2) Bill were compatible with the ECHR. Both the Cabinet Secretary for Constitution, Europe

and External Affairs Michael Russell MSP and the Parliament's Presiding Officer, Rt Hon Ken MacIntosh MSP certified that the bill was "within the legislative competence of the Scottish Parliament". Legislative competence imports compatibility with Convention rights.

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

The [Coronavirus \(Extension and Expiry\) \(Scotland\) Act 2021 \(legislation.gov.uk\)](#) The Coronavirus (Scotland) Act 2020 and Coronavirus (No.2) (Scotland) Act 2020 were passed by the Scottish Parliament on 1 April and 20 May 2020 respectively in response to the pandemic emergency situation. Their provisions were primarily temporary and provided that they would expire on 30 September 2020. The sunset date was amended to provide for the expiry of the Scottish Acts on 30 September 2021.

After the May 2021 election the Scottish Government decided that many of the temporary measures would remain necessary beyond 30 September 2021. The Bill for this Act was introduced in late June 2021 (as an emergency Bill) to extend the Coronavirus (Scotland) Act 2020 to 30 September 2022 and the Coronavirus (No.2) (Scotland) Act 2020 to 31 March 2022. The Act also expired some temporary provisions of both Acts on 30 September 2021. These Acts apply only to Scotland.

Our Comment

We agreed with the general principles of the Act relating to extension of the extended notice period for most evictions, the extended moratorium on bankruptcy enforcement, the repeal of the "stop the clock provisions" relating to vulnerable adults, the extension of the conduct of court business by electronic means (whilst making points about the need for a secure and reliable data link, or HD standard or better sound and video quality, the presentation of documents and the participation of parties), extended flexibility in the payment of legal aid, extended use of electronic hearing in licensing applications in remote areas (although we favoured a return to in person hearings), and various other provisions.

We were concerned about the extension of time limits in criminal cases. We accepted the inevitability of this provision whilst making the point that resourcing, elimination of backlog, respect for human rights and the rule of law were particularly important in the context of the delivery of justice in the criminal courts.

5. What measures should be taken to ensure that primary legislation made during a future public health emergency allows for urgent law-making while also satisfying (a) (b) and (c) above?

Promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation

Pre-legislative Activity

Our Comment

Governments across the UK should not wait for a future public health emergency to legislate, they should prepare the legislation now. By doing so, the UK Government and the devolved administrations would pre-

empt the emergency by legislating on a UK wide basis for those reserved aspects of the law which may be needed in such a public health emergency.

The public inquiries currently ongoing will in due course produce reports which will provide considered views upon which to legislate but without prejudice to the outcome of those inquiries it would be possible to design legislation now which would be available to implement in a future emergency. Consideration should also be given to the recommendations of the CCA reviews referred to above.

A four nation approach could envisage consultation on provisions which would apply across the UK such as matters relating to the objectives of the legislation, the principles upon which the legislation would be based, the definition of a public health emergency, the powers to be granted to Ministers, the broad content of the legislation including protection of the public, supply chains for food, medicine (including vaccines), medical supplies, the NHS and ancillary matters. Consultation could also take into account the need to underpin the economy during a period of public health emergency, maintaining essential services ensuring business continuity across health, education, utilities, transport, water and sewerage and as far as possible normal life.

Consulting, formulating policy, drafting legislation and engaging in parliamentary activity now ideally should allow the time for a considered approach which takes into account the views of many in a relatively calm atmosphere which should result in better law. This approach acknowledges that human diseases have a distinct placing on the National Risk Register of Civil Emergencies (NRR) and builds on the approach developed in the UK Influenza Preparedness Strategy 2011 and the learning from Exercise Cygnus. Crucially the pandemic Influenza draft bill set out the arrangements for devolved and UK response activities. The Government acknowledged that the pandemic influenza draft legislation was “essential in forming the basis of the Coronavirus Act 2020” : [UK pandemic preparedness - GOV.UK \(www.gov.uk\)](https://www.gov.uk).

Parliamentary Activity

If the solution of legislating outwith a period of pandemic is adopted the criticisms around the speed of the parliamentary passage and the consequent lack of proper scrutiny would be substantially resolved.

Transparency

We take the view that Government must ensure that it sets out clearly and transparently how it is protecting human rights during a pandemic. It must ensure that its assessments as to the proportionality and necessity of measures are up-to-date and based on the latest scientific evidence as well as a precautionary approach to minimising the overall risks to life. Importantly, the Government must be transparent in justifying its decision-making, including in explaining how it has balanced competing interests and the evidence on which the balancing decision has been made.

Parliamentary Control

Parliamentary control was a key feature of debates about the bill which resulted in the Coronavirus Act 2020. We comment on the key aspects, expiry after two years, regular reporting, six month parliamentary review and the one year status report in response to question 4. We take the view that future legislation

should contain provisions analogous to those in the Act. These provisions constituted important recognition of the role of Parliament.

