CVDR/S6/22/7/1

COVID-19 Recovery Committee

7th Meeting, 2022 (Session 6), Thursday 3 March 2022

Coronavirus (Recovery and Reform) (Scotland) Bill - Stage 1 scrutiny

Introduction

1. At this meeting, the Committee will take evidence on Coronavirus (Recovery and Reform) (Scotland) Bill at Stage 1 from the following witnesses—

Panel 1 – Public health measures contained in Part 1 of the Bill

- Professor Fiona de Londras, Professor of Global Legal Studies, COVID Review Observatory, University of Birmingham
- Franklin De Vrieze, Senior Governance Adviser, Westminster Foundation for Democracy
- Professor Paul Hunter, Professor in Medicine, Norwich Medical School, University of East Anglia

Panel 2 – Bankruptcy measures contained in Part 3 of the Bill

- Abbey Fleming, Policy and Communications Lead, Money Advice Scotland
- Jamie MacNeil, Manager, Money Matters Advice Service, Social Work Resources, South Lanarkshire Council
- Donna W. McKenzie Skene, Emerita Professor, School of Law, University of Aberdeen
- David Menzies, Director of Practice, Institute of Chartered Accountants of Scotland

2. Members may wish to refer to the following background reports and written submissions to other relevant inquiries from some of the witnesses which may inform this evidence session (see **Annexe A**):

- Westminster Foundation for Democracy, “Sunset Clauses and Post-Legislative Scrutiny: Bridging the Gap between Potential and Reality” (February 2022)

- University of Birmingham COVID-19 Review Observatory, written submissions to the Delegated Powers and Law Reform Committee inquiry into the use of the made affirmative procedure during the coronavirus pandemic (December 2021)

- Written submissions from Money Advice Scotland and Institute of Chartered Accountants of Scotland to the Committee's call for views on the Bill

The Bill

3. The Coronavirus (Recovery and Reform) (Scotland) Bill is a Scottish Government bill that was introduced on Tuesday, 25 January 2022 by John Swinney, Deputy First Minister and Cabinet Secretary for COVID Recovery. The Bill was accompanied by a Policy Memorandum (PM), Explanatory Notes (EN), and a Financial Memorandum (FM). The Scottish Government also published the following impact assessments—

- Coronavirus (Recovery and Reform) (Scotland) Bill: business and regulatory impact assessment
- Coronavirus (Recovery and Reform) (Scotland) Bill: child rights and wellbeing impact assessment
- Coronavirus (Recovery and Reform) (Scotland) Bill: equalities impact assessment
- Coronavirus (Recovery and Reform) (Scotland) Bill: fairer Scotland duty impact assessment
- Coronavirus (Recovery and Reform) (Scotland) Bill: island communities impact assessment

4. The effect of the Bill is to make permanent some of the time-limited reforms to the delivery of public services that were introduced in response to the COVID-19 pandemic and to extend others. The Scottish Government consulted on the proposals in its consultation paper entitled "Covid recovery: a consultation on public health, public services and justice system reforms", which was open from 17 August 2021 to 9 November 2021.[1]

5. The Policy Memorandum states that the purpose of the Bill is—

> "to embed reforms in Scotland's public services and justice system that, though necessitated by the Covid pandemic, have delivered improvements for service users and improved efficiency. The Bill will also help build resilience against future public health threats. Furthermore, the Bill will continue certain temporary justice system provisions on a longer extension basis as part of the Recover, Renew, Transform ("RRT"2) programme and as a response to the impact of Covid on Scotland's justice system, most particularly where backlogs have unavoidably built up."[2]

[1] https://consult.gov.scot/constitution-and-cabinet/covid-recovery/.
[2] Coronavirus (Recovery and Reform) (Scotland) Bill, Policy Memorandum, page 1

6. The Bill is divided into 6 Parts, as follows—

- Part 1: Public health protections (clauses 1 – 4)
- Part 2: Education (clauses 5 – 14)
- Part 3: Public service reform (clauses 15 – 32)
- Part 4: Tenancies (clauses 33 – 37)
- Part 5: Temporary justice measures (clauses 38 – 44)
- Part 6: Final provisions (clauses 45 – 47)

6. This Bill therefore covers a range of policy areas–

- alcohol licensing
- bankruptcy
- civic licensing
- courts, tribunals and parole boards
- criminal justice and proceeds of crime
- education (powers to close educational establishments and ensure continuity of education)
- freedom of information
- legal aid
- named persons nomination
- public health
- registration of deaths, still-births and live births
- tenancies and evictions
- vaccinations and immunisations

7. The Scottish Parliament's Information Centre (SPICe) has published a bill briefing on aspects relating to public health, education and the delivery of other public services. This is one of two SPICe briefings on the Bill.

Committee scrutiny

8. As the provisions in the Bill cover a wide range of policy areas, a number of Committees are involved in the Stage 1 scrutiny of this Bill. The COVID-19 Recovery Committee is the lead committee on the Bill.[3] The Criminal Justice Committee has been designated as a secondary committee and will be considering the civil and criminal justice matters covered in Parts 3 and 5 of the Bill. The Local Government, Housing and Planning Committee has also been designated as a secondary committee and will consider the tenancies provisions included in Part 4 of the Bill. The Education, Children and Young People Committee has an interest in Part 2 of the Bill. Those committees will report to this Committee.

9. Both the Finance and Public Administration Committee (in relation to the FM) and the Delegated Powers and Law Reform Committee (in relation to the delegated powers memorandum) will consider aspects of the Bill and will also report to this Committee.

[3] S6M-03035 – Designation of lead Committee.

10. To ensure a joined up approach to scrutiny, this Committee, the Criminal Justice Committee and Local Government, Housing and Planning Committee issued a joint call for views, which included the option of completing a short survey. The short survey has received 3,548 responses to date, and will remain open until Friday, 18th March.

11. The detailed response option for the call for views closed on 25 February 2022. The Committees has received 78 completed responses to date, of which four responses were removed due to being incomplete and one completed response was rejected for publication. The remaining submissions have been published. The Committee has also received requests for extensions and these late submissions will be uploaded, published and circulated to the Committee in due course.

12. The Committee also wrote to subject committees on 8 February, inviting them to contribute any evidence gathered which could be relevant to our scrutiny of the Bill. Responses from the Equalities, Human Rights and Civil Justice Committee and the Health, Social Care and Sport Committee are attached at **Annexe B**.

Next steps

13. The Committee will continue to take evidence on the Bill at its meetings on 10, 24 and 31 March 2022 and expects to publish its Stage 1 report after Easter recess.

Committee Clerks
February 2022

Annexe A

Sunset Clauses and Post-Legislative Scrutiny: Bridging the Gap between Potential and Reality

The PLS series, 3

Sean Molloy, Maria Mousmouti and Franklin De Vrieze

February 2022

The publication "Sunset Clauses and Post-Legislative Scrutiny: Bridging the Gap between Potential and Reality" was published in February 2022 as part of WFD's "*The PLS Series*" and made possible through funding received from the United Kingdom's Foreign, Commonwealth and Development Office (FCDO).

The publication has been drafted by Sean Molloy, Maria Mousmouti and Franklin De Vrieze. The authors appreciate the peer review comments received by Dr. Tom Caygill and by Dinesh Wagle and Airlie Taylor of WFD.

The "*PLS Series*" brings together applied research on aspects of legislative processes and Post-Legislative Scrutiny. For 2021-22, the following policy briefs are scheduled:

1. Post-Legislative Scrutiny in the UK Parliament, Tom Caygill
2. Post-Legislative Scrutiny of election campaign finance legislation: Comparative study on legislation and practices in Indonesia, Moldova, and Nigeria, S. Lipcean, F. Casal Bértoa, N. Goguadze
3. Sunset Clauses and Post-Legislative Scrutiny: Bridging the Gap between Potential and Reality, Sean Molloy, Maria Mousmouti and Franklin De Vrieze
4. Indicators for Post-Legislative Scrutiny

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Foreword

Governments may introduce legislation that embodies provisions creating new offences or conferring order-making powers on public officials. Anyone reading a Bill may need to look at other parts to see that the provisions are qualified. In the United Kingdom, it is common for order-making powers to be subject to commencement orders. In other words, they do not take effect until a minister makes a commencement order. There are many sections of Acts that have never been commenced: they constitute what I have termed "law but not law". (There is a whole Act – the Easter Act 1928, stipulating a fixed date for Easter – that famously has never been commenced.) Provisions may take effect, but be subject to 'sunset clauses', stipulating a date on which they cease to take effect, unless renewed.

Sunset clauses are generally seen in a positive light, ensuring that legislation does not linger unnecessarily on the statute book. They are employed especially for controversial legislation, not least when passed quickly in response to a crisis (such as anti-terrorism legislation), ensuring that, if it is to be continued, it is subject to review. The use of such clauses can facilitate the passage of the legislation, helping assuage the fears of critics in that it will not be permanent and that they will have an opportunity to revisit the arguments, and assess its effects, should there be a move to continue it. Post-legislative review is inherently desirable, ensuring that legislation has had the effect intended.

Despite their significance, sunset clauses have rarely been the subject of serious study. In this report, Sean Molloy, Maria Mousmouti and Franklin De Vrieze offer a detailed and very welcome examination. In addition to providing a valuable and succinct overview of the origins and functions of sunset clauses, they demonstrate that if sunset clauses are to live up to their potential, in effect their reputation for being a "good thing", they need to be well drafted and be subject to a substantive review process. As they argue, sunset clauses in practice may be poorly drafted, notable more for ambiguity than clarity, and, most importantly of all, not trigger a meaningful review process. The very fact of embodying sunset clauses may lull those discussing the initial legislation into a false sense of security – believing that, as it will be reviewed, much can be taken on trust – and with the subsequent reviews being rather perfunctory. As they note, debates on motions to continue the provisions may be poorly attended and with limited time allocated for their consideration. There may also be problems with the information provided for such reviews.

The authors lay out a roadmap for the effective use of sunset clauses. These include stipulating the conditions for a review, such as requiring the appointment of an independent reviewer who will produce a report to be laid before the legislature. The recommendations merit serious debate by legislators and indeed by ministers. Reviewing measures to ensure that they have achieved what they are intended to achieve is for the good of society. Sunset clauses need to be clear and, if intended to be subject to renewal, to be accompanied by provisions stipulating a process of review that will inform the legislature as to whether they have had the intended effect and merit being continued.

This report shines an invaluable light on an under-researched, but very important subject and it deserves a wide readership.

Philip Norton
Lord Norton of Louth

Summary

Sunset clauses set an expiration date on a particular law or set of provisions, and the expiration is either automatic or subject to a positive or negative authorisation by the legislature.

They are not new in the legislative toolkit but have experienced a resurgence in the past decades, mainly due to their capacity to limit the duration of legislative measures of an extraordinary or controversial nature.

Sunset clauses were in high demand in COVID-19 acts and regulations, with the main function to ensure that the restrictive measures adopted to respond to the pandemic extended no longer than necessary. In other areas where sunset clauses have been used, like terrorism legislation, sunset clauses are used to ensure that controversial measures are temporary or kept under scrutiny.

Sunset clauses in legislation are frequently regarded as important safeguards of democracy, particularly in contexts where emergency legislation is relied upon. However, these legislative devices are also often ineffective at limiting the continuation of emergency legislation.

This publication identifies reviews of emergency law as central to the effectiveness of sunset provisions. After detailing some of the difficulties associated with these reviews, we draw on examples from post-legislative scrutiny (PLS) more generally to identify best practices from a range of contexts. The purpose is to help identify how those involved in both drafting and reviewing emergency legislation might bridge the gap between the potential of sunset clauses and the realities that often arise.

The hypothesis of the present publication is that sunset clauses can only provide effective safeguards for legal certainty and democracy if they are well drafted and accompanied by substantive review processes.

To prove this, the publication looks at the origin and functions of sunset clauses and takes a critical view on their role in emergency legislation – in theory and practice. Based on this, the essential features of effective sunset clauses are identified that can promote legal certainty and democratic deliberation.

This paper:

1. identifies how those involved in both drafting and reviewing emergency legislation might bridge the gap between the potential of sunset clauses and the realities that often arise;
2. identifies the essential features of effective sunset clauses that can promote legal certainty and democratic deliberation;
3. demonstrates that sunset clauses can only provide effective safeguards for legal certainty and democracy if they are well drafted and accompanied by substantive review processes.

1. Introduction

When the American legal scholar Roscoe Pound said "the law must be stable, but it must not stand still" he was referring mainly to the theories that influenced the development of law at different times and the compromises that proved necessary to this end. In a contemporary context, the law often *cannot* stand still because it can rarely provide definite solutions to rapidly changing environments, situations and societies.

Reality openly challenges the assumption of longevity of legislative solutions, especially where emergencies or new social phenomena come into play. Emergency legislation holds a place of its own within this narrative. Emergency legislation is unique in that it often deviates from commonly applicable standards or practices and inevitably raises concerns regarding its impact, especially on democratic processes and fundamental rights. Sunset clauses were a legislative mechanism used to "tame" the challenges posed by emergency legislation by ensuring their limited duration.

Sunset clauses set an expiration date on a particular law or set of provisions, and the expiration is either automatic or subject to a positive or negative authorisation by the legislature.[1] They are not new in the legislative toolkit but have experienced a resurgence in the past decades, mainly due to their capacity to limit the duration of legislative measures of an extraordinary or controversial nature. Sunset clauses were in high demand in COVID-19 acts and regulations, with the main function to ensure that the restrictive measures adopted to respond to the pandemic extended no longer than necessary. In other areas where sunset clauses have been used, like terrorism legislation, sunset clauses are used to ensure that controversial measures are temporary or kept under scrutiny.

Sunset clauses are rarely encountered on their own. Instead, they are often combined with provisions that trigger reviews of the law. They also often require that the executive and the lawmakers – or both – revisit assumptions, enacted provisions, their implementation, and impact before deciding on further steps. These further steps can entail the re-authorisation of provisions due to expire or the amendments necessary to improve the effectiveness of the law. The review clauses that accompany sunset clauses are in essence statutory "trigger" or reflection points that initiate post-legislative scrutiny as a means for evidence-based decision making.

However, despite the good intention behind them, sunset clauses have often failed in practice to either ensure the temporary nature of contentious provisions, or initiate a meaningful scrutiny process, thus being challenged in their adequacy as gatekeepers of legal certainty, democracy or fundamental rights. This publication focuses on selected examples of sunset clauses in terrorism and COVID-19 response legislations and uses them as case studies to decipher the features that are critical for their success and failure.

The hypothesis of the present publication is that sunset clauses can only provide effective safeguards for legal certainty and democracy if they are well drafted and accompanied by substantive review processes. To prove this, the article looks at the origin and functions of sunset clauses and takes a critical view on their role in emergency legislation – in theory and in practice. Based on this, the essential features of effective sunset clauses are identified that can promote legal certainty and democratic deliberation.

1. Kouroutakis, A., (2016), *The Constitutional Value of Sunset Clauses: An Historical and Normative Analysis*, (Routledge).

2. Sunset clauses as safeguards for democracy?

Legislation is ordinarily permanent in that it persists unless and until repealed by subsequent legislation. Sunset clauses, by contrast, seek to achieve the opposite effect. As legal provisions, which provide for the expiry of a law at a future point in time, sunset clauses run against the grain of legislative practices; theirs is the business of temporariness, existing to ensure that legislation, or part of it, is operative for a specified period of time.

