Written evidence from The Law Society Scotland (TYO 08)

Public Administration and Constitutional Affairs Committee
Coronavirus Act 2020 Two Years On inquiry

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Constitutional Law and Human Rights sub-committee welcomes the opportunity to consider and respond to the Public Administration and Constitutional Affairs Committee inquiry into the Coronavirus Act 2020 Two Years On. The sub-committee has the following comments to put forward for consideration.

General Comment

1. The operational effectiveness of the Coronavirus Act 2020 and its interaction with other emergency legislation, including the Public Health Act 1984 and the Civil Contingencies Act 2004.

Introduction

It is difficult to comment on the "operational effectiveness of the Coronavirus Act 2020" without considering what "effectiveness" means in this context. If it means containing or delaying the spread of the disease the answer must be that the legislation has not succeeded in attaining that objective. On the other hand, if it means that the legislation might support hospitals to maintain essential services and ensure ongoing support for people ill in the community the legislation could be said to be a qualified success. The Explanatory Notes (paragraph 2) support this assessment where they state that the Act aims to support Government in doing the following: increasing the available health and social care workforce, easing the burden on frontline staff, containing and slowing the virus, managing the deceased with respect and dignity and supporting people.

In relation to its interaction with the Public Health Act (Control of Disease) Act 1984 Public Health (Control of Disease) Act 1984 (legislation.gov.uk) we consider in this response the interaction with the analogous Scottish legislation, the Public Health etc. (Scotland) Act 2008.

When it comes to broader interaction with law such as the Civil Contingencies Act 2004, we have detected hardly any impact notwithstanding that the 2004 Act contains many powers which could be deployed in relation to the pandemic. That is why we recommend a UK-wide review of the law relating to health emergencies.

The Civil Contingencies Act 2004 can apply to emergencies and creates a framework for civil protection in the UK. The Act provides for local arrangements for civil protection and the employment of emergency powers under Orders in Council.

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

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

The preference of Government to employ either the Coronavirus specific legislation or Public Health Acts rather than Civil Contingencies legislation raises questions about the legislative framework which applies across the UK and its fitness to deal with future Public Health crises. See the Public Administration and Constitutional Affairs Committee Report: ***Parliamentary Scrutiny of the Government's handling of Covid-19*** **para 19-35:** Responding to Covid-19 and the Coronavirus Act 2020 (parliament.uk) .

An urgent parliamentary review into the fitness of the legislative (and policy) framework for dealing with emergencies, such as pandemics, should be a priority for all the UK Legislatures and Administrations.

The Coronavirus action plan

Cooperation between the four UK nations had predated the Coronavirus action plan with legislation passed under the Public Health (Control of Disease) Act 1984http://www.legislation.gov.uk/ukpga/1984/22/contents to enable the quarantine and detention of individuals found to be infectious.

In February 2020, the Secretary of State for Health and Social Care made the Health Protection (Coronavirus) Regulations 2020 https://www.legislation.gov.uk/uksi/2020/129/made/data.pdf which applied in England and Wales.

The Regulations (now revoked) applied to two categories:

1. Cases involving people whom the Secretary of State or a registered public health consultant have reasonable grounds to believe are or may be contaminated with coronavirus provided they also consider that there is a risk that these people might infect

or contaminate others (domestic cases);

2. Cases concerning people who have arrived in England on an aircraft, ship or train from outside the UK and who the Secretary of State or a registered public health consultant have reasonable grounds to believe left an infected area within 14 days immediately preceding their arrival in England (overseas cases).

The Regulations provided for the detention by the Secretary of State or a consultant of members of the public "for screening, assessment and imposition of any restrictions" (on travel, activities and contact) for up to 48 hours or alternatively if screening has been undertaken, and restrictions are applied, the end of those restrictions. Regulations were made in Scotland and Northern Ireland making COVID-19 a notifiable disease under the Public Health (Scotland) Act 2008 and the Public Health Act (Northern Ireland) 1967 Order which provided detention and quarantine powers.

The Coronavirus: Action Plan (AP) was published on 3 March 2020 by the UK Department of Health and Social Care, the Scottish Government, the Department of Health for Northern Ireland and the Welsh Government.