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

The Joint Committee on Human Rights report entitled [The Government's response to COVID-19: human rights implications \(parliament.uk\)](#) explained the obligations of the Government in connection with respecting Human Rights obligations under Article 2 (Right to life) and the need for proportionality in the actions which it took.

The Joint Committee acknowledged the balance which the Government must take in the first paragraph the second chapter its report in the paragraph entitled *The necessity to act and the human rights framework*.

“In order to ensure compliance with human rights law, it is crucial that the Government can justify the steps it has taken to protect the right to life under Article 2 ECHR as well as justifying the proportionality and necessity of interferences with other rights through the measures taken to control the pandemic. Importantly, the Government must be transparent in justifying its decision-making, including in explaining how it has balanced competing interests and the evidence on which the balancing decision has been made. This applies, for instance in relation to the right to family life (Article 8 ECHR) for partners or families who could not see each other during lockdown, or the right to peaceful enjoyment of one's possessions for businesses who could not operate during lockdown (Article 1 of Protocol 1 ECHR) or the freedom of religion for those who could no longer attend religious services during lockdown (Article 9 ECHR). Any interferences with human rights in the Government's response to Covid-19 need to be justified, along with decisions to act (or not to act) to take protective measures to protect life.

Our Comment

We agree with the analysis by the Joint Committee.

We take the view that it is important to note as the report states that it was not necessary during the pandemic for the UK Government to derogate from any of ECHR obligations. The Joint Committee took into account the lockdown regulations enacted across the UK and their impact on human rights. These regulations engaged the following ECR articles Article 6 (the right to a fair trial), Article 8 (the right to respect for private and family life), Article 9 (freedom of religion), Article 11 (freedom of association), Article 1 of Protocol 1 (the right to peaceful enjoyment of property). Local authorities have been given powers to close businesses or categories of businesses without warning.

Otherwise reflecting Rule of Law values

Our Comment

We have no further comment to make.

6. How far do you consider that secondary legislation made in response to the Covid-19 pandemic facilitated urgent law-making while: a. promoting adequate levels of accountability,

transparency and appropriate parliamentary control of executive action in the context of an emergency situation; b. complying with the UK's international legal obligations, including those relating to human rights; and c. otherwise reflecting Rule of Law values?

a. Promoting adequate levels of accountability, transparency and appropriate parliamentary control of executive action in the context of an emergency situation

Our Comment

During the pandemic a considerable amount of Coronavirus subordinate legislation was made across all jurisdictions in the UK. This is evident from the number of regulations made in each jurisdiction in 2020: 278 UK statutory instruments, 148 Scottish Statutory Instruments, 146 Northern Ireland Statutory Rules and 109 Wales Statutory Instruments; and in 2021: 422 UK statutory instruments, 222 Scottish Statutory Instruments, 267 Northern Ireland Statutory Rules and 194 Wales Statutory Instruments.

Many of those statutory instruments were under made affirmative procedure which is a form of fast-track procedure for subordinate legislation and needs to be carefully scrutinised. In Scotland such regulations are made on the basis that Scottish Ministers consider them to be needed urgently.

Parliamentary concern

The Joint Committee on Statutory Instruments (JCSI) report: [Rule of Law Themes From COVID-19 Regulations \(parliament.uk\)](#) comments on coronavirus SIs that a trend had developed, since the first coronavirus legislation was made in March 2020, of "legislation being made, published and brought into force with almost no time either for Parliament to scrutinise it or for the public to prepare for it." It added that while this "was only to be expected in the early days of the pandemic...the Committee has observed with mounting unease that better knowledge of the virus and its impact has not been reflected in decreased reliance on last minute legislation. Some examples are particularly egregious." quoted in paragraph 67 of the Scottish Parliament's Delegated Powers and Law Reform Committee (DPLRC) reported in 2022 on its [Inquiry into the use of the made affirmative procedure during the coronavirus pandemic \(azureedge.net\)](#).

Made affirmative legislation is permitted under several Acts of both the UK and Scottish Parliaments including the Public Health etc. (Scotland) Act 2008, Corporate Insolvency and Governance Act 2020 Direct Payments to Farmers (Legislative Continuity) Act 2020 and the Coronavirus Act 2020. Other legislation under which made affirmative regulations have been made includes the Public Services Reform (Scotland) Act 2010, Land and Buildings Transaction Tax (Scotland) Act 2013.

The DPLRC considered 146 made affirmative regulations between 20 March 2020 and 1 February 2022.