These clauses have been employed in different contexts. Some trace the historical usage of sunset provisions to the time of Plato.[2] In the United Kingdom (UK), they were employed by parliaments since at least the time of the reign of Henry VII and appeared in statutes by 1500,[3] while in the United States (US), Mooney traces the history of sunsetting back to the writings of Thomas Jefferson.[4]

2.1 The origin and functions of sunset clauses

In a contemporary setting, sunset clauses are used in situations when legislation struggles to offer definite or lasting solutions to the regulated problems. In their initial conception, sunset clauses were used in legislation that regulated phenomena with a temporary dimension, such as natural disasters or emergencies. Measures adopted to respond to earthquakes or tsunamis are, by definition, temporary and can reasonably be expected to have a predefined duration and not to remain in the statute book after the emergency or disaster has finished.

The idea was then "borrowed" by sectors where rapid developments quickly rendered legislation outdated, such as financial regulation, and sunset clauses responded to the need for regular review. In other sectors, for example bioethics, genetics, or artificial intelligence, the rapid evolution of science and technology offered little certainty for the definite regulation of legal issues or raised important concerns with regard to potential adverse effects of regulatory options. At the same time insufficient data or evidence was available in order to decide on the best possible regulatory pathway.[5]

In this case, sunset clauses, combined with review clauses, offered a solution by operating as triggers – and safeguards – for *ad hoc* review. More recently, sunset provisions have been used in legal arenas as diverse as tax law,[6] contract law,[7] and even in the context of the UK's departure from the European Union.[8]

From a different viewpoint, sunset clauses played a role in the political game: they were used to facilitate consensus building when there was disagreement between majority and opposition on

2. See, for an excellent discussion of the origins of sunset clauses, Kouroutakis, A., (2016), *The Constitutional Value of Sunset Clauses: An Historical and Normative Analysis*, (Routledge).

3. Kouroutakis, A., (2016), *The Constitutional Value of Sunset Clauses: An Historical and Normative Analysis,* (Routledge 2016).

4. Mooney, C. (2004), "A Short History of Sunsets", Legal Affairs magazine, cited in Kouroutakis, A. and Ranchordás, S., (2016), "Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies", *Minnesota Journal of International Law,* 264.

5. De Vrieze, F., (2017), "Post-Legislative Scrutiny – Comparative study of practices of Post-Legislative Scrutiny in selected parliaments and the rationale for its place in democracy assistance", Westminster Foundation for Democracy, London.

6. See, for example, Kysar. R.M., (2011), "Lasting Legislation", *University of Pennsylvania Law Review* vol. 159, no. 4; Kysar. R.M., (2006), "The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code", Georgia Law Review vol. 40, no .2.

7. Ranchordás, S., (2015) "Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty?", *Statute Law Review,* vol. 36, no. 1, pp. 28–45.

8. United Kingdom Government, Department for Transport, Operation Brock: removing sunset clauses and provisions for EU Exit and COVID-19 pandemic from existing traffic management legislation (9 August 2021).

specific provisions or dispositions. For instance, in the US, the first Bush tax cut was passed in 2001 to terminate at the close of 2010. No sooner had the laws been passed than their Republican backers launched a pre-emptive strike, criticising the sunsets and attempting to undo them. The Republican-led House of Representatives subsequently voted to make permanent the repeal of the estate tax contained in Bush's first tax cut.[9] Thus, in the context of taxation, Manoj Viswanathan assesses that:

> sunset provisions ... are the product of political manoeuvring designed to bypass budgetary constraints and are exploited as a means of enacting permanent legislation under the guise of an ostensible expiration date.[10]

The admission of the temporality of the provisions, and the commitment to revisit issues at a later moment, was often sufficient to soften reactions and achieve compromises and agreement on the need to test solutions in practice. Even on highly political or contentious topics, like terrorism legislation, sunset clauses were often the "spoonful of sugar"[11] that was required to push legislation through parliament.

Last but not least, beyond the functions outlined above, sunset clauses are also a legislative management tool used to clean up the statute book, reduce spending, increase the level of government services,[12] reduce red tape, deliver clearer laws, maintain the alignment of legislation with policy[13] and monitor regulatory burden.[14] They are seen as triggers to monitor and correct legislation throughout its lifecycle,[15] appraise its responsiveness to the regulated problems and ultimately enhance the effectiveness and the quality of legislation.[16]

In practice, the use of sunset clauses and sunset reviews is widespread. In the US, sunset reviews (the process of evaluating the effectiveness of an agency or piece of legislation) range from comprehensive (where all statutory agencies undergo a sunset review on a pre-set schedule), regulatory (where only licensing and regulatory boards undergo sunset reviews), selective (where only selected agencies and regulatory boards are reviewed) or discretionary (the legislature chooses which agencies and statutes to review).[17]

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9. Molloy, S., (2020), "Coronavirus and Parliament: A Brief History of Sunset Clauses", *Prospect Magazine* (28 April 2020).
10. Viswanathan, M. (2007), "Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future", *New York University Law Review,* vol. 82, no. 1.
11. Expression borrowed from McGarrity, N., Gulati, R. and Williams, G., (2013), "Sunset Clauses in Australian Anti-Terror Laws" (2 February 2013). Adelaide Law Review, vol. 33, 2012, UNSW Law Research Paper No. 2013-14.
12. Waller, J. "The Expenditure Effects of Sunset Laws in State Governments" (All Dissertations 2009) 381, (last accessed 1 December 2018).
13. Australian Government, Guide to Managing Sunsetting of Legislative Instruments, 2016, last accessed 1 December 2018). See also the Guide to Report on the Operation of the Sunsetting Provisions in the Legislation Act 2003 and the downloadable report itself.
14. UK Government, Sunsetting Guidance, 2011 (last accessed 7 December 2018).
15. Flückiger, A. "L'obligation jurisprudentielle d'évaluation législative: une application du principe de précaution aux droits fondamentaux" in Auer, A., Flückiger, A., and Hottelier, M., *Les droits de l'homme et la constitution: études en l'honneur du Professeur Giorgio Malinverni* (Schulthess 2007) pp. 155-170 at 170.
16. Mousmouti, M. *Designing Effective Legislation* (Elgar 2019); Xanthaki, H; (2020) Sunset clauses: a contribution to legislative quality, in: Ranchordas, S. and Roznai, Y., (eds.) Time, Law, and Change An Interdisciplinary Study. Hart Publishing: Oxford, UK.
17. Baugus B. and Bose, F., (2015), "Sunset Legislation in the States: Balancing the Legislature and the Executive" (Mercatus Research, Mercatus Center at George Mason University, 2015) (last accessed 1 December 2018).

In Canada, statutory provisions that require legislation to be reviewed after a period of time are fairly common in statutes at both the provincial and federal level.[18]

In Australia, the Legislation Act 2003 (Part 4, Chapter 3) subjected all legislative instruments to a horizontal sunset clause. This means that all legislative instruments are due to expire ten years after the date of their introduction, unless explicitly exempted or unless their sunsetting is deferred. The performance of the sunsetting framework was reviewed ten years after its enactment and was found to be effective overall, while a number of improvements and corrections were proposed.[19] The Legislation Amendment (Sunsetting Review and Other Measures) Bill 2018 implemented the recommendations from the review of the sunsetting provisions by introducing amendments to the Legislation Act 2003.

In the diverse functions and contexts highlighted above, sunset clauses have often been used and misused in different ways. And although they are not a panacea, it is important to learn from success and failure in order to improve practice.

2.2 Monitoring, review and sunset clauses

It is important at this point to clarify that sunset clauses are rarely used on their own. Instead, they operate in combination with other clauses with a complementary nature. Three distinct types of clauses are particularly relevant: monitoring, review and evaluation clauses.

Monitoring clauses focus on the process of overseeing, following up the implementation of legislation and the systematic collection of data on implementation. Review clauses enable an assessment of the "working" of legislation or specific provisions, while evaluation clauses take a broader perspective and appraise the act comprehensively in relation to its policy objectives. Monitoring, review and evaluation clauses differ in terms of scope, timing and focus. Monitoring clauses facilitate a process of data collection on implementation, while review and evaluation clauses take effect at specific moments in time and focus on the performance or the outcomes of the act. The added value of these clauses is the fact that they enable the generation of implementation data and reports (in the case of monitoring clauses) and, most importantly, the fact that they trigger a substantive post-legislative scrutiny of legislation, involving the executive, the legislature or other bodies.

The combination of review and sunset clauses creates an "early warning system" against ineffectiveness and potential adverse effects of legislation, and can keep legislators on their toes to monitor how legislation performs in real life and allow them to revisit issues on which insufficient evidence was available at the time when legislation was adopted.

2.3 Sunset clauses in emergency legislation

Sunset clauses have enjoyed the most prevalent uptake in two distinct arenas. Firstly, sunset clauses have been used in the general context of counter-terrorism and more specifically in post-9/11 legislative responses to terrorist threats, particularly in the UK, US, Canada, and Australia.[20] Secondly, and more recently, sunset clauses have been used in the context of COVID-19 where they

18. De Vrieze, F. and Hasson, V., (2017), "Post-Legislative Scrutiny. Comparative study of practices of Post-Legislative Scrutiny in selected parliaments and the rationale for its place in democracy assistance", Westminster Foundation for Democracy, London, p.23.

19. Review of the Sunsetting Framework under the Legislation Act 2003, Report on the Operation of the Sunsetting Provisions in the Legislation Act 2003 (ag.gov.au).

20. See, as examples, McGarrity, N., Gulati, R. and Williams, G., (2012), "Sunset Clauses in Australian anti-Terror Laws" Adelaide Law Review vol. 33, 307; Finn, J. E., (2010), "Sunset clauses and democratic deliberation: Assessing the significance of sunset provisions in antiterrorism legislation", Columbia Journal of Transnational Law, vol. 48, no. 3, pp. 442-502.

have acted as an important safeguard for the potential abuse of emergency powers adopted as responses to the pandemic.[21] The particular modalities for dealing with the COVID-19 emergency differ from country to country.[22]

Some countries, such as Madagascar and Colombia, declared a state of emergency in line with their constitutions. Academics Kouroutakis and Ranchordás refer to a process of temporary de-juridification in reference to a state of emergency, which "can mean that special and extraordinary measures are enacted to respond to a certain crisis, in derogation of existing standards and rules".[23] In their place, states might pass emergency legislation or regulations, "the legal rules that governments make to deal with the threat in the exercise of the wider powers that have been given to the government under a state of emergency".[24] Sometimes, in conjunction with constitutional requirements, states issued formal notifications of their intention to derogate from international human rights law.[25]

In other cases, despite declaring a state of emergency, no such notifications of derogation were issued. Other countries, such as Sri Lanka and Somalia, adopted a range of emergency measures without a clear legislative basis and outside of an established legal framework,[26] founding their COVID-19 responses instead on executive discretion.

Still again, and most relevant for the purposes of this publication, some countries such as the UK, Scotland, Ireland and Singapore passed legislation or relied on existing laws to ground their COVID-19 response. A defining feature of the legislative model is that "however unusual it may be, emergency legislation remains ordinary within the framework of the constitutional system: it is an act of the legislature working within its normal competence".[27]

In theory, using legislation ought to ensure compliance with overriding public law and rule of law principles. For example, such laws ought to incorporate formal values such as clarity, non-retroactivity, publicity, universality of reach, and the possibility of compliance and congruence between expressed law and official enforcement. Nevertheless, there are always risks associated with emergency laws and, particularly in the context of legislative-focused responses, sunset clauses might be interpreted as important safeguards of democracy.[28]

For those countries that relied on legislation as the basis to ground their COVID-19 responses, sunset clauses were frequently held up as sufficient safeguard against the potential misuse of

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21. See Molloy, S., (2020), "Coronavirus and parliament: A brief history of sunset clauses", *Prospect Magazine* (28 April 2020); Molloy, S., "Covid-19, Emergency Legislation and Sunset Clauses", UK Constitutional Law Blog (8 April 2020).

22. See, for example, Grogan, J., "States of Emergency Analysing Global Use of Emergency Powers in Response to COVID-19", *European Journal of Law Reform* 2020, vol. 22, no. 4.

23. Kouroutakis, A., and Ranchordás, S. (2016) "Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies", *Minnesota Journal of International Law,* vol. 25, no. 1, at 31.

24. Welikala, A., (2020), "COVID-19: Southasian states of emergency" (26 March 2020), Himal SouthAsian.

25. Coghlan, N,. (2020), Dissecting Covid-19 Derogations, *VerfBlog*, 5 May 2020.

26. Molloy, S. (2021), "Emergency Law Responses to Covid-19 and the Impact on Peace and Transition Processes, International Institute for Democracy and Electoral Assistance.

27. Ferejohn, J. and Pasquino, P., (2004) "The law of the exception: A typology of emergency powers", *International Journal of Constitutional Law, v*ol. 2, no. 2, pp. 210–39, at 215.

28. Molloy, S. (2021), "Approach with Caution: Sunset Clauses as Safeguards of Democracy?", *European Journal of Law Reform*, vol. 23, no. 2.

emergency powers. For instance, *The Guardian*, in reviewing the UK Coronavirus Bill in an editorial, stated that "the first and most important overarching change that should be made to the bill is to introduce a sunset clause".[29] A sunset clause was subsequently included in the UK Coronavirus Act, 2020.

In Ireland, the Irish Council for Civil Liberties (ICCL) advocated for the inclusion of a sunset clause in the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020, noting the "imperative that any emergency legislation introduced to curb the spread of COVID-19 should be time-limited, or include a sunset clause."[30] Following a detailed analysis of the Irish Government's proposed emergency law, the ICCL subsequently sent this analysis to parliamentarians and senators in advance of the Dáil (the Irish parliament) debate.[31] As a result, a sunset clause of 9 November 2020 was included in the legislation, which was celebrated as an important check on executive emergency power.