The AP recognised the respective roles and responsibilities of the UK Government and Devolved Administrations and set out:

a. what was known about the virus and the disease it causes

b. how the Administrations had planned for an infectious disease outbreak, such as the coronavirus outbreak

c. the actions the Administrations had taken so far in response to the current coronavirus outbreak

d. what the Administrations were planning to do, depending upon the course the outbreak took,

e. the role of the public in supporting the Administrations' response.

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

i. Contain: detect early cases, follow up close contacts, and prevent the disease taking hold in this country for as long as is reasonably possible

ii. Delay: slow the spread in this country, if it does take hold, lowering the peak impact and pushing it away from the winter season

iii. Research: better understand the virus and the actions that will lessen its effect on the UK population; innovate responses including diagnostics, drugs and vaccines; use the evidence to inform the development of the most effective models of care

iv. Mitigate: provide the best care possible for people who become ill, support hospitals to maintain essential services and ensure ongoing support for people ill in the community to minimise the overall impact of the disease on society, public services and on the economy.

The AP was clearly a document which indicated a high level of cooperation and coordination between the four nations in respect of the initial phase of the crisis. The Cabinet Office guidance on responding to emergencies assumed that this would be the approach to be followed:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/192425/ CONOPs_incl_revised_chapter_24_Apr-13.pdf

Between 26 and 28 March 2020, UK governments responded to medical evidence and advice that lockdowns must be imposed and enforced to save lives, prevent the National Health Service from being overwhelmed and constrain the spread of Coronavirus and began a legislative effort which continues to this day.

Primary UK Legislation

The Governments across the UK also collaborated on the Coronavirus Act 2020 as can be seen from the terms of the Act and the fact that it received legislative consent from all devolved legislatures: Coronavirus Act 2020 publications - Parliamentary Bills - UK Parliament.

The Coronavirus Act 2020 contains 102 sections and 29 schedules and was considered at pace in Parliament. It had all its stages – Second Reading (debate of the principle of the bill), Committee (amending stage) and Third Reading – in the House of Commons on 23 March, all its stages in the House of Lords over 24 and 25 March and became law on 25 March 2020. In other circumstances the Law Society of Scotland would have highlighted the need to scrutinise the legislation carefully and not to sacrifice that scrutiny for speed. However, the nature of Covid-19 and the serious and imminent threat it poses to the community at large are potentially so devastating that it was right that Parliament's response matched the level of threat.

The Act introduced extensive powers which could be exercised by UK Ministers and Minsters from the devolved administrations. As regards England and Wales these powers provided for changes to justice matters, the closure of schools and provisions to relieve the NHS and local authorities of social care duties.

Scottish Legislation

By way of comparison, the Coronavirus (Scotland) Act 2020 Coronavirus (Scotland) Act 2020 (legislation.gov.uk), which is the principal relevant Scottish legislation, has many provisions of importance to life in Scotland, including law relating to children and vulnerable adults, justice matters, public bodies and a number of other areas. That Act contains

safeguards such as provisions requiring Scottish Ministers to report on the *necessity* of such legislation rather than, as in England and Wales, the *appropriateness* of the status of the legislation. Scottish Ministers must review and report on the Act every 2 months:

https://www.gov.scot/publications/coronavirus-acts-two-monthly-report-scottish-parliament/
There is also provision relating to the Act's expiry. The original date for expiry was 30 September 2020. The Act was extended until 31 March 2022 and can be extended by regulations until 30 September 2022. Many provisions such as the expiry provisions have been modified, repealed, suspended or expired by the Coronavirus (Extension and Expiry) (Scotland) Act 2021 Coronavirus (Extension and Expiry) (Scotland) Act 2021 (legislation.gov.uk) and by The Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2020 (legislation.gov.uk) and other regulations.