Safeguards are built into the Coronavirus Acts applicable across the UK and in Scotland. There is provision for a two-month review period in section 95 of the Coronavirus Act 2020. That is replicated in section 12 of the Coronavirus (Scotland) Act 2020 and sections 12 and 14 of the Coronavirus (Scotland) (No 2) Act 2020. Automatic expiry is also a safeguard and is a significant factor in section 89 of the Coronavirus Act

2020, section 12 of the Coronavirus (Scotland) Act 2020 and section 9 of the Coronavirus (Scotland) (No 2) Act 2020.

Furthermore, made affirmative regulations are subject to specific expiry deadlines if the Scottish Parliament does not approve them within 28 days of being made (Coronavirus Act 2020 Schedule 19 paragraph 6(3)(b) and Public Health etc. (Scotland) Act 2008 section 122(7)(b)).

Our Comment

The parliamentary counsels' offices and the solicitors in the Governments' legal departments are expert in drawing up instruments but the policies and the challenging conditions which prevail require speed of scrutiny so those carrying out that scrutiny need to be additionally careful about the legislation they are considering. Some of our comments in this response (eg upon the need for clarity and running consolidations) apply to all instruments no matter however made.

We are concerned about the clarity and accessibility of subordinate legislation under made affirmative procedure which is subject to frequent and significant amendment for example, the Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 13) Regulations 2021 or the Public Health (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 13) Regulations 2021. In 2020 some regulations were amended as many as 25 times, the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 25) Regulations 2020 (revoked). It is difficult to be certain of the state of the law when there are such frequent amendments, and the instrument is not presented as a consolidated version.

When amending an instrument whether made affirmative or under another procedure, the Government should produce a consolidated version showing the whole instrument as amended. The drafter and policy team must be working with a marked up consolidated version, and it ought not to take extra time to produce a consolidation instrument.

There is a potential danger of made affirmative procedure becoming a habit when there may not be any real urgency or emergency. It is difficult to comment whether made affirmative procedure has been generally used appropriately without access to the information and data upon which the Government has made the decision to deploy made affirmative legislation.

The DPLRC identified that between 20 March 2020 and 1 February 2022 made affirmative regulations under the Coronavirus Act 2020 were considered on 69 occasions and those under the Public Health etc (Scotland) Act 2008 on 72 occasions: paragraph 37 [Inquiry into the use of the made affirmative procedure during the coronavirus pandemic \(azureedge.net\)](https://www.azureedge.net).

They do not however refer to “made affirmative” regulations but rather to powers deployed on the basis of “urgency” which is translated into “emergency” regulations. The powers under the Coronavirus Act 2020 derive from Schedule 19 Paragraphs 1(1) and 6 which provide:

(2) Sub-paragraph (1) does not apply if the Scottish Ministers consider that the regulations need to be made urgently. (3) Where sub-paragraph (2) applies, the regulations (the “emergency regulations”)— (a)

must be laid before the Scottish Parliament; and (b) cease to have effect on the expiry of the period of 28 days beginning with the date on which the regulations were made unless, before the expiry of that period, the regulations have been approved by a resolution of the Parliament.

The powers under the Public Health etc. (Scotland) Act 2008 derive from sections 94 (International Travel) and section 122 (Regulations and Orders) which provide: (6) *Subsection (5) does not apply to regulations made under section 25(3) or 94(1) if the Scottish Ministers consider that the regulations need to be made urgently. (7) Where subsection (6) applies, the regulations (the “emergency regulations”)— (a) must be laid before the Scottish Parliament; and (b) cease to have effect at the expiry of the period of 28 days beginning with the date on which the regulations were made unless, before the expiry of that period, the regulations have been approved by a resolution of the Parliament.*

There is no definition of “urgency” nor an explanation of the criteria which Scottish Ministers apply to arrive at a decision that a regulation should be made on the basis of urgency. However, as the regulations under both acts are termed “emergency regulations” that suggests that Scottish Ministers must consider that an emergency exists and requires the Scottish Ministers to act with the minimum of delay to make regulations to meet the nature of the emergency.

It is noticeable that most introductory paragraphs in such regulations, after citation of the specific powers under the legislation, include a phrase such as “and all other powers enabling them to do so”. It would be helpful were the Scottish Government to explain to what powers this refers.

Subordinate legislation is better drafted and accepted if more time is taken to consult and if the draft is able to be scrutinised by Parliament before being made. Standing that made affirmative procedure will continue to be deployed consideration should be given to introducing some form of short consultation with relevant interests. This would be one way of increasing transparency and accountability for the actions of Scottish Ministers.

We also note that the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Act 2022 provides that Scottish Ministers are required to lay before Parliament a statement of their reasons as to why the regulations should be made. In addition, under section 4(6) *If emergency regulations are made, the Scottish Ministers must, at the same time as laying the regulations before the Parliament, lay before the Parliament a statement of their reasons for making the regulations and for making them urgently without their being subject to the affirmative procedure.*

Were such a provision adopted in UK parliamentary procedure it would enhance ministerial accountability to Parliament.