Other countries, such as Serbia,[32] Montenegro,[33] and Morocco,[34] have included sunset clauses in laws adopted in response to COVID-19.[35]

The salience often attached to sunset clauses in the context of COVID-19 can be explained, in part, by drawing on the similarities with inclusion of sunset clauses in counter-terrorism legislation.[36] Where counter-terrorism laws empower governments to adopt a range of measures, often ones that significantly impinge on the enjoyment of individual rights and liberties,[37] COVID-19 emergency legislation has been used in much the same way.[38] For instance, sweeping powers for detention, quarantine and lockdown, measures adopted in most countries, impinge upon rights to freedom of movement, and assembly. The increased use of surveillance through, for instance, contact tracing applications, can adversely affect rights to privacy and private and family life.[39]

Secondly, as with counter-terrorism legislation, COVID-19 emergency laws have empowered states' security apparatus, enabling police forces and, in some cases, the military to assume a range of additional responsibilities.[40] The level of engagement by security personnel varies from country to country.[41] In some cases, the role of the military has been limited to providing logistical

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29. The Guardian view on the coronavirus bill: strengthen the sunset clause | Editorial | The Guardian. The Guardian (19 March 2020).
30. Irish Council for Civil Liberties, "ICCL says emergency legislation must include sunset clause" (17 March 2020).
31. Irish Council for Civil Liberties, ICCL Submission on the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Bill 2020 (18 March 2020).
32. Westminster Foundation for Democracy, Country Overview: Serbia, WFD Pandemic Democracy Tracker.
33. Westminster Foundation for Democracy, Country Overview: Montenegro, WFD Pandemic Democracy Tracker.
34. Westminster Foundation for Democracy, Country Overview: Morocco WFD Pandemic Democracy Tracker.
35. For further examples, see Westminster Foundation for Democracy, Pandemic Democracy Tracker (WFD Pandemic Democracy Tracker) and V-DEM Institute, Resource Page of Covid Responses GitHub - vdeminstitute/pandem: The Pandemic Backsliding Project (PanDem).
36. See De Vrieze, F., and Molloy, S. (2020), "Sunset clauses: Don't let the sun go down on democracy", Westminster Foundation for Democracy (29 September 2020),
37. See, for a range of examples, the webpage of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (OHCHR | Special Rapporteur on counter-terrorism and human rights).
38. See United Nations, Human rights are critical – for the response and the recovery, UN Human rights and Covid, April 2020.
39. See Eck, K., and Hatz, S., (2020) "State surveillance and the COVID-19 crisis", *Journal of Human Rights,* vol. 19, no. 5, pp. 603-612
40. Breen-Smyth, M. (2014), "Theorising the 'suspect community': counterterrorism, security practices and the public imagination", *Critical Studies on Terrorism*, vol. 7, no. 2, pp. 223-240,
41. See, for example, Safer World, "The role of the security sector in COVID-19 response: An opportunity to 'build back better'?", Publications - Saferworld; Harm Reduction International, WAGING WAR AGAINST COVID-19: The Securitisation of Health Responses in Five Asian Countries June 2021, HRI Briefing Emergency Powers Law Enforcement.

support.[42] In other settings, the police and, at times, the military have assumed responsibilities for enforcing lockdown measures.[43] Still again, in such contexts as Sri Lanka, Indonesia and Egypt, security personnel have primarily led COVID-19 responses.[44] A range of civil society reporting and academic contributions over the course of the pandemic implies that as the security apparatus assumes more responsibility, the likelihood of human rights violations increases.[45] In contexts without a formal legal basis for emergency powers, the involvement of the security apparatus in responses to the pandemic has been directed by the head of state or the head of government and facilitated through emergency legislation. In the UK, for instance, under the Coronavirus Act, various surveillance powers have been expanded in terms of authorising authorities for the taking and retention of personal data (sections 22-24). Other examples of direct intrusions into civil liberties include regulatory powers to direct the suspension of port operations (sections 22-24). Public health officers and other officials can enforce quarantining under section 51. Section 52 allows for regulations to ban events and gatherings. Under Schedule 21 of the Coronavirus Act, police, immigration officers and public health officers are permitted to detain anyone they have "reasonable grounds" to suspect is "potentially infectious" for up to 14 days.

Thirdly, as is often the case with counter-terrorism legislation, COVID-19 emergency laws have generally been fast-tracked, meaning they passed through parliament in an expedited fashion. In normal circumstances, bills can take months to transition through lower and upper houses of parliament before receiving the final seal of approval. This timeframe allows for highly robust processes of review. In the UK, for instance, the legislative processes can include various readings of a bill, parliamentary debate, the work of committees and a bicameral system whereby a bill requires, for the most part, agreement in both houses. In addition, while most bills are introduced directly into parliament, a comparatively recent feature of the legislative process involves the publication of a draft bill by the government and its scrutiny by a parliamentary committee, usually in the parliamentary session preceding that in which a bill is formally introduced to parliament.[46] There is – as a rule – wide consultation on policies and proposals that may develop into legislation. A two-step procedure of white papers and green papers is used to discuss and consult government policy on a step-by-step basis. Stakeholders and interest groups, as well as citizens, are invited to put forward their views throughout the process.[47]

Counter-terrorism laws, by contrast, are frequently expedited to afford the government additional competences to enable them to respond to unfolding events and in anticipation of potential future attacks. Similar levels of panic and urgency surrounded the global pandemic, particularly as initial cases were recorded in countries across the globe. Understood as necessary to ensure that governments could respond in haste to the emergency at hand, legislatures across the globe rushed through emergency laws. In the UK, the Coronavirus Bill took approximately four days to

42. For example, in Canada and Croatia.

43. For example, in Colombia, Ghana, and Guatemala.

44. See Safer World, "The role of the security sector in COVID-19 response: An opportunity to 'build back better'?'", Publications – Saferworld.

45. Okech, A., Mwambari, D., and Olonisakin, F., (2020) "COVID-19 responses and human rights in selected African countries", Australian Journal of Human Rights, vol. 26, no. 3, pp. 549-555; Aaron, E., (2020), "Coronavirus shows the need for a human rights-based approach to public health crises", Freedom House (3 August 2020); European Centre for Non-for-Profit Law, Civic Space in the Era of Securitised Covid-19 Responses, at 10; Namu, J-A., and Riley, T., "Nine weeks of bloodshed: how brutal policing of Kenya's Covid curfew left 15 dead", The Guardian (23 October 2020).

46. See Lynch, C. and Martin, S. (2019), "Can Parliaments be Strengthened? A Case Study of Pre-Legislative Scrutiny", *Irish Political Studies* vol. 35, no. 1.

47. Voermans, W. ten Napel, H. and Passchier, R. (2015), "Combining efficiency and transparency in legislative processes", *The Theory and Practice of Legislation*, vol. 3, no. 3, at 287.

become an Act of Parliament. In Scotland, the Coronavirus (Scotland) Bill passed through the full legislative process at Holyrood (where the Scottish Parliament is located) in a single day.

Fourthly and relatedly, in much the same way that terrorism involves an invisible and unpredictable enemy, the uncertainty surrounding the pandemic meant that, at least in the formative stages of the contagion, laws were passed with partial and incomplete information.This uncertainty created a sense of indifference or reluctant pacifism among the wider public when restrictive measures were adopted; they were viewed as unavoidable, justified in the wider context of the greater good.[48]

Sunset clauses, as temporary measures, offer at least a partial response to concerns that emerge from how emergency laws are passed and used. For instance, the existence of sunset clauses in emergency laws helps to ensure that encroachments on civil liberties are time-bound, and that the strengthening of security sector competences are for a limited duration. This temporariness also assists the process of adopting legislation that both emboldens the government and its agencies, while simultaneously removing or reducing many of the rights held by citizens. Because these are viewed as short-term measures, even the more sceptical legislatures can be assured that laws passed in a wider context of fear, uncertainty and partial information, will have effect for only a limited period of time. For this reason, many describe sunset clauses as a spoonful of sugar that helps otherwise unpalatable legislation pass.

48. See discussions on the securitisation of COVID-19 and in particular the use of war rhetoric. As examples, Rizwan, S., "Securitisation of COVID-19", Centre for Strategic and Contemporary Research (4 February 2021).

3. Theory versus practice

What is particularly striking about the sunset clauses that are included in emergency laws is that they have often proven to be remarkably ineffective.

The prevailing characterisation of sunset clauses as legal provisions which provide for the expiry of a law at a future point in time is only partially accurate. It is the case that sunset clauses can indeed take this simplistic form. For instance, section 224 of the USA's Patriot Act, 2001 stipulates that:

> Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a), 203(c), 205, 208, 210, 211, 213, 216, 219, 221, and 222, and the amendments made by those sections) shall cease to have effect on December 31, 2005.

Sunset clauses that specify an end date in these terms can be ineffective in terminating legislation. More often than not, despite the inclusion of a sunset clause, legislation has been renewed for a longer period of time than the original sunset clause or even made permanent.

The Patriot Act, for instance, included 16 sections originally meant to expire on 31 December 2005. Nevertheless, the Act was reauthorised several times in the following years after only very limited evaluation. Finn, in his international study, concluded that the expiry of anti-terrorism legislation is extremely rare.[49] The reality of sunset clauses, therefore, is that their promise of curtailing emergency powers to prevent the normalisation of emergency powers is often unfulfilled. For some, they are simply ineffective.[50]

However, a more expansive definition of sunset clauses can explain why these provisions are often ineffective. In most cases, sunset clauses are provisions that declare that an act, or provisions within an act, at a set time, cease to have effect *unless reauthorised.*[51] For Ranchordás, sunset clauses introduce two regulatory messages: first, that legislation will expire at a set time; and second, that this expiration is conditional upon a decision of parliament.[52]

It is the latter aspect – the conditional approval by parliament – that is the more important here. Contrary to the initial definition offered in the introductory remarks, in most cases, sunset clause provisions are usually accompanied by some requirement for renewal. For instance, section 83.32(1) of the Anti-Terrorism Act (Canada) 2001 provided that:

> Sections 83.28, 83.29 and 83.3 cease to apply at the end of the fifteenth sitting day of Parliament after December 31, 2006 *unless, before the end of that day, the application of those sections is extended by a resolution – the text of which is established under subsection (2) – passed by both Houses of Parliament in accordance with the rules set out in subsection (3).*[53] [italics added]

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49. Finn, J.E., (2010), "Sunset Clauses and Democratic Deliberation: Assessing the Significance of Sunset Provisions in Antiterrorism Legislation", Columbia Journal of Transnational Law vol. 48, no. 3.

50. Gross, O., (2003), "Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?", *The Yale Law Journal* vol. 112, no. 5.

51. Gouvin, E. J., (2005), "Are There Any Checks and Balances on the Government's Power to Check Our Balances? The Fate of Financial Privacy in the War on Terrorism", *Temple Policy and Civil Rights Law Review* vol. 14, pp. 517-541, at 540.

52. Ranchordás, S. (2015), "Sunset Clauses and Experimental Regulations: Blessing or Curse for Legal Certainty?" *Statute Law Review* vol. 36, no. 1, pp. 28-45, at 30.

53. Anti-Terrorism Act (Canada) 2001 (italics added).

Similarly, in the United Kingdom, the Terrorism Act 2006 stipulated under section 25 that:

> (1) This section applies to any time which – (a) is more than one year after the commencement of section 23; and (b) does not fall within a period in relation to which this section is disapplied by an order under subsection (2).
>
> (2) The Secretary of State may by order made by statutory instrument disapply this section in relation to any period of not more than one year beginning with the coming into force of the order.
> ...
> (6) The Secretary of State must not make an order containing (with or without other provision) any provision disapplying this section in relation to any period unless a draft of the order has been laid before Parliament and approved by a resolution of each House.[54]

The COVID-19 legislative landscape in many settings reflects the practice of attaching some form of review alongside the sunset provision. The UK Coronavirus Act 2020, for instance, provides that:

> 89 Expiry
>
> (1) This Act expires at the end of the period of 2 years beginning with the day on which it is passed, subject to subsection (2) and section 90.
> (2)
> ....
> 90 Power to alter expiry date
>
> (1) A relevant national authority may by regulations provide that any provision of this Act –
>
> (a) Does not expire at the time when it would otherwise expire (whether by virtue of section 89 or previous regulations under this subsection or subsection (2)), and
> (b) expires instead at such earlier time as is specified in the regulations.
>
> (2) A relevant national authority may by regulations provide that any provision of this Act –
>
> (a) does not expire at the time when it would otherwise expire (whether by virtue of section 89 or previous regulations under this subsection or subsection (1)), and
> (b) expires instead at such later time as is specified in the regulations.[55]

To allow for this, section 98 of the Act provides for a motion to be debated within seven sitting days of each six-month period of the Act's operation: "That the temporary provisions of the Coronavirus Act 2020 should not yet expire". If the motion is rejected the minister must ensure the relevant provisions expire no later than 21 days since the beginning of the day of the vote.[56] In these examples, and while the particular substance varies, the legislation provides that the act or part of the act should cease to have effect on a particular date, unless, following a period of review, they are renewed. There are different ways in which renewals can take place. For instance, in the UK it is typical for the secretary of state to lay a statutory order before parliament. There are then two procedures available for the order to take effect: the affirmative resolution procedure,

54. Terrorism Act 2006.

55. Coronavirus Act.

56. See De Londras, F. (2021), "Six-Monthly Votes on the Coronavirus Act 2020: A Meaningful Mode of Review?", UK Constitutional Law Blog (25 March 2021) (available at https://ukconstitutionallaw.org/).

and the negative resolution procedure.[57] As De Londras explains, under the negative procedure, a statutory instrument automatically becomes law after a specific period of time unless there is an objection from either the House of Commons or the House of Lords – the two legislative chambers in the UK.[58] Under the affirmative procedure, both Houses of Parliament must formally approve the statutory instrument for it to become law.[59]

Where sunset clauses include provisions that stipulate the process of renewal, it is then more accurate to note that it is in fact these review processes that hold significant potential to bridge the gap between the expectations placed on sunset clauses, and the realities of what they achieve in practice. For instance, where legislation confers a wide range of competences on government actors and agencies, while also impeding the enjoyment of a range of rights, the discontinuation of these measures is decided following the process of review.[60] These review processes offer opportunities to reintroduce democratic deliberation and accountability, particularly where these important safeguards are sidelined as a result of the fast-tracked nature of lawmaking.

Moreover, there can be the opportunity for scrutiny of the full effect of legislation. As an example, the Counter-Terrorism Review project (by the University of Birmingham) proposed that review should involve "the retrospective consideration of counter-terrorism laws and measures to assess their lawfulness, propriety, impacts, effectiveness and appropriateness by reference to core principles of democracy, human rights and the rule of law."[61] In theory, this process of review can assist in making amendments to existing legislation, even if legislation is to be renewed.

Moreover, where legislation is adopted with incomplete or questionable information, it is not the sunset provision that addresses these deficits. Rather, it is the process of review. For Finn, for instance:

> Sunset clauses promote democratic oversight and accountability by providing the legislature with periodic opportunities to revisit questions with the additional information or experience necessary to adjust or to recalibrate public policy.[62]

Concerns over incomplete information were raised during the minimal debates on the Coronavirus Bill in the UK Westminster Parliament. Ian Blackford MP, for instance, expressed concern that:

> We know that the Bill sunsets after two years. However, there are serious concerns over the two-year period and the scrutiny of this measure. I know that aspects of the Bill and amendments to it will be discussed at later stages. I hope that the Government will look carefully at the safeguards of regular reporting, review and renewal if it is required.[63]

To this end, the aforementioned provisions in section 90 of the Coronavirus Act sought to address concerns raised about the lengthy two-year period before the sunset clause kicked in. Amongst

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57. De Londras, F., (2018), Sunset Clauses, Counter-Terrorism Review Project, 12 April 2018.
58. De Londras, F., (2018), Sunset Clauses, Counter-Terrorism Review Project, 12 April 2018.
59. De Londras, F., (2018), Sunset Clauses, Counter-Terrorism Review Project, 12 April 2018.
60. Kouroutakis, A. and Ranchordás, S., (2016) "Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies", *Minnesota Journal of International Law*, vol. 25, no.1, 264.
61. De Londras, F., (2018), Sunset Clauses, Counter-Terrorism Review Project, 12 April 2018
62. Finn, J. E., (2010), "Sunset clauses and democratic deliberation: Assessing the significance of sunset provisions in antiterrorism legislation". *Columbia Journal of Transnational Law* , vol. 48, no. 3, pp. 442-502, at 447.
63. Coronavirus Bill, Volume 674: debated on Monday 23 March 2020, Coronavirus Bill - Monday 23 March 2020 - Hansard - UK Parliament.

other things, this provision provides for six-monthly reviews to take place. Under section 90, ministers can use their powers to cause particular provisions to expire earlier than the two-year sunset. To allow for this, section 98 of the Act provides for a motion to be debated within seven sitting days of each six-month period of the Act's operation: "That the temporary provisions of the Coronavirus Act 2020 should yet expire". If the motion is rejected the minister must ensure the relevant provisions expire no later than 21 days since the beginning of the day of the vote. In addition, these reviews would be supported by insights and information generated by two-monthly reports and other enquiries, reports and research undertaken on the pandemic.