The Scottish Parliament also passed the Coronavirus (Scotland) (No2) Act 2020 Coronavirus (Scotland) (No.2) Act 2020 (legislation.gov.uk). The Act includes provisions to ensure business and public services can operate, change public service duties, provide protections for student tenants and support for carers and make changes to criminal procedure. It also allows Scottish notaries public to execute documents by video technology. As in the first Coronavirus (Scotland) Act, there are provisions for the Act's expiry which have been amended in the same way. Scottish Ministers must review and report on the measures every 2 months: https://www.gov.scot/publications/coronavirus-acts-two-monthly-report-scottish-parliament/ . Scottish Ministers must also review all coronavirus related Scottish Statutory Instruments under section 14 of the (No2) Act. Many provisions of the Act have also been modified, repealed, suspended or expired by the Coronavirus (Extension and Expiry) (Scotland) Act 2021 Coronavirus (Extension and Expiry) (Scotland) Act 2021 (legislation.gov.uk) and by subordinate legislation.

Subordinate Legislation

A variety of legislation was used at the beginning of the pandemic to deal with the public health emergency. For example, acting under powers contained in the Public Health (Control of Disease) Act 1984, the UK Health Secretary made the Health Protection (Coronavirus Restrictions) (England) Regulations 2020. This was followed by the Welsh Government, which enacted the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020. In Northern Ireland, the Executive Department of Health, using powers under the Public Health Act (Northern Ireland) 1967 as amended by the Coronavirus Act 2020 enacted the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland).

The Hansard Society notes that**, "**Coronavirus-related Statutory Instruments have been made and laid under 138 Acts of Parliament, seven Orders, two sets of Regulations, nine EU Regulations (which are now retained EU law in the UK) and one Church Measure.". The Society also points out that, "Only 27 of the Coronavirus-related SIs have been laid under the Coronavirus Act 2020. Eighteen have been laid under the Corporate Insolvency and

Governance Act 2020." Coronavirus Statutory Instruments Dashboard | Delegated legislation and Coronavirus SIs in Parliament | Hansard Society.

In Scotland the position is distinct in a few particulars, the Scottish Government, acting under powers in the Coronavirus Act 2020, enacted the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020.

There is a considerable amount of Coronavirus subordinate legislation across the UK: 423 (278: 2020) UK statutory instruments (regulations), 225 (108: 2020) Scottish Statutory Instruments, 269 (146: 2020) Northern Ireland Statutory Rules and 198 (109: 2020) Wales Statutory Instruments at the time of writing: Legislation.gov.uk. With so much subordinate legislation (and the potential for more) covering so many areas of the law, it is difficult for Parliament to ensure a co-ordinated approach to holding government to account, conducting scrutiny and, more importantly, there are no gaps in legislation that may be needed to deal with the consequences of this illness.

Made Affirmative Subordinate Legislation

In a significant number of those statutory instruments made affirmative procedure was being used. Made affirmative procedure is a form of fast-track procedure for subordinate legislation, which needs to be carefully scrutinised.

The Hansard Society has found that 116 statutory instruments "are subject to the 'made affirmative' procedure" Coronavirus Statutory Instruments Dashboard | Delegated legislation and Coronavirus SIs in Parliament | Hansard Society.

In Scotland, similar to the position in England under the Public Health (Control of Disease) Act 1984 section 45R, such regulations are made on the basis that Scottish Ministers consider them to be needed urgently. The Scottish Parliament's Delegated Powers and Law Reform Committee (DPLRC) between 20 March 2020 and 2 December 2021 considered 132 made affirmative regulations. The House of Lords Constitution Committee, in its "Fast-track Legislation: Constitutional Implications and Safeguards" report, said: "The made affirmative procedure is often used in Acts where the intention is to allow significant powers to be exercised quickly. It is a kind of 'fast-track' secondary legislation. In most cases the parent Act specifies which form of procedure should be applied to instruments made under it. In some cases, however the Act may provide for either the draft affirmative or the made affirmative procedure to be used. If the made affirmative procedure is used, then the instrument is effective immediately." The report went on to say: "Instruments laid as made instruments almost inevitably place a serious time pressure on those drafting them. The JCSI's 8th report of this session drew the special attention of both Houses to three statutory instruments which had been laid as made affirmatives ... 'revisions were being made to the terms of the instruments down to the moment that they were made'", and there had been "serious time pressure" in the making of the instruments": Microsoft Word - FINAL Fast-Track Legislation report _5_.doc (parliament.uk).