As we have pointed out above there are many statutes which confer urgent regulation making powers on Ministers. It is up to the legislatures to limit the occasions on which UK or Scottish Ministers are granted the power to make subordinate legislation subject to the made affirmative procedure, such as by defining what is an emergency or urgency, who is to determine it, the use of sunset clauses both in the parent Act and in the regulations and not enabling that procedure to be used twice in relation to the same instrument.

It is a feature of the treatment of Scottish made affirmative regulations that although they are approved by the Parliament they are not debated in the Chamber. There should be a regular scheduled Chamber debate where MSPs are able to discuss and comment upon such regulations and question the Minister about the use of made affirmative procedure.

Ultimately, the alternative to made affirmative regulations is primary legislation perhaps made under emergency procedure (Scottish Parliament Standing Orders Rule 9.21 – a recent example of which is the Cost of Living (Tenant Protection) (Scotland) Act 2022 which was introduced into the Scottish Parliament on 3 October 2022 and passed on 6 October 2022. It became law on 26 October. Scottish Ministers should include information in any supporting statement about occasions when primary legislation has been considered and why it has been decided to proceed with made affirmative regulations. See also: [Use of the Made Affirmative Procedure in Scotland: Reflections from the Pandemic | Edinburgh Law Review \(eupublishing.com\)](https://eupublishing.com)

b. Complying with the UK’s international legal obligations, including those relating to human rights

Regulations made by Scottish Ministers are subject to Sections 54, 29 and 57 of the Scotland Act 1998. Section 54(2) provides: “It is outside devolved competence— (a) to make any provision by subordinate legislation which would be outside the legislative competence of the Parliament if it were included in an Act of the Scottish Parliament, or (b) to confirm or approve any subordinate legislation containing such provision.” Section 29(2) states that a provision is outside the legislative competence of the Scottish Parliament if it is incompatible with any of the Convention rights. There are also convention rights compatibility provisions under section 57 which provides “A member of the Scottish Government has no power to make any subordinate legislation, or to do any other act, so far as the legislation or act is incompatible with any of the Convention rights.”

Our Comment

Accordingly, subject to subsequent challenge, such subordinate legislation will have been cleared by the Scottish Government legal advisers as complying with Convention Rights.

Such a challenge was successful in the case of *Reverend Dr William JU Philip and others v Scottish Ministers [2021] CSOH 32*, where the Court of Session held that regulations closing churches for worship were beyond the devolved competence of Scottish Ministers. The legislation under scrutiny was the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No 11) Regulations 2021 (SSI 2021/3) which provided that “A person who is responsible for a place of worship must close that place of worship, except for a use permitted in paragraph (2)”. Permitted uses included “a funeral or commemorative event, a broadcast of an act of worship, a marriage ceremony which consists of no more than 5 persons...”

The petitioners maintained that the Scottish Ministers lacked the power to make the regulations insofar as they contravened the historic freedom of churches in Scotland to practise religion and threatened the independence of the church; and that the regulations were unlawful because they were a disproportionate infringement of ECHR articles 9 (freedom of thought, conscience and religion) and 11 (freedom of

assembly and association). On the human rights point, the Court came to the decision that the regulations did constitute a disproportionate interference with the article 9 right and as such were beyond the legislative competence of the Government.

c. Otherwise reflecting Rule of Law values

Our Comment

We have no further comment to make.

7. What measures should be taken to ensure that secondary legislation made during a future public health emergency facilitates urgent law-making while also satisfying (a), (b) and (c) above?

Our Comment

The parent legislation must contain sufficient safeguards such as those described in our answer to questions 4 and 6.

8. Were the concerns and interests of different groups, in particular marginalised and disadvantaged groups, properly taken into account in the formulation and review of emergency powers? If not, how could this be improved in future public health emergencies?

Our Comment

We do not have the data to comment on this question.

Topic 3: The creation of offences and enforcement powers (pages 18-20)

9. Did the creation of new offences and the legal framework for enforcing these offences during the Covid-19 pandemic reflect Rule of Law values? If not, how could this be improved in future public health emergencies?

Our Comment

The creation of new offences during the pandemic included under [The Health Protection \(Coronavirus\) \(Restrictions\) \(Scotland\) Regulations 2020 \(legislation.gov.uk\)](#) restrictions on meeting with others in public places; leaving a dwelling; business activities; and in separate regulations on the movement of people both within and into the United Kingdom. The enforcement powers include prosecution under summary procedure (judge sitting without a jury) with the fine on conviction being no more than the statutory maximum (£10,000) and for the police to issue a fixed penalty notice. Under subordinate legislation such as [The Health Protection \(Coronavirus\) \(International Travel\) \(Scotland\) Regulations 2020 \(legislation.gov.uk\)](#), a made affirmative instrument, regulations 5 and 9 may engage convention rights in so far as they are enforced by fixed penalty notices.