Of course, it is also the case that emergency laws may well persist longer than the stipulated sunsetting period. McGarrity *et al* note that it is unrealistic to expect that sunset clauses will always result in the expiry of legislation and indeed, in some cases, the most appropriate decision will be to renew the legislation. Nevertheless, the point remains that the decision of whether or not to continue with legislation should, in theory, be subject to robust scrutiny, by a range of actors, in a democratic and transparent way, with sufficient information.

3.1 The ineffective drafting of sunset clauses

Sunset clauses can only be as effective as their design, drafting and application allows them to be. The sunset clauses identified and examined previously, when scrutinised from the perspective of legislative quality, show a number of deficiencies that can account, even if only partly, for their limited effectiveness.

A first problem, which is common in all the provisions examined, is their opaqueness and lack of clarity in setting out what is subject to sunsetting, the time of sunsetting and the processes required for the provisions to sunset. If a measure of good legislation is the extent to which it can communicate effectively to all those concerned the regulatory messages contained there,[64] then the sunset provisions examined above fail miserably. Rather than sending a clear message they engage in complex, sophisticated and ambiguous or incomprehensive formulations.

The US Patriot Act 2001 starts with an exception before referring to the title and its amendments that are due to expire, but in between lists in detail all sections that are exempt from the sunset. The emphasis is on what does not expire rather than on what expires, the reference to amendments is confusing and the result is a very unclear provision that is incomprehensible to anyone who is not privy to the details of the Act, its sections and amendments:

> Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a), 203(c), 205, 208, 210, 211, 213, 216, 219, 221, and 222, and the amendments made by those sections) shall cease to have effect on December 31, 2005.

The Anti-Terrorism Act (Canada) 2001 (section 83.32(1)) is more specific in determining the sections that cease to apply and then proceeds to define the sunsetting date. Sunsetting takes place "at the end of the fifteenth sitting day of Parliament after December 31, 2006" This is a complicated formulation that might not be easy to calculate for anyone who is not well versed in the internal procedures of the parliament. When do sitting days start? Are weekends included? Are all weekdays included? When is the fifteenth sitting day? What is more confusing is that there is no obvious reason why the sunsetting date needs to be set out in such a complicated manner. How easy is it for every interested party to calculate with certainty the fifteenth sitting day of parliament?

64. Mousmouti, M., (2019), *Designing Effective Legislation* (Elgar).

In an equally opaque manner, the Terrorism Act 2006 (UK) under section 25 refers to "any time which – (a) is more than one year after the commencement of section 23; and (b) does not fall within a period in relation to which this section is disapplied by an order under subsection (2)". How one can figure out what these actual dates are is a mystery, and so is the need for these unnecessarily complicated provisions.

A second problem is that several of these provisions, including those related to COVID-19, set very vague requirements in relation to their extension. The decision to extend the duration of the provisions due to sunset in most examples can be made without an explicit link to a thorough review, other than the need for approval by the Houses of Parliament. The Anti-Terrorism Act (Canada) 2001 refers to *a resolution... passed by both Houses of Parliament and the Terrorism Act 2006 (UK) to an order of the Secretary of State made by statutory instrument (s 25 par. 2) which needs to have been laid before Parliament and approved by a resolution of each House (s 25 par 6)*. These provisions rely on the decision of a specific authority without any explicit reference to a review process that will examine the effectiveness or the working of these measures. The emphasis is more on procedural aspects of the approval than on its substance. But even when substantive aspects are explicitly mentioned, the way in which this is done is so complicated and opaque that the message is lost.

What these examples teach us is that one reason why sunset clauses can fail is because they do not communicate effectively their regulatory messages: what expires, when and how – as well as the substantive requirements that are attached to any extension.

Whether poor design and drafting are a conscious choice to cultivate uncertainty and mysticism around the provisions is difficult to verify *ex-post*. What can be ascertained, however, is that provisions such as sunset clauses, because of their exceptional nature and function, need to meet a very high level of clarity, specificity and unambiguity in order to be effective.

3.2 The problems of review in practice

Nevertheless, there remain many challenges for reviews of sunset clauses. In the context of counter-terrorism, for instance, review processes have often been ineffective. For one, reviews have frequently been poorly attended. The UK civil society group JUSTICE, for instance, has in the past voiced its scepticism about the quality of debate triggered by the sunset clauses in the Anti-Terrorism Crime and Security Act 2001 and the Prevention of Terrorism Act 2005, noting that "the annual debates triggered by these measures have typically been rushed affairs and seem to us to offer little of the substantive scrutiny that is required in respect of such sweeping measures (indefinite detention of foreign nationals and control orders respectively)".[65] Similarly, the Counter-Terrorism Review Project highlights that in the 2003 debate in the House of Lords on whether to renew the Part 4 powers of the Anti-Terrorism, Crime and Security Act 2001, just four lords spoke. This included the minister who had introduced the renewal order. Only 13 MPs attended the first debate in 2006 on whether to renew the Prevention of Terrorism Act 2005 – the legislation that established the control order regime.

There is, in addition, often insufficient time allocated to reviews. The House of Commons Third Delegated Legislation Committee, which was entrusted to consider whether the Terrorism Prevention and Investigation Measures Act 2011 should be renewed for a further five years, debated the measures for just 32 minutes.

65. The Law Commission, Post-Legislative Scrutiny, (Law Com No 302), at Para. 3.56.

More recently and in the COVID-19 context, De Londras, in assessing the effectiveness of the initial six-month review of the UK Coronavirus Act, noted that members of parliament debated the motion for just over an hour and a half, 90 minutes having been assigned to the debate.[66]

The necessary period between adoption and review and between different review processes also raises additional issues. Although the UK's Coronavirus Act allows for review after a period of six months, this may still be too infrequent. During the House of Lords review of Fast Track Legislation in 2009, for instance, The Better Government Initiative – established in 2007 as a response to growing concern about the poor quality of formation and implementation of government policies in the United Kingdom – argued that "post-legislative scrutiny is all the more necessary" in cases of fast-track legislation, and that "it should perhaps be more frequent".[67] Such is the nature of the pandemic and such is the extent and wide-ranging scope of powers afforded under the Coronavirus Act (and similar pieces of legislation adopted globally), that more frequent review processes might be required. In addition, the time allotted for debates on sunset clauses is also very short, often limited by parliamentary procedure to only an hour and a half.[68]

Furthermore, there are questions regarding the most effective form of review. If parliamentary post-legislative review is the chosen approach, there may be problems associated with politicisation of the legislation in question. Should, then, the review be undertaken by an independent expert, committees of the House of Commons or Lords, or an independent group? If so, how democratic would the process be?

There are, in addition, problems associated with the information that is used to inform reviews. As noted, one of the supposed benefits of sunset clauses is that, as temporary measures, they enable the accumulation of more information so that reviews can be better informed.[69] Yet, Berman contests this claim. Examining debates in the US Congress on counter-terrorism laws, she states that:

> a close inspection of these debates indicates that Congress has largely continued to rely upon incomplete – and sometimes misleading – information… When it comes to Congress's lack of information, there is plenty of blame to go around; much of it can be laid at Congress's own feet for failing to request information that would allow it to evaluate policy effectiveness or executive abuse or waste.[70]

66. De Londras, F., (2021), "Six-Monthly Votes on the Coronavirus Act 2020: A Meaningful Mode of Review?", UK Constitutional Law Blog (25 March 2021) (available at https://ukconstitutionallaw.org/)

67. House of Lords, Constitution Committee: Fifteenth Report, "Fast-Track Legislation: Constitutional Implications and Safeguards" HL 116-1 Session 2008-9, at para. 174.

68. See Counter-Terrorism Review Project, "Sunset Clauses" (12 April 2018).

69. Berman, E., (2013), The Paradox of Counterterrorism Sunset Provisions, Brooklyn Law School, Legal Studies Paper No. 307, Fordham L. Rev. vol. 18, pp. 1793-1794, at 1777. Available at SSRN: https://ssrn.com/abstract=2149011.

70. Berman, E., (2013), The Paradox of Counterterrorism Sunset Provisions, Brooklyn Law School, Legal Studies Paper No. 307, Fordham L. Rev. vol. 18, pp. 1793-1794, at 1777. Available at SSRN: https://ssrn.com/abstract=2149011.

The UK's Equality and Human Rights Commission has raised similar concerns regarding debates on the Coronavirus Act, stating that:

> we remain concerned that the two-monthly reports provide minimal detail. They fail to address the impact of how the provisions have been used, including the equality or human rights impact, and do not include evidence on how the views and experiences of groups sharing protected characteristics have been considered.[71]

There are no doubt various reasons for the inadequacies of sunset reviews. For one, while sunset clauses can facilitate compromise, their inclusion can be used to garner cross-party approval to push through contentious pieces of legislation only for them to be later removed. By including sunset clauses, opponents of particular bills (largely because of the wide powers that are afforded under them) are reassured that any measures are time-bound. But this does not necessarily safeguard sunset clauses from political lobbying and subsequent amendments post-adoption. A frequent criticism of sunset clauses is that they provide a convenient political excuse for shortcutting initial parliamentary debate about controversial legislation, thereby postponing the substantive debate until the legislation comes up for expiry or renewal. As Kouroutakis and Ranchordás note:

> Sunset clauses have been used to gather consensus regarding controversial, and often emergency, laws that would have not been adopted otherwise. The consensus-gathering virtue attributed to sunset clauses frequently evolves into a vice and "sunset clauses have been transformed from an instrument of better government into a clever political trap".[72]

Similarly, in the context of taxation, Manoj Viswanathan assesses that "sunset provisions... are the product of political manoeuvring designed to bypass budgetary constraints and are exploited as a means of enacting permanent legislation under the guise of an ostensible expiration date".[73]

There might also be financial or political reasons that deter effective reviews. Kearney has reported a survey of states with sunset legislation providing for agency review and discontinuation of governmental entities over time, and found that 12 states discontinued legislative sunset reviews "because of high monetary and temporal costs of sunset review, intensive lobbying by vested interests, unfulfilled expectations of agency termination, low levels of citizen participation, and other perceived problems".[74]

It is thus perhaps both inaccurate and unfair to attribute the continuation of legislation to the ineffective functioning of sunset clauses. Rather, if the effect of a sunset clause is to trigger a process of review, whereby decisions are made as to whether to discontinue or reaffirm the existence of legislation or provisions, then sunset clauses, in doing so, have fulfilled their function. The failings fall rather on the review process itself.

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71. Equality and Human Rights Commission, Briefing for the Coronavirus Act 2020 Six Month Review Debate House of Commons, 24 September 2020.

72. Mooney, C., (2004), "A Short History of Sunsets", Legal Affairs magazine, cited in Kouroutakis, A. and Ranchordás, S., (2016), "Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies", *Minnesota Journal of International Law*, 264.

73. Viswanathan, M., (2007), "Sunset Provisions in the Tax Code: A Critical Evaluation and Prescriptions for the Future", *New York University Law Review* vol. 82, no. 1.

74. Kearney, R.C., (1990), "Sunset: A Survey and Analysis of the State Experience", *Public Administration Review*, vol. 50, no.1, at 49.

This is succinctly captured by John Finn:

> How we calculate the success or failure of sunset provisions should not reduce to counting how many times such provisions have been repealed. Whether sunset clauses work depends instead upon whether they deliver the informational, distributive and deliberative benefits they promise.[75]

Against this backdrop, the remainder of this paper draws on a number of positive examples of post-legislative scrutiny. We focus primarily on two aspects: firstly, best practices of legislative drafting that have led to more concrete reviews and secondly, wider issues, particularly around the contexts of reviews and level of engagement from legislatures.

75. Finn, J. E., (2010), "Sunset clauses and democratic deliberation: Assessing the significance of sunset provisions in antiterrorism legislation", vol. 48, no.3, *Columbia Journal of Transnational Law*. pp. 442-502.

4. A roadmap for effective sunset clauses

The criticisms and challenges identified above confirm that sunset clauses are not a panacea that can cure the numerous vices associated with legislation and the policies to which they give legislative form. They also confirm that sunset clauses can reduce legal certainty and democratic deliberation if they fail to incorporate two important requirements: a high standard of design and drafting, and a substantive framework for scrutiny and review.

This section examines some fundamental considerations that need to guide the drafting of sunset clauses and some requirements for substantive post-legislative scrutiny process.

4.1 Drafting considerations

The main principle that needs to guide the drafting of effective sunset clauses is clarity and certainty in the regulatory messages around the subject of expiry, the time of expiry, the subject and the time of the review, the competent bodies, the required processes, including their outputs and follow-up activities. Drafted in this way, sunset clauses are likely to be more specific, less open to manipulation and better able to set a meaningful framework for review. Some more specific drafting questions are addressed below.

The subject of sunsetting

The most important message that a sunset clause has to communicate is what specifically is subject to the expiration clause. The sunset clause can apply to the entire act or regulations or just a segment of them, in which case these need to be determined with precision. For example, section 89 of the Coronavirus Act 2020 (UK) concerns the entire Act, while section 9 of the Coronavirus (Scotland) (No.2) Act 2020 concerns only Part 1 of the Act. The reference to parts, sections or subsections that expire must be as straightforward as possible without unnecessary complications. In this part of the sunset clause no level of ambiguity is permissible, in order to safeguard legal certainty. The clauses subject to expiration would need to be preceded by a thorough examination of potential gaps in the enjoyment of rights or factual situations created while the provisions were in force, in which case, transitional provisions (provisions resolving or regulating pending issues) would need to be put in place.

Sunsetting date

The expiration date is the second most important regulatory message that a sunset clause has to communicate. In setting the expiration date, a number of factors need to be taken into account, such as the nature of the provisions that expire, the point in time when sufficient evidence will be available to decide on the need to expire, the processes through which this evidence will be generated or collected and so on. However, most importantly, the expiration date needs to be specific. Naming a specific date; for example "(1) Part 1 expires on 30 September 2020" (Coronavirus (Scotland) (No.2) Act 2020) is the most straightforward way to regulate this. If naming a date is not possible, then the formulation to calculate the expiry date should be as uncomplicated as possible. The Coronavirus Act 2020 (UK) provides that:

> 89 Expiry
>
> (1) This Act expires at the end of the period of 2 years beginning with the day on which it is passed, subject to subsection (2) and section 90.

Is it possible for any interested party to identify the date on which the Act was passed with unequivocal certainty? Does everyone know that the date when a law is passed is different from that when it is enacted? If not, a more accessible reference to the expiry date needs to be selected.

4.2 Setting a framework for substantive scrutiny or review

The second element of effective sunset clauses is that expiration is often subject to a review that determines whether the measure should be renewed, amended or allowed to expire. A framework for meaningful and substantive scrutiny needs to determine with clarity and precision an explicit requirement for a review, and determine the subject of the review, its timing, the authority competent to conduct the review and the procedure required.

Explicit requirement for a review and the subject of review

It is common to find sunset clauses being linked to the outcome of the review process. So a provision would expire unless explicitly extended following a review. In such cases, the review clause needs to identify with precision what is subject to review. This can cover "core" or "non core" aspects of a law, including "substantive" provisions or just implementation processes, all or some elements of legislation.

Apart from the subject of the review, it is good practice to specify also the focus of the review, especially if it concerns specific contentious aspects. This can make reference to the degree of attainment of the objectives of the act, implementation, costs, or anything else. A lack of specification in the focus of the review can leave room for a superficial review that shies away from controversial topics. Australia's Tasmania Climate Change (State Action) Act 2008 stipulates that the review of the Act shou
Id focus on:

> (a) the extent to which the objects of this Act are being achieved; and
>
> (b) the extent to which additional legislative measures, if any, are considered necessary to achieve the targets set by this Act within the periods contemplated by this Act, including by the introduction of performance standards and other mandatory requirements; and
>
> (c) such other matters as the Minister may consider relevant to a review of this Act.