The Public Administration and Constitutional Affairs Committee Report: ***Parliamentary Scrutiny of the Government's handling of Covid-19*** **paragraphs 36-54 (particularly paragraphs 49-51) contain significant criticism of the current arrangements for consideration of urgent subordinate legislation.**

The parliamentary counsels' offices and the solicitors in the Governments' legal departments are clearly expert in drawing up instruments but the policies and the challenging conditions which prevail require speed of scrutiny so those carrying out that scrutiny need to be additionally careful about the legislation they are considering.

Furthermore, made affirmative regulations in the UK Parliament which need to be approved in 28 or 40 days, in the Scottish context made affirmative regulations are subject to specific expiry deadlines if the Scottish Parliament does not approve them within 28 days of being made: (Coronavirus Act 2020 Schedule 19 paragraph 6(3)(b) and Public Health etc. (Scotland) Act 2008 section 122(7)(b)).

We have concerns which apply equally to UK and Scottish statutory instruments about the clarity and accessibility of subordinate legislation under made affirmative procedure which is subject to frequent and significant amendment for example The Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 13) Regulations 2021 or The Public Health (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 13) Regulations 2021. In 2020 some regulations were amended as many as 25 times: The Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 25) Regulations 2020 (revoked). It is difficult to be certain of the state of the law when there are such frequent amendments, and the instrument is not presented as a consolidated version. When amending an instrument, the Government should produce a consolidated version showing the whole instrument as amended. The drafter and policy team must be working with a marked up consolidated version, and it ought not to take extra time to produce a consolidation instrument.

When commenting on the enactment of coronavirus legislation in 2020 we stated that we would ordinarily "highlight the need to scrutinise the legislation carefully and not to sacrifice that scrutiny for speed. However, the nature of Covid-19 and the fast-evolving threat it poses to the community at large are potentially devastating, so the law's response must match that level of threat with alacrity. This does not mean that there should not be close scrutiny of how the legislation will work in practice and each legislature in the UK will need mechanisms to ensure that scrutiny will take place in a searching and comprehensive manner".

Those comments apply equally today. As the DPLRC committee has already heard in evidence there is a potential danger of made affirmative procedure becoming a habit when there may not be any real urgency or emergency. It is difficult to comment whether made affirmative procedure has been generally used appropriately without access to the information and data upon which the Government has made the decision to deploy made

affirmative legislation.

Parent Acts

Made affirmative legislation is permitted under several Acts of both the UK and Scottish Parliaments including the Public Health etc. (Scotland) Act 2008, Corporate Insolvency and Governance Act 2020 Direct Payments to Farmers (Legislative Continuity) Act 2020 and the Coronavirus Act 2020. Other legislation in Scotland under which made affirmative regulations have been made includes, the Public Services Reform (Scotland) Act 2010, Land and Buildings Transaction Tax (Scotland) Act 2013 and Articles 69(1) and 75(3) of Regulation (EU) No. 1306/2013.

We carried out an analysis of the agendas of the DPLRC over 2020 and 2021 and have identified that made affirmative regulations under the UK Coronavirus Act 2020 were considered on 61 occasions and those under the Public Health etc (Scotland) Act 2008 on 67 occasions. These Acts provide the powers to Scottish Ministers to make the majority of made affirmative regulations. Specifically, they do not refer to "made affirmative" regulations but rather to powers deployed on the basis of "urgency" which is translated into "emergency" regulations.

The powers under the Coronavirus Act 2020 derive from Schedule 19 Paragraphs 1(1) and 6 which provide:

(2) Sub-paragraph (1) does not apply if the Scottish Ministers consider that the regulations need to be made urgently.

(3) Where sub-paragraph (2) applies, the regulations (the "emergency regulations")— (a) must be laid before the Scottish Parliament; and Page 5 (b) cease to have effect on the expiry of the period of 28 days beginning with the date on which the regulations were made unless, before the expiry of that period, the regulations have been approved by a resolution of the Parliament.