Coronavirus regulations broadly engaged article 6, 7 and 8 convention rights in relation to fixed penalty notices.

Furthermore, better pre-legislative consultation would improve understanding of the law. The law should also be seen to apply to everyone, there should be greater clarity about the individual's obligations under the law (see the comments about the distinction between law and guidance in response to question 21), the defences which can be advanced and the penalties which apply.

Do additional safeguards need to be put in place to ensure that the creation of new offences and the legal framework for enforcing these offences are compliant with human rights law?

Our Comment

Ministers could be required to make a statement analogous to that under the CCA that the regulations are compatible with the Convention rights under the HRA 1998.

The regulations should be examined from a human rights perspective by the relevant parliamentary committees charged with that responsibility in each legislature.

Is the use of fixed penalty notices and/or the Single Justice Procedure an appropriate and proportionate way of enforcing emergency public health restrictions? If not, how should emergency public health powers be enforced in the future?

Our Comment

See our comments on fixed penalty notices above.

Topic 4: Divergences throughout the UK (pages 20-22)

10. What were the key divergences in the legislative responses to the coronavirus pandemic in England, Wales, Scotland and Northern Ireland? What caused these divergences?

Our Comment

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

The Blavatnik School of Government, University of Oxford has conducted research on the divergence among the 4 UK jurisdictions which is published in its paper, *Variation in the response to COVID-19 across the four nations of the United Kingdom*. That research makes the following findings:

- All four nations of the UK (England, Scotland, Wales, and Northern Ireland) have diverged in the timing, duration, and stringency of their responses highlighting their autonomy and legislative powers as devolved nations.

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

Key differences in policy over the past year

- Stay-at-home orders: The first stay-at-home order from March 2020 ended in England and Northern Ireland on 3 May 2020, ending two weeks later in Scotland on 29 May, and Wales on 1 June. England and Wales required people to stay at home for several weeks in October and November of 2020 while Northern Ireland and Scotland did not. While Wales ordered a second national stay-at-home order on 20 December 2020, England, Scotland, and Northern Ireland didn't introduce another legally enforceable national stay-at-home order until January 2021.
- School closures: After the first round of restrictions in March 2020, England reopened some levels of schooling on 1 June 2020, followed by all levels in Wales on 29 June, while education remained closed in Scotland until 22 July, and in Northern Ireland on 24 August. Schools were closed in Scotland again on 26 December 2020, and in Wales on 14 December, followed by Northern Ireland on 4 January 2021, and England on 5 January 2021.
- 'Circuit breakers': Scotland was the only UK nation not to implement a national 'circuit breaker' style lockdown in October and November 2020.
- Internal movement: All nations of the UK except for England have introduced distance restrictions on internal movement.

The Oxford COVID-19 Government Response Tracker (OxCGRT) provides a systematic way to measure and compare government responses to COVID-19 across the four nations from 1 January 2020 to the present (2022) and will be updated continuously going forward. The tracker combines individual indicators into a series of novel indices that aggregate various measures of government responses. These can be used to describe variation in government responses, explore whether the government response affects the rate of infection, and identify correlates of more or less intense responses.

In our submission to the House of Lords Constitution Committee Inquiry we commented on the emerging diversity as at June 2020 as follows:

In February 2020 the Secretary of State for Health and Social Care made the Health Protection (Coronavirus) Regulations 2020 <https://www.legislation.gov.uk/ukSI/2020/129/made/data.pdf> which applied in England and Wales. The Regulations (now revoked) applied to two categories:

1. Cases involving people whom the Secretary of State or a registered public health consultant have reasonable grounds to believe are or may be contaminated with coronavirus provided they also consider that there is a risk that these people might infect or contaminate others (domestic cases);
2. Cases concerning people who have arrived in England on an aircraft, ship or train from outside the UK and who the Secretary of State or a registered public health consultant have reasonable grounds to believe left an infected area within 14 days immediately preceding their arrival in England (overseas cases). The Regulations provided for the detention by the Secretary of State or a consultant of members of the public “for screening, assessment and imposition of any restrictions” (on travel, activities and contact) for up to 48 hours or alternatively if screening has been undertaken, and restrictions are applied, the end of those restrictions.

Regulations were made in Scotland and Northern Ireland making COVID-19 a notifiable disease under the Public Health (Scotland) Act 2008 and the Public Health Act Northern Ireland) 1967 which provided detention and quarantine powers.

The Coronavirus: Action Plan (AP) was published on 3 March 2020 by the UK Department of Health and Social Care, the Scottish Government, the Department of Health for Northern Ireland and the Welsh Government. The AP recognised the respective roles and responsibilities of the UK Government and Devolved Administrations and set out:

- a. what was known about the virus and the disease it causes
- b. how the Administrations had planned for an infectious disease outbreak, such as the coronavirus outbreak
- c. the actions the Administrations had taken so far in response to the current coronavirus outbreak
- d. what the Administrations were planning to do, depending upon the course the outbreak took.
- e. the role of the public in supporting the Administrations’ response.