Timing of the review

The timing of the review is an important matter, especially if linked to an expiration clause. Criteria that need to be considered in order to prescribe a reasonable and meaningful review period relate to the content of the law and the provisions under review, an assessment on a reasonable time to expect results or the time when meaningful implementation data will be available to inform the review in a substantive way. Although a period of three to five years is often indicated as a reference period for review, in practice, this needs to be tailored to the intricacies of each act. In Germany, a review of the administrative cost of legislation takes place one year after the adoption of legislation to ensure that no disproportionate burdens are created. The sunsetting provisions in the Legislation Act 2003 in Australia were reviewed after ten years.

Fixing the expiry time also needs to consider that meaningful reviews require time and resources and, as such, need to be timed in a way that makes them substantive rather than formal and superficial. This comes as a response to requests for more frequent reviews. Reviews are only

effective if they are meaningful, which means that they take place at the right time and can generate substantive information on the operation and effectiveness of the act.

Authority to conduct the review

An effective review clause determines the body responsible to conduct it. Naming the authority needs to consider the body best placed not only to collect implementation data but also to offer a comprehensive and objective assessment of the operation and the working of the act. In principle, implementation agencies, which are often appointed as review bodies, have the advantage of proximity to implementation data but the disadvantage of a potential lack of objectivity, as they might be biased to present a positive picture of reality.

Independent reviews or reviewers are an option that is commonly adopted when the topic of legislation is particularly sensitive or requires enhanced guarantees of independence, objectivity and expertise. For example, the UK's Terrorism Prevention and Investigation Measures Act 2011 provides:

> **20 Reviews of operation of Act**
>
> (1) The Secretary of State must **appoint a person to review the operation of this Act** ("the independent reviewer").
>
> (2) The independent reviewer must carry **out a review** of the operation of this Act **in respect of each calendar year**, starting with the first complete calendar year beginning after the passing of this Act.
>
> (3) Each review must be completed as soon as reasonably practicable after the end of the calendar year to which the review relates.
>
> (4) The independent reviewer must send to the Secretary of State **a report on the outcome of each review** carried out under subsection (2) **as soon as reasonably practicable after completion of the review.**
>
> (5) On receiving a report under subsection (4), the Secretary of State must lay a copy of it before Parliament.
>
> (6)The Secretary of State may pay to the independent reviewer ...

Procedure for the review or expiry

The expiry or extension of clauses due to expire often require the observance of a specific procedure, a motion or order and a resolution from one or both Houses of Parliament. In terms of procedure, review clauses often provide for the submission of the outcomes of the review to parliament and its consideration. The active involvement of parliament in the decisions around the expiry of legislation is not a matter of courtesy or form but in essence a constitutional issue that adds to the objectivity and the democratic deliberation around sunset clauses. An interesting example is the Privacy Act 1985 (Consolidated), Canada that provides for permanent reviews of the Act by a parliamentary committee to be decided by the houses:

Permanent review of this Act by Parliamentary committee

The administration of this Act shall be reviewed on a permanent basis by such committee of the House of Commons, of the Senate or of both Houses of Parliament as may be designated or established by Parliament for that purpose.

Review and report to Parliament

(2) The committee designated or established by Parliament for the purpose of subsection (1) shall, not later than July 1, 1986, undertake a comprehensive review of the provisions and operation of this Act, and shall, within a year after the review is undertaken or within such further time as the House of Commons may authorize, submit a report to Parliament thereon including a statement of any changes the committee would recommend.

Other procedural provisions might require consultation with specific bodies. For example, the Tasmania Climate Change (State Action) Act 2008 requires the competent Minister to consult with "(b) relevant business, scientific, environment and community bodies" (section 18, paragraph 3).

5. Conclusions

Within the panorama of legislation, emergency legislation holds a special place, and sunset clauses are vested with the high hopes of safeguarding rights or values that might be endangered or compromised. Our analysis shows that sunset clauses can fail to do so for two reasons: first, their ineffective design and drafting and second, their superficial or weak link to a substantive process of review.

Sunset clauses are not a panacea for all the vices of legislation and caution is required, when considering firstly whether to include a sunset clause or expiration provision in a bill or a provision for mandatory review of the act, and secondly when designing and drafting them in order to set an enabling framework for meaningful review.

Sunset clauses can only safeguard democracy and legal certainty when drafted effectively and combined with a meaningful review process. On the drafting side, this means that the law sets out in the most clear and precise way what is subject to expiry, when and under what conditions. With regard to the review and scrutiny required prior to sunsetting, the law must clearly set out what is to be reviewed, when, by whom and how. In practice, the review needs to ensure a meaningful debate that considers objective information and uses evidence as the basis for any decisions made.

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University of Birmingham COVID-19 Review Observatory

Professor Fiona de Londras, Dr Pablo Grez Hidalgo and Daniella Lock

1. Has the made affirmative procedure generally been used appropriately for bringing forward urgent public health measures during the coronavirus pandemic? Please set out your reasons why.

Summary

- The Made Affirmative Procedure (MAP) is inherently problematic and should only be employed in exceptional circumstances.
- The figures indicate that the Scottish Government's response to the pandemic has relied heavily on the MAP, including in cases where the 'urgency' requirement has arguably not been met.
- While the *ex ante* scrutiny of policy announcements, strategic frameworks and the like can be a proxy for the scrutiny of Scottish Statutory Instruments (SSIs), it cannot replace the detailed scrutiny of the implementation of policy as contained in relevant SSIs.
- Parliamentary scrutiny procedures at the Scottish Parliament have improved over the course of the pandemic, however these improvements have not fully addressed the pressing issues raised by the MAP.

1. The Made Affirmative Procedure ('MAP') is inherently problematic

1.1. Primary legislation is subject to a superior degree of parliamentary scrutiny when compared to SSIs. Most SSIs are not debated at the Chamber, and Parliament cannot amend them. MSPs are presented with an 'all or nothing' choice: they either approve or reject the SSI. While this is common to all procedures used for making SSIs, challenges of parliamentary oversight of delegated legislation are exacerbated in respect of the MAP in at least in two ways.

1.2. First, SSIs can come into force even before they are laid before Parliament. This means that there is limited room for MSPs to engage in negotiations with the government. Similarly, there is often no realistic opportunity for the relevant Minister to withdraw a draft SSI and lay a new instrument addressing MSPs' concerns.

1.3. Second, in essence, by the time an SSI subject to MAP is considered by the Chamber, MSPs are presented with an instrument that already is in force, sometimes for two or three weeks or even more. Thus, the SSI has already been in the public domain. If it contains lockdown restrictions, people are following guidance based on regulations contained in the SSIs, and where relevant the police may be enforcing them. Furthermore, public transport, workplaces, and business are abiding by these regulations. In such circumstances, confusion would likely result were the Scottish Parliament to reject the SSI, leaving it with few realistic options. In practice, a regulation made under the MAP comes before Parliament as a *fait accompli*.

1.4. Given these well-recognised shortcomings, the MAP should only be employed in the most exceptional circumstances.

II. The Scottish Government has relied heavily on the MAP to craft its emergency response to the Covid-19

2.1. In addition to primary legislation, the Scottish Government has used SSIs extensively during the pandemic. Indeed, they have been the mode of introducing lockdown regulations and international travel restrictions. These SSIs have been made under powers provided by s 49 and Schedule 19 of the Coronavirus Act 2020 ('CVA'), and section 94(1)(b)(i) of the Public Health etc. (Scotland) Act 2008 (PHA), respectively. In both cases, Scottish Ministers can make such regulations under the MAP if, in their view, there are reasons of urgency justifying use of the procedure (s 6(2) and (3) of Schedule 19 CVA and s 122(6) of the PHA).

2.2. According to figures provided by the Covid-19 Committee (Session 5 Scottish Parliament), Scottish Ministers have relied heavily on the MAP to make regulations during the pandemic (Covid-19 Committee, Annual Report 2020-21, SP 1022 at para 23). Between 21 April 2020 and 24 March 2021, the CVC considered a total of 56 Scottish Statutory Instruments, all containing Covid-19 related regulations. The vast majority of them (47) were made under the MAP.

2.3. Our own research and analysis of lockdown regulations made under s 49 and Schedule 19 of the CVA confirms this finding. We have identified a total of 64 SSIs made between the 26 of March 2020 and the 29 November 2021 (see Annex to this evidence). All but one of these SSIs (i.e. 63 SSIs) were made under the MAP.

2.4. The exception is The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 4) Regulations 2021. These regulations amend the Covid certification scheme by incorporating a recent negative test result as an alternative to proof of vaccination to access venues or events covered by the scheme. The Government made these regulations under the Affirmative Procedure, which meant that a draft was laid before the Scottish Parliament for approval. However, the Scottish Government asked Parliament to consider the instrument in four days, instead of the standard 40 days usually given to Parliament to approve affirmative instruments, as noted in the Delegated Powers and Legislative Reform Committee (DPLRC) letter to the convenor of the Covid-19 Recovery Committee (CVRC).

III. Arguably, the Scottish Government has employed the MAP in cases where the "urgency" requirement has arguably not been met

3.1. As mentioned above, the CVA and the PHA enable Scottish Ministers to employ the MAP, where there are reasons of urgency. However, whether the urgency threshold is met is a matter for the relevant Scottish Minister ("if the Scottish Ministers consider that the regulations need to be made urgently"). The frequent use of the MAP over the last 18 months noted in para. 2.3 above raises questions about whether and if so how that urgency threshold is operating as a constraint.

3.2 One interpretation is that Scottish Ministers have considered there to be a more or less constant condition of urgency over the last 18 months. This raises the concern that the urgency requirement is not an effective constraint on the MAP. Bearing this in mind, and cognisant of the scrutiny challenges that the MAP poses (outlined in Part I), claims of urgency should be justified and questions of how Ministers decide whether the urgency requirement is met, and whether all necessary and reasonable steps are taken to ensure that MAP is treated as *exceptional* arise.

3.3. The importance of this can be illustrated by reference to a recent example: the Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No 2) Regulations 2021. This set of regulations, which introduced a Covid vaccination certification scheme, was subject to the following procedure:

Made	Laid	Came into Force	Scrutinised by Covid-19 Recovery Committee	Debated by the Chamber and approved by Parliament
30.09.2021 11.39 am	30.09.2021 3.30 pm	01.10.2021 5 pm	04.11.2021 * Motion Ref. S6M-01529 to approve this instrument laid down on 5 October 2021	09.11. 2021 * Motion Ref. S6M-02048 Approved on a division 60 for, 49 against (Conservatives, Labour and LibDems)

3.4. While the Scottish Government made the SSI on 30 September it was not debated until the 9th of November. However, the 'certification scheme' policy was announced before Parliament by the First Minister of Scotland (FMS) on 3 August 2021 (Scottish Parliament Official Record 3 August 2021 col 4); almost two months before the Regulations were made. MSP questioned the FMS on the details of the policy on 3 August, and on 9 September 2021 the Chamber debated for 2 hour and 16 minutes a motion on a 'COVID Vaccine Certification Scheme' (S6M-01123), introduced by the Cabinet Secretary for Covid-19 Recovery (Scottish Parliament Official Record, 9 September 2021 cols 77-127). The motion provided very broad guidelines on how it was proposed that the policy would work. In addition, the Government published on that very same day a 'Strategy/Plan' with proposals. The debate was a clear indication that the proposal was fraught with political controversy. The Conservatives, Labour and Liberal Democrats all voted against the motion, which was eventually passed, 68 for, 55 against. The CVRC subsequently undertook three evidence sessions (16, 23 and 30 September) to gather the views of stakeholders on the vaccine certification scheme.

3.5. Hence, despite the policy being announced on 3 August 2021, the Government's publication of a policy document outlining the policy, and opposition from the three major opposition parties, the Government used the MAP to make regulations implementing the policy on the 30 September 2021. The Government

only shared a draft of the regulations for MSPs to scrutinise one day in advance of the regulations being made (29 September 2021). This also meant that the CVRC got a copy of the regulations only *after* two evidence sessions had taken place. In other words, only in the last session, did the CVRC have a chance to look at the details of the scheme, as developed in the regulations.

3.6. We respectfully submit that passage of time between the policy announcement and making of the regulations calls into question the urgency-basis for the use of the MAP in this case. Eventually, the CVRO undertook proper scrutiny of the SSI implementing the scheme on 4 November 2021, one month and four days after they had come into force, and the Chamber debated and approved the regulations on 9 November 2021, one month and nine days after they had come into force. It is also worth noting that the Chamber only debated the instrument for ten minutes, despite all the major opposition parties being opposed to this policy. Notably, these debates and approval took place after the 28 days period indicated in
the Coronavirus Act 2020 ('CVA').[1]

IV. *Ex ante* policy scrutiny cannot replace detailed scrutiny of the text of proposed SSIs.

4.1. As indicated by the Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No 2) Regulations 2021, it can be possible for a policy decision and associated strategy, framework or similar to be scrutinised in advance of the text of an SSI being published. It might be claimed that this mitigates the scrutiny concerns raised by the MAP. However, such scrutiny can only be of the broad policy decision. In the absence of the text of an SSI the exact mode of its implementation and likely impacts of a policy cannot be subjected to proper scrutiny. Thus, such *ex ante* policy scrutiny cannot replace parliamentary scrutiny of the SSI itself.

4.2. This is not to suggest that such *ex ante* policy scrutiny is not of value. It clearly is, as indicated by, for example, pre-legislative scrutiny of regulations extending the expiry date of the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No. 2) Act 2020 ('the Scottish Acts') and bringing some of its provisions to an early expiry, which included two inquiries by the session 5 Covid-19 Committee (CVC) resulting in the elicitation of a wealth of evidence, including an oral evidence session with the First Minister of Scotland. Similarly, the CVC's inquiries "Options for easing lockdown restrictions" (April-July 2020) and "COVID-19 Framework for Decision Making and Scotland's Route Map" including scrutiny of the Scottish Government's plans for transitioning out of the first lockdown, entitled "Coronavirus (COVID-19): framework for decision making", the "COVID-19: Framework for Decision Making – Scotland's Route Map Through and Out of The Crisis", and the "Coronavirus (COVID-19): Scotland's Strategic Framework". These plans outlined policies which would later be reflected in SSIs. For instance, the "Coronavirus (COVID-19): Scotland's Strategic Framework, was given effect by means of The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 and The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels)

(Scotland) Amendment Regulations 2020. Again, the inquiries gathered valuable evidence and reflected formidable work by the Committee.

4.3. Notwithstanding this, however, inquiries and other forms of *ex ante* policy scrutiny cannot be said to be equivalent to scrutiny of the relevant SSIs themselves. As noted by Fox and Blackwell, 'The devil is in the detail' (Fox, Ruth & Blackwell, Joe, The Devil is in the Detail: Parliament and Delegated Legislation, Hansard Society, 2014). SSIs contain the detailed development of broad policy objectives and should be subject to proper scrutiny by Parliament.

[1] According to s 6(1)(3)(b) Schedule 19 CVA, regulations made under the MAP "cease to have effect on the expiry of the period of 28 days on which the regulations were made unless" approved by Parliament.

V. Improvements in Parliamentary Oversight over the course of the Pandemic do not resolve the challenges posed by SSIs made under the MAP

5.1. We acknowledge that there have been considerable improvements in parliamentary oversight over the course of the pandemic. However, these improvements do not resolve the challenges posed by SSIs made under the MAP.