The powers under the Public Health etc. (Scotland) Act 2008 derive from sections 94 (International Travel) and section 122 (Regulations and Orders) which provide:

(6) Subsection (5) does not apply to regulations made under section 25(3) or 94(1) if the Scottish Ministers consider that the regulations need to be made urgently.

(7) Where subsection (6) applies, the regulations (the "emergency regulations")— (a) must be laid before the Scottish Parliament; and (b) cease to have effect at the expiry of the period of 28 days beginning with the date on which the regulations were made unless, before the expiry of that period, the regulations have been approved by a resolution of the Parliament.

There is no definition of "urgency" nor an explanation of the criteria which Scottish Ministers apply to arrive at a decision that a regulation should made on the basis of urgency. However, as the regulations under both acts are termed "emergency regulations" that

suggests that Scottish Ministers must consider that an emergency exits and requires the Scottish Ministers to act with the minimum of delay to make regulations to meet the nature of the emergency.

3. The evidence and procedures underpinning the six-monthly and annual renewal processes for the Coronavirus Act 2020 since its entry into force in March 2020.

Parliamentary Scrutiny

The Act includes the following parliamentary scrutiny provisions:

a. Section 97 requires the Secretary of State to publish a report every two months on the status of the non-devolved provisions of the Act. The first two monthly reporting period ended on 25 May 2020. The report covers the status of certain non-devolved provisions and whether they continue to be appropriate relates to whether the provisions have been brought into force, have been suspended or revived or if an expiry date has been altered. The Government recently published the Coronavirus Act 2020: ninth two-monthly report (publishing.service.gov.uk) .

b. Section 98 requires the non-devolved, temporary provisions to be subject to review and a renewal vote in the House of Commons every six months. The review allows MPs to consider the motion 'that the temporary provisions of the act should not yet expire'. The last review motion debate occurred on 19 October 2021: Coronavirus Act 2020 (Review of Temporary Provisions) - Hansard - UK Parliament. See the House of Commons Library briefing 'The Renewal of Temporary Provisions under the Coronavirus Act 2020'. This statutory requirement does not apply to the House of Lords. Peers debated a motion to take note of the temporary provisions on 26 October 2021 Coronavirus Act 2020 - Hansard - UK Parliament.

c. Section 99 requires that both Houses of Parliament to consider the one-year status report if the Act remains in force one year after coming into force. This process took place on 25 March 2021. Section 99 applies where the Act substantively operates for more than a year from 25 March 2020. Under this section, a Minister of the Crown must make arrangements for a motion in neutral terms to be moved in the House of Commons to the effect that the House has considered the one-year status report, to be moved in that House. The House of Lords will also consider around the same time a motion to take note of the report.

The COVID-19 Review Observatory have concluded that the section 98 six-month reviews, in September 2020 and March 2021, were limited in practice because "*The government, which effectively controls timing in the House of Commons, allocated inadequate parliamentary time for these reviews – only 90 minutes for the first and 210 minutes for the second. Compare this to prime minister's questions, which last at least half an hour every week, and Lords' questions, which get 30 minutes every day.*

Also, this time is not dedicated entirely to reviewing the powers under the act. These debates have been dominated by backbench grievances and general concerns about parliament's role during the pandemic (in the first review), and by multiple complex motions the government scheduled to be debated at the same time (in the second review)".

The six-month review is limited by the Coronavirus Act 2020 section 98(2) as we point out above. This means that the House of Commons votes on the motion provided for in the Act and can only renew or expire all the temporary provisions in the Act.

The Review Observatory also note that the Government's bimonthly reports about how powers under the act are used do not help the situation. These should inform the reviews, but are often expressed in vague and general terms, with little indication of exactly how the powers contained in the act are being used, or what their broad impacts are. Even when MPs have asked for more detail to be provided, the government has not been forthcoming.

Parliamentary responsibility

When the House of Commons reviews the Act, it is important that the Government is held to account. This is even more crucial given that the pandemic has not ended and is unlikely to be so by March 2022.

The government should apply those powers which are necessary, and which are not already available in existing legislation.

The Act also contains a statutory expiry period. This will see the Act expire at the end of 24 March 2022 subject to any extension regulations.