The AP set out four phases to respond to COVID-19:

- i. Contain: detect early cases, follow up close contacts, and prevent the disease taking hold in this country for as long as is reasonably possible
- ii. Delay: slow the spread in this country, if it does take hold, lowering the peak impact and pushing it away from the winter season

- iii. Research: better understand the virus and the actions that will lessen its effect on the UK population; innovate responses including diagnostics, drugs and vaccines; use the evidence to inform the development of the most effective models of care
- iv. Mitigate: provide the best care possible for people who become ill, support hospitals to maintain essential services and ensure ongoing support for people ill in the community to minimise the overall impact of the disease on society, public services and on the economy.

The AP was a document which indicated a high level of cooperation and coordination between the four nations in respect of the initial phase of the crisis. The Cabinet Office guidance on responding to emergencies assumed that this would be the approach to be followed:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/192425/CONOPs_incl_revised_chapter_24_Apr-13.pdf

Between 26 and 28 March, UK governments responded to medical evidence and advice that lockdowns must be imposed and enforced in order to save lives, prevent the National Health Service from being overwhelmed and constrain the spread of Coronavirus and began the legislative effort which forms the basis of the Commission's Inquiry.

Acting under powers contained in the Public Health (Control of Disease) Act 1984, the UK Health Secretary made the [Health Protection \(Coronavirus Restrictions\) \(England\) Regulations 2020](#).

This was followed by the Welsh Government, which enacted the [Health Protection \(Coronavirus Restrictions\) \(Wales\) Regulations 2020](#).

In Northern Ireland, the Executive Department of Health, using powers under the Public Health Act (Northern Ireland) 1967 as amended by the Coronavirus Act 2020 enacted the [Health Protection \(Coronavirus, Restrictions\) Regulations \(Northern Ireland\)](#).

In Scotland the position was similar, the Scottish Government, acting under powers in the Coronavirus Act 2020, enacted the [Health Protection \(Coronavirus\) \(Restrictions\) \(Scotland\) Regulations 2020](#).

Divergence can however be seen in the way in which the regulations (which were similar but not identical) and Guidance published by all four Governments evolved: <https://www.gov.uk/coronavirus>; <https://www.gov.scot/coronavirus-covid-19/>; <https://gov.wales/coronavirus>; <https://www.nidirect.gov.uk/campaigns/coronavirus-covid-19>.

The Guidance contained information on how to protect one another from the virus (including vulnerable people and those who are shielded), maintain health and deal with employment, financial and work issues. The Guidance also covered topics such as business matters, education, schooling, housing, transport, travel and immigration, healthcare workers, volunteering and support when there is a death.

However, the Guidance evolved as the effect and understanding of the virus developed, and as Government priorities changed among the Four Nations and the Guidance each Government had issued

diverged. The controversy between “staying alert” in England and “staying at home” in Scotland, Wales and Northern Ireland is an example of this divergence.

Consequently, we reached the position where the Guidance and the law are not the same in each part of the UK (indeed divergences in guidance may not be reflected in amendments to regulations). This is understandable, given that the virus may have spread in each jurisdiction at different times and rates, with each nation having its own institutions and capacities to address the problems as they arise. Care must therefore be taken to ensure that the regulations applicable to whichever part of the UK are being followed, as a breach may result in legally enforceable penalties. To assist the public in following the relevant law and guidance it would seem particularly relevant, when broadcasting, for UK Government Ministers and officials to emphasise the jurisdiction to which their statements apply which could be the UK as a whole but often apply only to England. Otherwise, citizens in other parts of the UK might easily assume that the statements are being made in respect of the whole of the UK.

11. Did such divergences:

- a. demonstrate best practice that could be instructive to the work of the Commission; or**
- b. impact upon the Rule of Law in ways that could be better managed in future public health emergencies?**

Our Comment

We are not able to detect that the divergencies indicate best practice or any future way to manage public health emergencies.

Topic 5: Parliamentary scrutiny processes (pages 22-25)

12. Did existing parliamentary scrutiny processes facilitate urgent law-making while enabling appropriate scrutiny of legislation made during the Covid-19 pandemic? If not, why?

Our Comment

The Hansard Society has conducted research which shows which scrutiny procedures applied to Coronavirus related statutory instruments: [Coronavirus Statutory Instruments Dashboard | Delegated legislation and Coronavirus SIs in Parliament \(hansardsociety.org.uk\)](https://hansardsociety.org.uk/coronavirus-statutory-instruments-dashboard).

That research showed that of the “582 Coronavirus-related Statutory Instruments (SIs) laid before Parliament by 3 March 2022, 417 were subject to made negative procedure, 118 were subject to the made affirmative procedure, 44 were subject to the draft affirmative procedure, 2 were laid only and 1 was subject to strengthened scrutiny procedure.