5.2. The Chamber very rarely considers SSIs made under the MAP. Our analysis of the 64 SSIs introducing lockdown regulations and made under the powers provided by s 49 and Schedule 19 of the CVA indicates that the Chamber very rarely debates SSIs. According to our data, out of 64 SSIs introducing lockdown regulations, 63 of which were made under the MAP, the Chamber has only debated six of them (including two debated on the same day). In practice, the Chamber only debates regulations when an individual MSP makes a point or expresses dissatisfaction with an SSI's content or its broader policy. Furthermore, debates on regulations are quite short; the longest of those debates considered for this submission lasted for 10 minutes. In total, in one year and eight months of pandemic, the Chamber has spent a total of 35 minutes debating lockdown regulations made under the MAP.

5.3. In terms of the voting arrangements, the default position is that Covid-related SSIs are put to a vote at "decision time". Until the end of November 2020, SSIs were put to a vote without even providing a brief introduction about their content and significance. This meant that in practice MSPs might be unaware of what they were voting on. Now most SSIs are introduced by a brief statement by the relevant Scottish Minister before being moved to a vote. However, despite this improvement in practice, which we welcome, SSIs are only put to a vote if they have been previously debated, and, as indicated above, they are rarely debated at the Chamber. Thus, only six of the 64 SSIs we have analysed have been approved on a division. None of them has been voted down.

5.4. Thus, the burden of scrutinising SSIs in the pandemic falls on committees. Hence, when committees are not in operation, the quality of parliamentary scrutiny diminishes dramatically. This is relevant because due to the 2021

general election committees at the Scottish Parliament were not established from the end of March 2021 to the end of June 2021, although the CVC was permitted to meet during the recess, it chose not to do so (Scottish Parliament, Official Report 26 May 2021 col 38). Committees were arranged in mid-June 2021 (see Scottish Parliament, Official Report 15 June 2021 cols 82-86 and Scottish Parliament, Official Report 17 June 2021 col 104-105 and 118-119) but only started operating normally after the summer recess in September 2021, resulting in a significant parliamentary scrutiny gap.

5.5. As regards committees, scrutiny of relevant SSIs is primarily undertaken by the CVRC (and previously, during Session 5, in its predecessor, the CVC) and the Delegated Powers and Legislative Reform Committee ('DPLRC'). Most Covid-related SSIs are subject to scrutiny by the CVRC (in session 5, by the CVC), which acts as the lead committee, and by the DPLRC. Consideration by the CVRC usually takes place after the instrument has been scrutinised by the DPLRC. If Covid-related SSIs are made under pre-pandemic powers, the SSI is subject to scrutiny by the committee to which it best corresponds according to their respective remits. However, regulations containing international travel restrictions, which are made under the PHA, are scrutinised by the CVRC. Both the CVRC (the CVC in session 5)and the DPLRC issue a report on each SSIs that they scrutinise. With respect to the 64 SSIs we looked at, none of these reports were referenced in a debate at the Chamber.

5.6. In October 2020, the Parliamentary Bureau launched a consultation on improving scrutiny and future business planning in relation to Covid-19-related regulations and policy changes. Eventually, the Government and Parliament agreed a package of measures to improve the scrutiny of Covid-19 regulations at Parliament. This included regulations made under the MAP. Among the measures introduced was the commitment that Ministers shall make statements to Parliament on each Tuesday setting out any changes to lockdown policies. In addition, the Government agreed to provide a draft copy of proposed regulations (including those to be made by MAP) on Wednesday afternoons, and to make a Scottish Minister available to give evidence to the CVC (and currently, to the CVRC), on a weekly basis, on Thursdays afternoons (see Covid-19 Committee, SP Paper 1010 Session 5, at paras 17-21). With these arrangements in place, a sort of routine of 'pre-legislative' scrutiny of policies and draft SSIs was instantiated. This had a more or less fixed weekly routine as follows:

Policy change announcement	Draft copy of SSI laid at Parliament	Minister appears before the CVC/CVRC	Regulations are made	Regulations enter into force
Tuesday afternoon morning before the Chamber, Opportunity for MSPs to question the Minister	Wednesday (potentially the DPLRC or another committee may look at the draftSSI)	Thursday morning The CVC/CVRC conducts 'pre-legislative' scrutiny of the draft SSI	Thursday afternoon Ministers make the SSI following the MAP	Friday

5.6. Thanks to these arrangements, during session 5, the Cabinet Secretary for the Constitution, the National Clinical Director, and other high-level civil servants have appeared before the CVC on a weekly basis. The Cabinet Secretary attended some 25 committee sessions between November 2020 and March 2021. This practice has continued during session 6, although rather than one Minister, various Ministers have attended these meetings (the Minister for Transport, the Cabinet Secretary for Covid Recovery, the Cabinet Secretary for Health and Social Care and the Cabinet Secretary for Net Zero, Energy and Transport).

5.7. While these arrangements represent a significant improvement from the previous situation and are very much welcomed, they still fall short of addressing the various shortcomings of the MAP. Although they provide an opportunity to perform 'pre-legislative' scrutiny of draft SSIs, this is done under a very constrained timetable as these regulations continue to be made using MAP and, thus, on an urgency basis. As a consequence, if a Committee member suggests improvements or changes, there is no subsequent opportunity to scrutinise how the Government addresses their concerns in the final SSI text. In reality, this pre-legislative routine has not resolved the challenges posed by SSIs made under the MAP.

2. Are changes required to:
- **the use of the made affirmative procedure**
- **how Parliament scrutinises the made affirmative procedure.**

Please set out what those changes should be.

Summary:

- The MAP should only be employed when there are objective reasons of urgency, supported by a statement of reasons in an SSI's explanatory memorandum.
- Serious consideration should be given to incorporating core elements of the pandemic response (e.g. modes of regulating lockdowns (e.g. tier systems), vaccine certification schemes, international travel restrictions,

requirements to wear face coverings etc) into primary legislation, and empowering the Scottish Government to use secondary legislation to select, trigger, expire, and determine appropriate combinations of these measures as appropriate to the prevailing circumstances.
- The Parliamentary Bureau may want to consider replicating the measures to strengthen parliamentary scrutiny of SSIs agreed in November 2020.

2.1. In its consultation paper on 'public health, public services and justice system reform', published on 17 August 2021, the Scottish Government made clear its intention to retain powers granted by the Coronavirus Act 2020, including the powers contained in Schedule 19 to make Public Health Regulations (Scottish Government, Covid Recovery, August 2021, at paras 25-30). However, nothing is said in the consultation document about retaining the ability to make such regulations used the MAP. We respectfully submit that, should the Scottish Government wish to retain the ability to make such regulations using the MAP significant changes would be required.

2.2. First, the MAP should only be employed when there are objective reasons of urgency, supported by a statement of reasons in an SSI's explanatory memorandum. In other words, the Minister should have the burden of justifying the claim of urgency whenever it is proposed to use the MAP. This would allow, for example, for MSPs to test claims of urgency where a public health crisis has persisted for such time and Government continues to rely on the MAP rather than shifting into a more scrutinised mode of law making suited to crisis management situations.

2.3. Second, we propose that any new primary legislation pertaining to public health emergencies might be designed so that different available 'levels' of foreseeable elements of a public heath response (like lockdowns, restrictions on international travel, closure of schools, requirements for vaccine status certification etc) are outlined within primary legislation, with powers to trigger these powers and tailor them according to level, extent, duration etc being exercisable through secondary legislation. Such a legislative design would strike an appropriate balance between flexibility and urgency in response to an evolving situation, and democratic legitimacy for and parliamentary oversight of government powers. Furthermore, this would allow bodies involved in delivering and enforcing public heath responses, like police forces, local authorities and NHS services, to have delivery plans in place and be prepared according to a known general framework of response. This of course would not preclude new, perhaps even emergency, law-making in the event that such frameworks are not sufficient to address a new or evolving public health emergency in the future, but would place the burden of justifying a move away from these agreed and known approaches on the part of the Scottish Government. The legislative framework should also outline clear parliamentary oversight processes to be implemented in case of a public health emergency, learning from the experience of this pandemic. These might include a bespoke committee dedicated to the crisis in question, requirements for regular appearance by relevant ministers before this committee, and requirements for regular reporting on the use, status, impacts and effects of powers in force as part of the public health response.

2.4. Third, we respectfully submit that the Parliamentary Bureau may want to consider replicating the measures to strengthen parliamentary scrutiny of SSIs to which we referred in our response to question 1 (see para 5.6 above). Given that a significant proportion of SSIs are made under the MAP, these measures have, in practice, enabled a sort of 'pre-legislative' stage of SSIs subject to the MAP. If such measures are combined with our second proposal above, this would put the Scottish Parliament at the centre of the emergency response and would address many of the issues raised by the MAP.

2.4. Third, we respectfully submit that the Parliamentary Bureau may want to consider replicating the measures to strengthen parliamentary scrutiny of SSIs to which we referred in our response to question 1 (see para 5.6 above). Given that a significant proportion of SSIs are made under the MAP, these measures have, in practice, enabled a sort of 'pre-legislative' stage of SSIs subject to the MAP. If such measures are combined with our second proposal above, this would put the Scottish Parliament at the centre of the emergency response and would address many of the issues raised by the MAP.

Regulations	Made	Laid before Parliament	Came into force	Debated/approved before the Chamber	Comments
The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (SSI 2020/103)	7.15 p.m. on 26th March 2020	27th March 2020	Immediately after made	1 April 2020 Neither debated, nor voted	Came into force before being laid in Parliament First SSI introducing lockdown regulations
The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment Regulations 2020 (SSI 2020/106)	8.30 a.m. on 1st April 2020	10.00 a.m. on 1st April 2020	Immediately after made	1 April 2020 Neither debated, nor voted	Came into force before being laid in Parliament
The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 2) Regulations 2020 (SSI 2020/126)	9.00 a.m. on 21st April 2020	11.00 a.m. on 21st April 2020	Immediately after made	6 May 2020 Neither debated, nor voted	Came into force before being laid in Parliament

Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 3) Regulations 2020 (SSI 2020/164)	11.00 a.m. on 28th May 2020	2.00 p.m. on 28th May 2020	29th May 2020	10 June Neither debated, nor voted	Laid before coming into force
The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 4) Regulations 2020 (SSI 2020/182)	12.00 p.m. on 18th June 2020	4.30 p.m. on 18th June 2020	19 June 2020, except regulation 2(2), (4) and (6), regulation 2(7)(a), (b)(i) and (c), and regulation 2(7)(b)(iv) and (9)(a) so far as they relate to (i)the wearing of a face covering, or (ii)the use of a place of worship for prayer or contemplation. (22 June 2020)	24 June Neither debated, nor voted	Laid before coming into force
The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 5) Regulations 2020 (SSI 2020/190)	11.45 a.m. on 26th June 2020	3.00 p.m. on 26th June 2020	29th June 2020	26 August Neither debated, nor voted	Laid before coming into force Approved by the Chamber two months after being made (2020 Summer recess)
The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 6) Regulations	12.36 p.m. on 2nd July 2020	4.00 p.m. on 2nd July 2020	3 July 2020, except regulation 2(2) (6 July 2020)	26 August Neither debated, nor voted	Laid before coming into force Approved by the Chamber one month and three weeks after being made

2020 (SSI 2020/199)					(2020 Summer recess)
The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 7) Regulations 2020 (SSI 2020/210)	1.50 p.m. on 9th July 2020	3.30 p.m. on 9th July 2020	10 July 2020, except regulation 2(6), so far as it relates to gatherings for the purpose of supervised outdoor recreation for people who are under 18 years of age. (13 July 2020)	26 August Neither debated, nor voted	Laid before coming into force Approved by the Chamber one month and two weeks after being made (2020 Summer recess)
The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 8) Regulations 2020 (SSI 2020/211)	11.08 a.m. on 14th July 2020	1.30 p.m. on 14th July 2020	15 July 2020, except regulation 2(5)(d) and (f) to (h) (22 July 2020)	26 August Neither debated, nor voted	Laid before coming into force Approved by the Chamber one month and one week after being made (2020 Summer recess)
The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendments (No.9) Regulations 2020 (SSI 2020/232)	30th July 2020	31st July 2020	31 July 2020, except regulation 2(2)(b)(i) and (d) (3 August 2020)	26 August Neither debated, nor voted	Laid on the same day the SSI came into force
The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendments (No.10) Regulations 2020 (SSI 2020/236)	11.05 a.m. on 7th August 2020	3.00 p.m. on 7th August 2020	8th August 2020	26 August Neither debated, nor voted	Laid before coming into force

The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendments (No.11) Regulations 2020 (SSI 2020/241)	2.40 p.m. on 13th August 2020	4.30 p.m. on 13th August 2020	14th August 2020	9 September 2020 Neither debated, nor voted	Laid before coming into force
The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendments (No.12) Regulations 2020 (SSI 2020/251)	1.00 p.m. on 21st August 2020	3.00 p.m. on 21st August 2020	24th August 2020	9 September 2020 Neither debated, nor voted	Laid before coming into force
The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendments (No.13) Regulations 2020 (SSI 2020/261)	10.15 a.m. on 27th August 2020	2.00 p.m. on 27th August 2020	28 August 2020, except some paragraphs of Regulation 2 (31 August 2020)	It was never taken in the Chamber, as it was revoked on the 14 September 2020 by the Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020 (SSI 2020/279)	Laid before coming into force Expired before being approved
The Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Regulations 2020 (SSI 2020/262)	1.14 p.m. on 27th August 2020	4.00 p.m. on 27th August 2020	28th August 2020	Approved on a division on 23 September 2020, only 1 vote against. The debate lasted for 7 minutes	Laid before coming into force First SSI to be voted by a vote at the Chamber
The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations	10.58 a.m. on 11th September 2020	3.00 p.m. on 11th September 2020	14th September 2020	8 October 2020 Neither debated, nor voted	Laid before coming into force Important set of regulations, parent

2020 (SSI 2020/279)					lockdown regulations
The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Amendment Regulations 2020 (SSI 2020/300)	24th September 2020	25th September 2020	25th September 2020	8 October 2020 Neither debated, nor voted	Laid on the same day the SSI came into force
The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020 (SSI 2020/318)	11.55 a.m. on 9th October 2020	4.00 p.m. on 9th October 2020	18.00 on 9 October 2020, except regulations 7, 11, 12, 16, and 17 (10 October 2020)	Eventually, no motion of approval was moved before the Chamber, as on 22 October 2020, the Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Amendment (No. 2) Regulations 2020 (SSI 2020/329), which extended the expiry date until 2 November 2020.	Laid on the same day the SSI came into force The expiry date of this SSI was extended before being put on a vote.
The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) Amendment (Scotland) Regulations 2020 (SSI 2020/325)	1.50 p.m. on 15th October 2020	4.00 p.m. on 15th October 2020	16 October 2020, except regulations 2(3) and (4) (19 October 2020)	No motion of approval was moved before the Chamber	Laid before coming into force
The Health Protection (Coronavirus) (Restrictions and Requirements)	10.58 a.m. on 22nd October 2020	3.00 p.m. on 22nd October 2020	24th October 2020	The purpose of this SSI expired on 2 November 2020. A motion to approve this SSI	Laid before coming into force