Recommendations for further Scrutiny Proposals

We have suggested a Joint Coronavirus Committee of both Houses to coordinate detailed scrutiny of Government through the pandemic in much the same way as the Joint Committee on Human Rights deals with human rights issues and the Covid-19 Recovery Committee in the Scottish Parliament deals with Coronavirus issues. The Covid-19 Recovery Committee's remit and responsibilities are 'to consider and report on the Scottish Government's response to COVID-19 including the operation of powers under the Coronavirus (Scotland) Act, the Coronavirus Act and any other legislation in relation to the response to COVID-19 and (along with the Delegated Powers and Law reform Committee) any secondary legislation arising from the Coronavirus (Scotland) Act and any other legislation in relation to the response to COVID-19: https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/114997.aspx In our view a similar Committee in the UK Parliament would enhance scrutiny of changes to the law made as a result of the pandemic. We note the House of Lords Covid-19 Committee but that committee's remit "*to consider the long-term implications of the Covid-19 pandemic on the economic and social wellbeing of the United Kingdom"* is too narrow for the purposes we have in mind.

We also suggested a quadripartite parliamentary group, bringing together all the UK legislatures to share experience, best practice and knowledge about legislating in the pandemic, using as a model the Interparliamentary Forum formed to consider Brexit.

Court challenges

We estimate that there have been around 25 challenges to Covid legislation across the UK of which only two have resulted in a finding of illegality: *Reverend Dr William JU Philip and others v Scottish Ministers [2021] CSOH 32* and The Queen (on the application of Article 39) v Secretary of State for Education [2020] EWCA Civ 1577 7; the remainder are ongoing or were dropped (some of which following a change in policy).

4. The transparency surrounding the use of data (including behavioural insights) in decision-making relating to the renewals of the Coronavirus Act 2020.

We have no empirical evidence which would enable us to comment on these issues.

5. The circumstances and process under which Section 90 of the Coronavirus Act 2020 can and/or should be used to extend measures beyond their sunset clause.

Section 90 provides as follows:

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.

(3) A time specified under subsection (2) in relation to a provision of this Act must not be later than the end of the period of 6 months beginning with the time when the provision would otherwise have expired (whether by virtue of section 89 or previous regulations under subsection (1) or (2)).

(4) Regulations under this section—

(a) may make different provision for different purposes or areas;

(b) may make transitional, transitory or saving provision.

(5) In this section "relevant national authority" means a Minister of the Crown, subject as follows.

(6) In the case of regulations under this section which could also be made by an authority by virtue of subsection (7), (9) or (11), a Minister of the Crown may not make the regulations without the authority's consent.

(7) The Welsh Ministers are also a relevant national authority for the purposes of this section in relation to a provision of this Act if—

(a) it extends to England and Wales and applies in relation to Wales, and

(b) so far as it so extends and applies, it would be within the legislative competence of the National Assembly for Wales if it were contained in an Act of that Assembly (including any provision that could only be made with the consent of a Minister of the Crown within the meaning of the Ministers of the Crown Act 1975).

(8) The power of the Welsh Ministers to make regulations under this section in relation to a provision of this Act is a power to do so only so far as the provision extends to England and Wales and applies in relation to Wales.

(9) The Scottish Ministers are also a relevant national authority for the purposes of this section in relation to a provision of this Act if—

(a) it extends to Scotland, and

(b) so far as it so extends, it would be within the legislative competence of the Scottish Parliament if it were contained in an Act of that Parliament.

(10) The power of the Scottish Ministers to make regulations under this section in relation to a provision of this Act is a power to do so only so far as the provision extends to Scotland.

(11) A Northern Ireland department is also a relevant national authority for the purposes of this section in relation to a provision of this Act if—

(a) it extends to Northern Ireland, and

(b) so far as it so extends, were it contained in an Act of the Northern Ireland Assembly—

(i) it would be within the legislative competence of that Assembly, and

(ii) it would not require the consent of the Secretary of State.

(12) References in this section to regulations are to be read in relation to a Northern Ireland department as references to an order.

(13) The power of a Northern Ireland department to make an order under this section in relation to a provision of this Act is a power to do so only so far as the provision extends to Northern Ireland.