The research also shows that in terms of compliance with the 21 day scrutiny rule, 189 made negative regulations complied and 228 breached the rule. 66 statutory instruments came into effect before being laid in Parliament although 516 came into effect after being laid. The research also demonstrates the effect of

the “pressures of the crisis” and details the problems of rapid amendment, repeat amendment and revocation.

These statistics indicated that the pre-pandemic problems with scrutiny of subordinate legislation continued during the pandemic. Adequate scrutiny of subordinate legislation in non-pandemic conditions is generally considered as lacking. It appears that the pressure to legislate during the pandemic underscores that state of affairs.

13. Could parliamentary scrutiny processes be improved to facilitate urgent law making while enabling appropriate scrutiny of legislation in future public health emergencies?

Our Comment

Yes, it is generally accepted that parliamentary procedure for dealing with subordinate legislation could be improved by pre-introduction consultation, more time for consideration of the instruments, better briefing for elected representatives and the ability to amend subordinate legislation.

14. Do additional measures need to be taken to ensure that the UK and Scottish Parliaments, Welsh Senedd and/or Northern Ireland Assembly have appropriate oversight of the use of urgent procedures to enact secondary legislation in public health emergencies?

Our Comment

Yes, particularly when Scottish Ministers rely on the UK Government to make Statutory Instruments within areas of devolved competence. The Scottish Parliament and the Scottish Ministers entered into a protocol on scrutiny by the Scottish Parliament of consent by Scottish Ministers to UK secondary legislation arising from the UK exit from the European Union. A similar protocol could be employed when dealing with analogous statutory instruments when dealing with a pandemic.

15. Were the UK and Scottish Parliaments, Welsh Senedd and/or Northern Ireland Assembly provided with sufficient information and evidence to properly scrutinise Government use of emergency powers during the Covid-19 pandemic? If not, how could this be improved in future public health emergencies?

Our Comment

We have no empirical evidence to enable us to answer this question. MSPs and MS/AS would be better placed to reply.

16. How far did the four parliaments in the UK work together during Covid-19? Are there improvements that could be made in future public health emergencies?

Our Comment

In our submission to the House of Lords Constitution Committee in response to its Inquiry into the constitutional implications of Covid 19 we suggested a quadripartite parliamentary group, bringing together

all the UK legislatures to share experience, best practice and knowledge about legislating in the pandemic, using as a model the Inter-Parliamentary Group formed to consider the UK exit from the European Union.

Topic 6: The adaptation of parliamentary procedures (pages 26-28)

17. How successful was the adaptation of parliamentary procedures in order to manage the meeting of the UK and Scottish Parliaments, Welsh Senedd and/or Northern Ireland Assembly throughout the Covid-19 pandemic and facilitate parliamentary oversight of executive action?

Our Comment

The Scottish Parliament agreed a number of changes to Standing Orders to ensure that it was able to continue to sit during the public health emergency [Standing Orders | Scottish Parliament Website](#). These included meeting to pass the emergency legislation referred to above.

The changes to Standing Orders:

- i) enabled remote and hybrid participation in meetings of the Parliament and committees;
- ii) enabled the introduction of a remote voting system for meetings of the Parliament;
- iii) provided flexibility in relation to methods of voting in committees;
- iv) suspended the requirement for public access to meetings of the Parliament and committees;
- v) provided flexibility on the nomination of committee substitutes;
- vi) enabled the use of the electronic voting system in the Chamber for the election of an additional Deputy Presiding Officer;
- vii) suspended the requirements in relation to the scheduling of Members', committee and opposition business.

The suspensions and variations applied from 17 March 2020 until the dissolution on 5 May 2021.

Further details of the changes made and comparison with other UK and international legislatures is contained in the Scottish Parliament Information Centre publication: [How has the COVID-19 pandemic changed the way the Scottish Parliament works? \(azureedge.net\)](#).

These changes ensured that the Parliament could continue to work during this period and scrutinize and pass primary and secondary legislation. The Standards, Public Appointments and Procedures Committee conducted an Inquiry into the resilience of the Scottish Parliament's practices and procedures in relation to its business. The Committee reported in February 2021 [Standing Order Rule Changes - Inquiry into the resilience of the Scottish Parliament's practices and procedures in relation to its business \(azureedge.net\)](#).

The Parliament also established the COVID-19 Committee on 21 April 2020. Its remit was to consider and report on the Scottish Government's response to COVID-19 including the operation of powers under the Coronavirus (Scotland) Act, the Coronavirus Act and any other legislation in relation to the response to COVID-19 and any secondary legislation arising from the Coronavirus (Scotland) Act and any other legislation in relation to the response to COVID-19. It met until the dissolution and concluded on 21 March 2021.