(Additional Temporary Measures) Amendment (No.2) (Scotland) Regulations 2020 (SSI 2020/329)				was never moved before the Chamber	
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 (SSI 2020/344)	12.40 p.m. on 30th October 2020	2.45 p.m. on 30th October 2020	6.00 a.m. on 2nd November 2020	25 November 2020 Neither debated, nor voted	Laid before coming into force This is a very important set of regulations setting out a “five tier” system of restrictions
Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment Regulations 2020 (SSI 2020/347)	12.40 p.m. on 30th October 2020	2.45 p.m. on 30th October 2020	6.00 a.m. on 2nd November 2020	25 November 2020 Neither debated, nor voted	Laid before coming into force
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 2) Regulations 2020 (SSI 2020/374)	12.57 p.m. on 12th November 2020	3.00 p.m. on 12th November 2020	6.00 a.m. on 13th November 2020	2 December 2020 Neither debated, nor voted	Laid before coming into force
The Health Protection (Coronavirus) (Restrictions	11.20 a.m. on 20th November 2020	2.00 p.m. on 20th November 2020	6.00 p.m. on 20th November 2020	8 December 2020. Debated for 6 minutes, the Chamber approved	Laid on the same day that it came into force

and Requirements) (Local Levels) (Scotland) Amendment (No. 3) Regulations 2020 (SSI 2020/389)				this SSI on a division on 8 December 2020.	
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 4) Regulations 2020 (SSI 2020/392)	23rd November 2020	6.00 a.m. on 24th November 2020	9.00 a.m. on 24th November 2020	9 December 2020 Neither debated, nor voted	Laid before Parliament after coming into force
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 5) Regulations 2020 (SSI 2020/400)	12.15 p.m. on 26th November 2020	3.45 p.m. on 26th November 2020	27th November 2020	23 December 2020 Neither voted, nor debated	Laid before Parliament before it came into force First SSI to be preceded by a short statement about its content and significance before motion of approval being put to a vote
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 6) Regulations	11.55 a.m. on 3rd December 2020	2.30 p.m. on 3rd December 2020	4th December 2020	23 December 2020 Neither voted, nor debated	Laid before Parliament before it came into force

2020 (SSI 2020/415)					
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 7) Regulations 2020 (SSI 2020/427)	12.20 p.m. on 10th December 2020	2.45 p.m. on 10th December 2020	18.00 hours on 11 December 2020, except regulation 8 (06.00 hours on 11 December 2020)	23 December 2020 Neither voted, nor debated	Laid before Parliament before it came into force
The Health Protection (Coronavirus) (Restrictions and Requirements) (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/439)	12.20 p.m. on 17th December 2020	3.30 p.m. on 17th December 2020	6.00 p.m. on 18th December 2020	20 January 2021 Neither voted, nor debated	Laid before Parliament before it came into force Approved more than one month after being made (2020 Christmas recess)
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 8) Regulations 2020 (SSI 2020/452)	20th December 2020	21st December 2020	21 December 2020, except Regulation 5 (26 December 2020)	23 December 2020 Neither voted, nor debated	Laid on the same day the SSI came into force Important SSI: lockdown regulations concerning Christmas period
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 9) Regulations	12.39 p.m. on 23rd December 2020	3.00 p.m. on 23rd December 2020	26th December 2020	20 January 2021 Neither voted, nor debated	Laid before coming into force

2020 (SSI 2020/471)					
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 10) Regulations 2021 (SSI 2021/1)	4th January 2021	5th January 2021	5th January 2021	20 January 2021 Chamber approved this SSI on a division on 20 January 2021. It was debated for 7 minutes.	Laid on the same day it came into force Important SSI: reinstated the stay at home requirement and tightened social distancing rules
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 11) Regulations 2021 (SSI 2021/3)	12.25 p.m. on 6th January 2021	3.00 p.m. on 6th January 2021	8th January 2021	20 January 2021 Chamber approved this SSI on a division, debated along with the previous SSI (2021/1) for 7 minutes.	Laid before coming into force
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 12) Regulations 2021 (SSI 2021/17)	12.50 p.m. on 14th January 2021	3.00 p.m. on 14th January 2021	16 January 2021, Regulations 4, 5, 6 and 14 (22 January 2021)	3 February 2021. Chamber approved this SSI on a division. The debate lasted for 5 minutes.	Laid before coming into force
The Health Protection (Coronavirus)	12.10 p.m. on 19th January 2021	3.30 p.m. on 19th January 2021	20th January 2021	3 February 2021 Neither debated, nor voted	Laid before coming into force

(Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 13) Regulations 2021 (SSI 2021/25)					
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 14) Regulations 2021 (SSI 2021/35)	1.30 p.m. on 22nd January 2021	3.30 p.m. on 22nd January 2021	23rd January 2021	17 February 2021 Neither debated, nor voted	Laid before coming into force
The Health Protection (Coronavirus) (Restrictions and Requirements) (Miscellaneous Amendment) (Scotland) Regulations 2021 (SSI 2021/49)	1.30 p.m. on 22nd January 2021	3.30 p.m. on 22nd January 2021	23rd January 2021	17 February 2021 Neither debated, nor voted	Laid before coming into force
The Personal Protective Equipment (Temporary Arrangements) (Coronavirus) (Scotland) Regulations 2021 (SSI 2021/50)	11.23 a.m. on 28th January 2021	2.30 p.m. on 28th January 2021	1st February 2021	24 February 2021 Neither debated, nor voted	Laid before coming into force
The Health Protection (Coronavirus) (Restrictions and	1.49 p.m. on 29th January 2021	3.00 p.m. on 29th January 2021	30th January 2021	17 February 2021 Neither debated, nor voted	Laid before coming into force

Requirements) (Local Levels) (Scotland) Amendment (No. 15) Regulations 2021 (SSI 2021/54)					
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 16) Regulations 2021 (SSI 2021/86)	18th February 2021	19th February 2021	9.00 a.m. on 19th February 2021	17 March 2021 Neither debated, nor voted	Laid before coming into force
The Health Protection (Coronavirus) (Restrictions and Requirements) (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2021 (SSI 2021/117)	11.26 a.m. on 4th March 2021	2.45 p.m. on 4th March 2021	5th March 2021	23 March 2021 Neither debated, nor voted	Laid before coming into force This SSI extends the duration of the lockdown tier-system until 30 September 2021
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 17) Regulations 2021 (SSI 2021/136)	11.47 a.m. on 11th March 2021	3.45 p.m. on 11th March 2021	12 March 2021, except regulations 3 and 5(6)(c) (15 March 2021)	26 May 2021 Neither debated nor voted	Laid before coming into force This SSI relaxed restrictions on social gathering, among others. Approved after one month and a half after being made (2021 general

					elections recess) * Note that the Covid-19 Committee did not convene during recess, although it had been autorised to do so. The COVID-Recovery Committee only started working in practice by early September
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 18) Regulations 2021 (SSI 2021/166)	11.37 a.m. on 24th March 2021	2.00 p.m. on 24th March 2021	26 March 2021, except regulation 8, which comes into force at 6pm on 24 March 2021	2 June 2021 Neither debated nor voted	Laid before coming into force Debated more than two months after being made (2021 general elections recess)
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 18) Amendment Regulations 2021 (SSI 2021/168)	24th March 2021	25th March 2021	13th May 2021	2 June 2021 Neither debated nor voted	Laid before Parliament one month and three weeks after being made Approved by the Chamber more than two months after being made (2021 general elections recess)

The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 19) Regulations 2021 (SSI 2021/180)	1 April 2021	13 May 2021	2 April 2021, except regulation 9(2)(a) and (c) (5 April 2021)	9 June 2021 Neither debated nor voted	Laid before Parliament a month and 11 days after being made Approved two months and one week after being made (2021 general elections recess)
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 20) Regulations 2021 (SSI 2021/186)	15 April 2021	13 May 2021	16 April 2021	9 June 2021 Neither debated nor voted	Laid before Parliament a month and 11 days after being made Approved one month and three weeks after being made (2021 general elections recess)
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 21) Regulations 2021 (SSI 2021/193)	22 April 2021	13 May 2021	26 April 2021	9 June 2021 Neither debated nor voted	Laid before Parliament three weeks after being made Approved one month and two weeks after being made (2021 general elections recess)
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment	04 May 2021	13 May 2021	5 May 2021	9 June 2021 Neither debated nor voted	Laid one week after being made Approved more than a month after being made (2021 general

(No. 22) Regulations 2021 (SSI 2021/202)					elections recess)
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 23) Regulations 2021 (SSI 2021/209)	14 May 2021	11.30 am on 17 May 2021	17 May 2021	9 June 2021 Neither debated nor voted	Laid three days after being made, on the same that of coming into force
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 24) Regulations 2021 (SSI 2021/211)	21 May 2021 (1.20 pm)	21 May 2021 (2.45 pm)	22 May 2021, except regulation 4 (24 May 2021)	16 June 2021 Neither debated, nor voted	Laid before Parliament on the same day of being made
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 25) Regulations 2021 (SSI 2021/224)	27 May 2021 (11.47 am)	27 May 2021 (2.30 pm)	31 May 2021	23 June 2021 Neither debated nor voted	Laid before Parliament on the same day of being made
The Health Protection (Coronavirus) (Restrictions and	3 June 2021 (1.25 pm)	3 June 2021 (3.30 pm)	5 June 2021	23 June 2021 Neither debated nor voted	Laid before Parliament on the same day of being made

Requirements) (Local Levels) (Scotland) Amendment (No. 26) Regulations 2021 (SSI 2021/227)					This is an important SSI which adjust the allocation of levels across Scotland
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 27) Regulations 2021 (SSI 2021/238)	10 June 2021	11 June 2021 (9.30 am)	11 June 2021	8 September 2021 Neither debated, nor voted	Laid on the same that of being made Approved three months after being made (summer recess)
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 28) Regulations 2021 (SSI 2021/242)	17 June 2021 (11.39 am)	17 June 2021 (2.30 pm)	21 June 2021	8 September 2021 Neither debated, nor voted	Laid before Parliament on the same day of being made Approved two months and three weeks after being made (summer recess)
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 29) Regulations 2021 (SSI 2021/252)	1.57 p.m. on 24th June 2021	3.30 p.m. on 24th June 2021	28 June 2021, except Regulation 4(2) and (3) and regulation 5(2), (3) and (4)(b) and (c) (26 June 2021)	8 September 2021 Neither debated, nor voted	Laid before Parliament on the same day of being made Approved two months and two weeks after being made (summer recess)

The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 30) Regulations 2021 (SSI 2021/255)	1.59 p.m. on 29th June 2021	3.45 p.m. on 29th June 2021	30th June 2021	8 September 2021 Neither debated nor voted	Laid before Parliament on the same day of being made Approved two months and one week after being made (summer recess)
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 31) Regulations 2021 (SSI 2021/262)	11.30 a.m. on 7th July 2021	2.30 p.m. on 7th July 2021	8th July 2021	8 September 2021 Neither debated nor voted	Laid before Parliament on the same day of being made Approved two months after being made
The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 32) Regulations 2021 (SSI 2021/263)	12.15 p.m. on 15th July 2021	3.00 p.m. on 15th July 2021	19th July 2021	8 September 2021 Neither debated nor voted	Laid before Parliament on the same day of being made Approved one month and three weeks after being made
The Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 (SSI 2021/277)	1.50 p.m. on 5th August 2021	4.00 p.m. on 5th August 2021	9th August 2021	8 September 2021 Neither debated, nor voted	Laid before Parliament on the same day of being made Approved one month and three days after being made

The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment Regulations 2021 (SSI 2021/299)	11.32 a.m. on 2nd September 2021	2.00 p.m. on 2nd September 2021	3rd September 2021	22 September 2021 Neither debated nor votes	Laid before Parliament on the same day of being made
The Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Amendment Regulations 2021 (SSI 2021/329)	21st September 2021	22nd September 2021	29th September 2021	4 November 2021 Neither debated, nor voted	Approved one month and two weeks after being made (two weeks October recess)
The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 2) Regulations 2021 (SSI/349)	11.39 a.m. on 30th September 2021	3.30 p.m. on 30th September 2021	5.00 a.m. on 1st October 2021	9 November 2021 10 minutes debate, and voted on a division, for 60, against 49 (Conservatives, Labour and Libdems)	Laid before Parliament on the same day of being made Approved by Parliament one month and 10 days after being made. (two weeks October recess) * These were controversial regulations concerning the introduction of a Covid vaccination certificate scheme
The Health Protection	11.42 a.m. on 29th	3.00 p.m. on 29th	30th October 2021	24 November 2021 Neither debated, nor voted	Laid before Parliament on the same

(Coronavirus) (Requirements) (Scotland) Amendment (No. 3) Regulations 2021 (SSI 2021/384)	October 2021	October 2021			day of being made
The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 4) Regulations 2021	2nd December 2021	29 November 2021 (in draft)	5.00 a.m. on 6th December 2021	2 December 2021 Neither debated, nor voted	This is the only SSI that was subject to the affirmative procedure. Laid in draft, and approved four days before coming into force.

University of Birmingham COVID-19 Review Observatory, supplementary evidence

Professor Fiona de Londras, Dr Pablo Grez Hidalgo and Daniella Lock

In this supplementary evidence, we identify five key stages of an SSI, namely, when the instrument is made, laid before Parliament, comes into force, is approved, and expires; applies them to our sample of 64 SSIs contained in our original submission to the Committee, and briefly explores the implications for the principle of parliamentary accountability.

A. SSIs made and in force vs SSIs laid

First, we found that nine of our SSIs sample came into force before being laid in Parliament. This means that MSPs had no chance to read the regulations before they entered into force. Temporality played a part in this. Some of these SSIs were part of the initial response to the pandemic in late March and early April 2020 when there was a situation of great urgency and systems to respond to the pandemic were just being put in place. In those circumstances one might argue that bringing SSIs immediately into force was appropriate. Other SSIs were made while Parliament was in recess, particularly the summer recess or the pre-election recess. Within this second group, we found cases of SSIs that were laid before Parliament more than a month after being made and came into force.[1]

Second, ten SSIs were laid before Parliament on the same day as they came into force. This means that the vast majority of our sample, 44 SSIs, came into force after being laid before the Scottish Parliament. However, a closer look indicates that MSPs were given very short notice in advance about the creation of these regulations, usually having between one and four days notice of their coming into force. This provides a very small window of opportunity for MSPs to react to these SSIs.

B. SSIs made vs SSIs approved

We already know that SSIs are made and come into force around the same time that they are laid before the Scottish Parliament. Under the CVA any SSI made under the MAP must be approved within 28 sitting days of being made, however our analysis shows that this does not preclude a very long period of time—far more than 28 days per se—passing before an SSI is approved.[2]

[1] The Scottish Parliament entered recess for 2021 General Elections. This caused that the following SSIs were laid after a month of being made: The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 19) Regulations 2021 (SSI 2021/180) (made on 1 April 2021, laid on 13 May 2021); The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 20) Regulations 2021 (SSI 2021/186) (made on 15 April 2021, laid on 13 May 2021). The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 21) Regulations 2021 (SSI 2021/193) were laid three weeks after being made.

[2] CVA Sched 19 s 6(6) CVA provides that in calculating the 28 days period, the period lapsed during a recess lasting for more than four days is not counted.