(14) Any power of a Minister of the Crown or the Welsh Ministers to make regulations under this section is exercisable by statutory instrument.

(15) Any power of a Northern Ireland department to make an order under this section is exercisable by statutory rule for the purposes of the Statutory Rules (Northern Ireland) Order 1979 (S.I. 1979/1573 (N.I. 12)) (and not by statutory instrument).

There are several points which can be made about section 90:

a. This section empowers Ministers of the Crown to make regulations to provide that the Act does not expire on 31st March 2022 (or such other date when it would otherwise expire) but on an earlier date or on a later date. However, under subsection (3) the later date cannot be more than 6 months after 31st March 2022 (or such other date when it would otherwise expire). Subsection (5) enables a Minister of the UK Government to exercise these powers. Consent of the relevant Devolved Administration is required in relation to devolved matters.

b. This regulation making power extends to other national authorities such as Scottish Ministers, Welsh Ministers and a Northern Ireland Department if the regulations made by the relevant national authority. apply to that authority's territorial jurisdiction and would be "within the legislative competence" of the Scottish Parliament, the Senedd Cymru or the Northern Ireland Assembly.

c. Section 93 sets out the procedures for regulations made by a Minister of the Crown under the powers to alter the expiry date, the power to amend the Act in consequence of amendment to secondary legislation and the power to make consequential modifications. Section 95 contains the analogous procedures for regulations made by Scottish Ministers. Regulations made under section 90(1) are subject to the affirmative procedure (see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010) (asp 10)). Whereas, regulations made under section 90(2) must be laid before the Scottish Parliament as soon as reasonably practicable after being made.

d. Regulations laid before the Scottish Parliament by virtue of section 90(2), (3) or (4)(b) cease to have effect at the end of the period of 40 days beginning with the day on which they are made unless, during that period, the regulations are approved by resolution of the Scottish Parliament.

The lack of a nominated procedure for regulations which extend a provision of the Act beyond the expiry date is problematic. Extending the application of a section or sections in the Act could have significant consequences. In such circumstances consideration should be given to introducing some form of short consultation with relevant interests. This would be one way of increasing transparency and accountability for the actions of Ministers in any National Authority. Additionally, Ministers should be required to lay before Parliament a statement of their reasons as to why the regulations should be made. This would be a useful

addition to the procedure which would enhance ministerial accountability to Parliament. Ultimately, the alternative to deploying regulations under the Act is primary legislation perhaps made under emergency procedure. Ministers should include information in any supporting statement about occasions when primary legislation has been considered and why it has been decided to proceed by way of regulations.

Specific comment on schedule 9

Schedule 9 of the Coronavirus Act 2020 allowed for potential temporary changes to mental health legislation, specifically the Mental Health (Care and Treatment) Scotland) Act 2003, the Criminal Procedure (Scotland) Act 1995, and associated subordinate legislation.

The provisions in schedule 9 were not brought into force and remain prospective at present.

Scotland's existing mental health legislation contains a number of safeguards to protect the fundamental rights of those subject to the legislation, and in particular the rights of individuals arising from Articles 3, 5, 6 and 8 ECHR. The provisions of schedule 9 have the potential to remove or reduce these safeguards, leading to potential significant human rights violations.

We acknowledge that the provisions of schedule 9 were introduced at a time when there were acute fears that health services could be overwhelmed. We recognise that there may be circumstances where infringement of individual rights may be justified, including in response to a public health emergency such as the pandemic. However, the provisions contained in schedule 9 have not been required, and as such have not been brought into force. Mental Health Tribunal hearings have continued throughout the pandemic but have been done mostly remotely. Although not at all optimal for many patients, in this emergency this has allowed Tribunals to continue to operate to protect the rights of patients by testing the criteria with a full panel of 3 members and allowing all parties including mental health professionals to attend on a telephone conference call. There has not been a need to reduce the medical reports received or the number of Tribunal members and whilst the opportunity continues to hold hearings remotely this continues to remain the case despite increasing numbers of coronavirus cases causing additional staff pressures through isolating requirements. We would suggest therefore that the legislation should now be allowed to expire to prevent any diminution to the rights of all patients.

January 2022