After the Scottish Parliament election in May 2021 the COVID-19 Recovery Committee was established with the remit to focus on:

- A. The Scottish Government's response to COVID-19 and actions to recover from the pandemic
- B. Government legislation introduced in response to the pandemic
- C. Legislation or policies aiming to help Scotland recover from the pandemic
- D. How Government departments work together to respond and recover from the pandemic

18. Could any improvements be made in future public health emergencies?

Our Comment

We have no comment to make.

Topic 7: The use of guidance vs. law (pages 28-29)

19. When it is constitutionally appropriate to use guidance rather than law to respond to public health emergencies?

Our Comment

We take the view that guidance should be used only to advise the public as to how they can best protect themselves, or to explain the Government's objectives in broad terms. It is never constitutionally appropriate (in the sense of complying with the rule of law) to use guidance in any way that suggests guidance is equivalent to rules with which there should be compliance. The content of guidance should not be written as if it had force of law, and possibly more importantly, politicians and others (including the police) should never refer to, use or rely on guidance as if it had the force of law. The Institute for Government in their paper [The government must draw a clear line between law and guidance during the coronavirus crisis | Institute for Government](#) published on 1 April 2020 makes the point that police forces should be enforcing the law rather than Government Guidance.

Rules should be dealt with in primary or subordinate legislation, with appropriate sanctions for their non-observance. In other words, guidance should never be used if the intention is to achieve the same effect as rules. Rules are rules and guidance should only be used to provide guidance as to what the rules are intended by the Government to mean (although their actual meaning is a matter for the courts).

It is important to make this distinction, or there will be a temptation for policy makers to make up rules in guidance, which may conflict with what is stated in rapidly changing legislation during an emergency. There is a grey area where it is desired to explain how the rules are intended to operate in particular situations. This is where there may be some confusion between guidance and rules especially when it is difficult to know what the law itself is when it has been amended multiple times in a short space of time.

To some extent this confusion can be avoided because it is possible to draft rules which illustrate how they are intended to operate in particular situations. Where this is not done, the guidance should expressly make it clear that it is only providing guidance.

20. Was the right balance struck during the Covid-19 pandemic between the use of law and guidance to impose non-pharmaceutical interventions? If not, what could be improved in future public health emergencies?

Our Comment

We have no comment to make.

21. How and when was public health guidance incorporated into law during the Covid-19 pandemic? Were any Rule of Law issues caused by this incorporation and, if so, how could these be addressed in future public health emergencies?

Our Comment

We have no comment to make on this topic at the moment but may be able to submit a supplementary submission in the future.

Topic 8: Legal clarity (pages 29-32)

22. Were the emergency public health laws governing the Covid-19 pandemic sufficiently clear and accessible? If not, how could this be improved in future public health emergencies?

Our Comment

We have referred earlier in this response to Lord Bingham's *Rule of Law* and the eight principles which he identified as contributing to the rule of law the first of which is "The law must be accessible, intelligible, clear and predictable.". We agree that there is a rule of law need for emergency laws to be accessible. As we have stated and as the Hansard Society has reported, a significant amount of subordinate legislation was made across the UK during the pandemic, with regulations often being changed from day to day. In our answer to Question 6, we refer to the need for running consolidation, noting that the administrations will have their informal consolidations and that it should be possible at least to reproduce that in electronic form (if not in printed form). Ideally these should be authoritative texts which have gone through a parliamentary process, but even illustrative consolidations online would be better than the confusing amount of subordinate legislation that developed during the pandemic.

23. How far did the use of Government guidance affect public understanding of restrictions imposed during the Covid-19 pandemic? Could improvements be made in future public health emergencies?

Our Comment

Public understanding of what could and could not lawfully be done during the pandemic was likely adversely affected by a blurred distinction between guidance and the law. Often this lack of clarity meant that guidance appeared to be more stringent than the law, see: [The government must draw a clear line between law and guidance during the coronavirus crisis | Institute for Government](#)

The Institute for Government highlights that “Published government [guidance](#) remains more restrictive than the regulations. For example, it says that people should only leave home for specified “very limited purposes”. It also suggests that people can exercise only once a day, although in England the law does not say this. The government advises people, further, to “stay local and use open spaces near home where possible”, rather than drive, but the legislation does not say this either.

24. Are there any other matters that affected the clarity and accessibility of coronavirus legislation and guidance? Could improvements be made in future public health emergencies?

Our Comment

See our responses to questions 21, 24 and 25. We take the view that Ministerial announcements should clearly distinguish between the applicable law and applicable guidance. UK Ministerial announcements should also make clear to which jurisdiction in the UK the respective law or guidance applies.

Topic 9: International comparisons (page 32)

25. Are there any examples of best practice from other jurisdictions that could be instructive for the work of the Commission?

We have no comment to make.



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