22 of the SSIs we analysed were approved later than 28 *calendar* days after being made. In all of these cases, their approval periods coincided with the following periods in which the Scottish Parliament was in recess: 2020 Summer recess, 2020 Christmas recess, 2021 General Elections recess, 2021 Summer recess, and 2021 two-week October recess. As consequence, in each of the cases the 28 days rule was met as Sched 19 s 6(6) CVA, extending the time for recess, applied. The strict rule was thus complied with, but in reality far more than 28 days elapsed between the SSI being made and being approved. By means of example, while the 2020 Summer recess ended on 9 August, SSIs made before or during that recess were approved only on the 26 August. Likewise, SSIs whose periods were extended due to the 2021 General Elections were approved on 9 June although Session 6 had started on 13 May. After the 2021 two weeks October recess, two pending SSIs were approved two weeks and 19 days after the end of recess. Importantly, when Parliament reconvened on 4 September 2001 after the summer recess, Government sought approval of pending SSIs on 8 September. This indicates that it was open to Government to seek to enact greater respect for the spirit of the 28-day approval period than seemed to be in evidence after other recesses even if, in those circumstances, the rule was per se complied with.

In other, rare cases (4 in our sample) SSIs were never approved at all because they expired before a vote could be held. While these are exceptional cases, the very fact that the MAP enables Scottish Ministers to make regulations that can be repealed before Parliament has a chance to even express their assent raises serious questions as to the appropriateness of the current parliamentary oversight procedures. Take for instance the case of The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendments (No.13) Regulations 2020 (SSI 2020/261). This SSI came into force on 28 August 2020 and was revoked on 14 September. It was in force for two weeks and expired before being approved by the Chamber. Of perhaps greater concern is the Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020 (SSI 2020/318). This SSI was made on 9 October 2020, yet no motion of approval was moved because on 22 October the Scottish Government extended their expiry date by means of The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) Amendment (No.2) (Scotland) Regulations 2020 (SSI 2020/329). This second set of regulations extended the expiry date of the first set of regulations (SSI 2020/318) until 2 November 2020. However, since it was made on 22 October and its purpose expired on the 2 November, this second set of regulations was never taken to a vote before the Chamber. This second situation, although exceptional, raises significant concerns as there could potentially be chains of regulations, one extending the expiry dates of the others, and considering the delays between an SSI being made and an SSI being subject to approval, a concrete set of regulations could remain in force through various extensions without being subject to parliamentary approval.

Written submission from Money Advice Scotland

Money Advice Scotland is Scotland's money charity. We exist to help people in debt, support money advisers, and influence policy. Our mission is to be the driving force towards financial wellbeing for the people of Scotland.

Bankruptcy

Bankruptcy (Part 3, Clauses 15-17)

15 – Bankruptcy: Service of documents

We agree with the proposals to permanently allow for the electronic service of bankruptcy documents. Allowing this on a permanent basis reflects the increasing digitisation of society, and would be beneficial in addressing the backlog in delivery of public services by allowing for quicker transfer of documents. We have no concerns with these provisions being made permanent.

16– Bankruptcy: meaning of "qualified creditor" and "qualified creditors"

Money Advice Scotland agrees that the creditor petition debt level should be permanently increased from £ 3,000. We are encouraged to see the Scottish Government's proposals this week that include extending the temporary £ 10,000 creditor petition debt level beyond 31 March 2022 and support this extension. We believe that a permanent increase from £ 3,000 is much needed in recovery from the pandemic once the £ 10,000 level expires; however, we have some concerns as to whether £ 5,000 is enough of an increase in the context of coming out of a pandemic into a cost of living crisis that is likely to be long lasting. We are of the view that £ 6,000-£ 7,000 may be more appropriate to protect those (particularly homeowners) who have incurred debt as a result the pandemic and are now facing further difficulties due to the rapidly rising cost of living. Had there been no cost of living emergency, the effects of which remains uncertain, we are of the view that £ 5,000 would be sufficient.

17– Bankruptcy: remote meeting of creditors

Money Advice Scotland is in agreement with these proposals to permanently allow for remote meetings of creditors and agree that this would help alleviate the backlog of public service delivery. We do not foresee any negative impacts of this provision.

Institute of Chartered Accountants of Scotland

Coronavirus (Recovery and Reform) (Scotland) Bill

I refer to the Coronavirus (Recovery and Reform) (Scotland) Bill ("the Bill") recently laid before the Scottish Parliament and the subsequent Call for views issued by the Committee. ICAS is pleased to provide the following comments which I hope the Committee will find helpful.

ICAS previously responded to the Scottish Government paper, Covid recovery: a consultation on public health, services, and justice system reform. Our detailed response is available here.

In responding to this Call for views we have restricted our comments to those aspects which impact on the areas of bankruptcy directly and indirectly.

Sections 15-17 of Part 3 relating to bankruptcy are broadly welcomed. We would wish to ensure that as the temporary provisions are transferred onto a permanent footing that legislation is clear, effective and any unintentional consequences are minimised. We therefore make the following observations:

Service of documents

As with the temporary provision introduced by the Coronavirus (Scotland) (No.2) Act 2020, the wording of the proposed new Section 224A of the Bankruptcy (Scotland) Act 2016 ('the 2016 Act') does not appear to allow a trustee to rely on presumed consent for electronic communication with creditors because of the debtor's dealings with their creditors pre-insolvency.

The new section 224A (4) as drafted states *"electronic transmission of a document must be effected in a way that the recipient has indicated to the sender that the recipient is willing to receive the document, the recipient's indication of willingness to receive a document in a particular way may be…….. inferred from the recipient having previously been willing to receive documents from the sender in that way and not having indicated unwillingness to do so again"* (emphasis added)

The equivalent provision brought in for corporate insolvency procedures recognises the introduction of the office holder 'in place of' the insolvent as far as communications are concerned. As an example r1.41(4) of the Insolvency (Scotland) (Receivership and Winding up) Rules 2018 ("the 2018 Rules") states *"…..an intended recipient is deemed to have consented to the electronic delivery of a document where the intended recipient and the company who is the subject of the insolvency proceedings had customarily communicated with each other by electronic means before the insolvency proceedings commenced".*

The approach taken in corporate insolvency has many advantages, most significantly as it adopts the 'digital first' approach which is favoured by Government and ensures that costs of administering bankruptcy estates can be reduced. It is unclear from a policy perspective why there would be a divergent approach between personal and corporate insolvency in Scotland.

The emphasised text above could more usefully say something along the lines of "*from the recipient having previously been willing to receive the documents from the debtor who is the subject of the insolvency proceedings in that way, or from the sender, and not having indicated unwillingness to do so again."*

The language "*service of documents*' may be somewhat confusing given its more usual usage in connection with legal processes. While we note that the proposed s224A clarifies that "*service*" of a document captures the terms "*serve", "give", "send"* or any other expression used, again borrowing from corporate legislation, perhaps '*delivery of documents'* would lessen the legal connotations associated with "*serving*" while achieving the same effect.

Proposed s224(4)(c) usefully permits the use of websites, a provision widely used within corporate insolvency. Unfortunately, as drafted, the Bill seems to suggest that *"a notification that the document has been uploaded in that way*" would require to be sent to the recipients on each and every occasion a document is uploaded. This of course somewhat defeats the intended purpose of the provision, particularly in personal insolvency when it is rarely voluminous reports that are being issued.

Again, the corporate provisions may be worth echoing more closely if this change is to make a material difference on a permanent basis. As an example, r1.45(1)(a) of the 2018 Rules states *"The office-holder may deliver a notice to each person to whom a document will be required to be delivered in the insolvency proceedings which contains— (a)a statement that future documents in the insolvency proceedings other than those mentioned in paragraph (2) will be made available for viewing and downloading on a website without notice to the recipient and that the office-holder will not be obliged to deliver any such documents to the recipient of the notice unless it is requested by that person"*. The Rule then goes on to state further conditions.

Qualified creditors

Our response to the earlier Covid recovery consultation paper highlighted several issues for consideration in relation to the possible raising of minimum debt level for a creditor to seek sequestration through the courts. We note the consultation analysis and Government responses published on 26 January. While we retain reservations that the proposed increase from £3,000 to £5,000 is being made with a limited evidential base and consideration of the potential impact with the potential of unintended consequences, we consider that by limiting the increase to £5,000 the risks have been somewhat mitigated.

While the primary impact of the increased debt in the definition of qualified creditor and qualified creditors would be in the context of individuals, it should be bourne in mind that the increase would also affect the threshold for non-natural persons to access bankruptcy including partnerships, trust estates and unincorporated entities, albeit the number of such sequestrations is not significant on an annual basis.

Remote meetings of creditors

The Bill proposes that Schedule 6 of the 2016 Act is to be amended to allow meetings of creditors in bankruptcy to take place using electronic means, as well as in person. However, the Bill does not propose setting out further detailed provisions regarding minimum standards of access or notification as has been done in equivalent corporate insolvency legislation. The proposed change would simply allow any meeting of creditors to be held *"by such electronic means as would, in the opinion of the person calling the meeting, be most convenient to allow the majority of the creditors to participate in the meeting without being together in the same place".*

While meetings of creditors in bankruptcy are not commonplace, they do take place on occasion. At those meetings there may be the requirement for a decision (e.g. a trustee vote per S49 of the 2016 Act or a decision of commissioners on the performance of the trustee's functions). If there are no provisions setting out the mechanics of how the meetings are to take place and decisions taken at them, then it seems to leave significant scope for disagreement and ambiguity. It would seem appropriate to make provisions, either as part of the amended primary legislation or within secondary legislation, similar to those noted below from r8.4 and r8.5 of the 2018 Rules.

Electronic voting

8.4. Where the decision procedure uses electronic voting—

(a)the notice delivered to creditors in accordance with rule 8.8 must give them any necessary information as to how to access the voting system including any password required;

(b)except where electronic voting is being used at a meeting, the voting system must be a system capable of enabling a creditor to vote at any time between the notice being delivered and the decision date; and

(c)in the course of a vote the voting system must not provide any creditor with information concerning the vote cast by any other creditor.

Virtual meetings

8.5. Where the decision procedure uses a virtual meeting the notice delivered to creditors in accordance with rule 8.8 must contain—

(a)any necessary information as to how to access the virtual meeting including any telephone number, access code or password required; and

(b)a statement that the meeting may be suspended or adjourned by the chair of the meeting (and must be adjourned if it is so resolved at the meeting).

Other relevant areas

In general terms we support the proposed arrangements in respect of electronic signature of documents in relation to the Register of Inhibitions (Clause 25) and the disapplication of physical presence requirements (Clause 30).

We note the provisions contained within the Schedule in relation to the operation of court procedures. We would highlight our previous consultation response in this area which highlighted that there would be benefit in excluding from the general presumption of non-physical attendance in Court for certain matters where there is sufficient gravity of the situation to be maintained. This may include for instance public and private examinations under sections 118 and 199 of the Bankruptcy (Scotland) Act 2016, Inquiry into company's dealings, etc under section 236 Insolvency Act 1986, proceedings under the Company Director Disqualification Act 1986, etc.

ANNEXE B

Letter to the Convener from the Equalities, Human Rights and Civil Justice Committee

Dear Convener,

Coronavirus (Recovery and Reform) (Scotland) Bill

Thank you for your letter of 8 February inviting any comments from the Equalities, Human Rights and Civil Justice Committee as part of your Committee's scrutiny of the Coronavirus (Recovery and Reform) (Scotland) Bill.

At its meeting on 30 November 2021, the Committee held a civil justice roundtable evidence session. At that session, we heard about the civil justice sector's use of remote hearings as a result of the pandemic. The principal focus of the session was on the advantages and disadvantages of the move to digital hearings; whether remote hearings created barriers to accessing justice for marginalised groups, and what, if any, impact the move to remote hearings had on resourcing and budgets.

On 22 February 2022, we held a further roundtable session, with a focus on family law particularly as it applies to disputes between parents about the care of their children. This session focussed on the impact of the public health restrictions brought about by the pandemic, particularly on difficulties in maintaining relationships between parents and children who live apart, as well as the advantages and disadvantages of remote or in-person hearings. In addition, the session covered—

- children's participation in decision-making;
- child contact centres;
- child welfare reporters and;
- child advocacy services.

Evidence heard at both sessions highlighted a number of challenges associated with the move to remote hearings and highlighted that certain existing issues have been exacerbated by the pandemic. We heard that new approaches may need to be considered. However, the Committee also heard how the move to digital hearings has presented opportunities for more innovative processes within the civil justice and family law sectors.

Separately, and particularly relevant to your scrutiny of Part 1 of the Bill (public health protections), the Committee is currently hearing evidence on "women's unfair responsibility for unpaid care and domestic work", which has been exacerbated by the public health restrictions. We have held two evidence sessions (7 and 14 December 2021) with further sessions scheduled for early March. We will share any outcomes and findings from those sessions with you in due course.

You may wish to note at this stage, however that evidence suggests the impact on unpaid carers has been significant and, given the continued reliance on unpaid carers, the Committee considers it is important that the recovery legislation considers this specifically.

Similarly, the Committee considers it is important that the recovery legislation gives specific consideration to the protection of clinically vulnerable people. It hopes the legislation will reflect the public health protection measures and restate the principle that such measures (for example, social distancing and the wearing of face coverings) will continue to protect those in our society who are most vulnerable.

Finally, the Committee would highlight once more the importance of all committees applying a human-rights based approach to their scrutiny work as recommended by our predecessor committee in its 2018 report, 'Getting Rights Right'.

Yours sincerely,

Joe FitzPatrick MSP
Convener
Equalities, Human Rights and Civil Justice Committee

Letter to the Convener from the Health, Social Care and Sport Committee

Dear Convener,

Coronavirus (Recovery and Reform) (Scotland) Bill

I am writing further to your letter of 8 February 2022 inviting the Health, Social Care and Sport Committee to contribute any evidence it has gathered which may be relevant to your Committee's scrutiny of the Coronavirus (Recovery and Reform) (Scotland) Bill.

The Health, Social Care and Sport Committee recently took evidence on the provisional Common Framework on Public Health Protection and Health Security.

The explanatory cover page accompanying this provisional Common Framework describes its purpose as being: "to ensure continued cooperation on serious cross-border threats to health within the UK following the end of the Transition Period and a robust UK-wide regime on public health protection and health security".

This Common Framework is underpinned by the Health Security (EU Exit) Regulations 2021 which, as explained by the explanatory cover page, "repeal retained EU law on health and security which no longer operates effectively in the UK, and introduce a standalone regime which requires the four nations to coordinate surveillance, prevention and control of serious cross-border threats to health". At its meeting on 23 March 2021, the Committee's predecessor took evidence on these regulations and agreed it was content with a Scottish Government proposal to give consent to the UK Government to legislate via these regulations using the powers under the European Union (Withdrawal) Act 2018.

Given the stated purpose of this Common Framework, its operation is clearly intended to underpin current and future cross-border cooperation within the UK in response to the COVID-19 pandemic. As such, I thought it would be useful to share with you the Health, Social Care and Sport Committee's scrutiny of this provisional Common Framework and the evidence it has gathered on it as being potentially of relevance to your Committee's scrutiny of the Coronavirus (Recovery and Reform) (Scotland) Bill.

The Health, Social Care and Sport Committee issued a call for written evidence on the provisional Common Framework which ran from 17 November to 6 December 2021 and received one response.

On 21 December 2021, the Committee took oral evidence on the provisional Common Framework from Nick Phin, Clinical Director and Director of Public Health Protection at Public Health Scotland.

The Committee subsequently took oral evidence on the provisional Common Framework from the Cabinet Secretary for Health and Social Care on 18 January 2022.

At time of writing, the Committee has yet to agree a formal response to the Scottish Government on this Common Framework pending completion of scrutiny of a number of other provisional common frameworks within its remit.

In the meantime, I hope you find this information useful.

Yours sincerely, Gillian Martin MSP, Convener, Health, Social Care and Sport Committee