

## **RIGHTS AND PARLIAMENTARY OVERSIGHT IN THE PANDEMIC: REFLECTIONS FROM THE SCOTTISH PARLIAMENT**

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### **Abstract**

The Scottish Parliament is the only devolved legislature that has passed general Coronavirus-related emergency primary legislation, and it is now debating legislation that would put emergency public health powers on a permanent footing. This paper considers whether, and if so to what effect, human rights have acted as a core concern in law-making during the pandemic in Scotland in order to draw out lessons for future crises. The analysis reveals a mixed picture. In situations where Parliament is closely involved in scrutiny, like legislative debates, human rights concerns were surfaced and in notable ways rights operated as an effective limit on desired state action. However, much of the pandemic response was executed by means of secondary legislation, as enabled by the Coronavirus Act 2020, and there was a clear pattern of making this secondary legislation using the Made Affirmative Procedure. This ‘scrutiny-lite’ legislative pathway is one in which there are reduced opportunities for and compulsions towards rights-based reasoning and justification, even though as a matter of democratic legitimacy and the limitation of state power such instruments are particularly in need of robust parliamentary scrutiny. Thus, while well-embedded parliamentary processes and an apparent hospitality towards rights by the Scottish Government resulted in admirable levels of rights-based scrutiny of COVID-19 related primary legislation, this was undermined by extensive recourse to scrutiny-lite modes of delegated law-making and the Scottish Parliament’s failure to subject resulting Scottish Statutory Instruments to meaningful scrutiny.

### **Keywords**

Scottish Parliament – human rights – COVID-19 pandemic – legislation – devolution – delegated law-making – made affirmative procedure

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## Introduction

To date, the Scottish Parliament is the only devolved legislature that has passed general Coronavirus-related emergency primary legislation.<sup>1</sup> The Coronavirus (Scotland) Act 2020, and the Coronavirus (Scotland) (No. 2) Act 2020 ('the Scottish Acts')<sup>2</sup> were both introduced as emergency bills. Although they have a narrower focus than the wide-ranging Coronavirus Act 2020,<sup>3</sup> which provided Scottish Ministers with important regulation-making powers in Schedule 19, they formed a key part of the Scottish Government's pandemic response. As we appear to emerge from the pandemic, and considering the Coronavirus Act 2020's 'sunset' at the end of March 2022, the Scottish Government is now embarking on a process of creating a permanent legislative framework for future public health emergencies,<sup>4</sup> modelled closely on (although not precisely replicating) Schedule 19 of the Coronavirus Act 2020. It is thus apposite to consider how, and to what extent, the Scottish Parliament has maintained human rights as a core legislative concern during the pandemic.<sup>5</sup> Such an analysis not only adds to the existing literature on whether, how, and to what extent the Scottish Parliament is an effective rights-protecting institution<sup>6</sup> but also draws out important lessons for not only the design but also—should it be needed—the exercise of future powers in a public health crisis.

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<sup>1</sup> The Northern Ireland Assembly passed the Private Tenancies (Coronavirus Modifications) Act (Northern Ireland) 2020 on the 4 May 2020. The Welsh Assembly and the Scottish Parliament passed legislation providing measures relating to protection against coronavirus to apply to the Senedd and Scottish parliamentary elections and local government elections (powers to change the dates, etc). These were the Welsh Elections (Coronavirus) Act 2021 and the Scottish General Election (Coronavirus) Act 2021

<sup>2</sup> The Scottish Parliament also passed the Coronavirus (Extension and Expiry) (Scotland) Act 2021 ('the Extension Act') extending the operation of the general Acts, as well as the Carer's Allowance Supplement (Scotland) Act 2021. However, we focus here on the two Scottish Acts as it is in them that the general framework complementing the Coronavirus Act 2020 was established for Scotland.

<sup>3</sup> On the Coronavirus Act 2020 see generally Jeff King and Natalie Byrom, 'United Kingdom: Legal Response to Covid-19', in Jeff King and Octavio Ferraz et al (eds), *The Oxford Compendium of National Legal Responses to Covid-19* (Oxford: OUP, 2021), paras. 14 ff.

<sup>4</sup> The Coronavirus (Recovery and Reform) (Scotland) Bill. The Bill was preceded by a consultation: Scottish Government, 'Covid Recovery – A consultation on public services, justice system and other reforms' (August 2021), available at <https://www.gov.scot/publications/covid-recovery-consultation-public-services-justice-system-reforms/> [Accessed 12 November 2021].

<sup>5</sup> See also the shorter analysis in Christopher McCorkindale and Aileen McHarg, "Tackling the COVID-19 Pandemic in Scotland" (2020) *Revista Catalana de Dret Públic* 256.

<sup>6</sup> For example Aidan O'Neill, "Human Rights and People and Society" in Elaine Sutherland and Kay Goodall, *Law Making and the Scottish Parliament: The Early Years* (Edinburgh: Edinburgh University Press, 2011); Christopher McCorkindale and Aileen McHarg, "Tackling the COVID-19 Pandemic in Scotland" (2020) *Revista Catalana de Dret Públic* 256; Bruce Adamson, "The Protection of Human Rights in the Legislative Process of Scotland" in Murray Hunt, Hayley J. Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Oxford: Hart Publishing, 2015), 195; Christopher McCorkindale and Janet Hiebert, "Vetting Bills in the Scottish Parliament for Legislative Competence" (2017) 21 *Edinburgh Law Review* 319.

Our exposition and argument proceed in three substantive sections. In Part I we outline engagement with rights in the legislative processes relating to the Scottish Acts, showing not only that human rights concerns surfaced explicitly, implicitly, and through proxy references throughout, and seemed to increase rather than diminish with the passage of time, but also that this was more than ‘mere talk’. Rather, in at least some cases, this was turned into action with rights operating as an effective limit particularly with respect to the legislative debates on the second Scottish Act. In Part II we turn our attention to delegated law-making under Schedule 19 of the Coronavirus Act 2020. The analysis in this Part reveals not only an extensive but what we claim is an excessive use of the Made Affirmative Procedure to make Scottish Statutory Instruments (SSIs) during the pandemic, which in turn substantially reduces Parliament’s *capacity* to be an effective rights actor in the realm of delegated law-making. In other words, even if there were behavioural reflexes towards rights-based scrutiny in the Scottish parliament – as there seems to be from the analysis of the debates on the Scottish Acts – the extensive use of the Made Affirmative Procedure shut them off in respect of the bulk of everyday pandemic-responsive law-making. This is because both the rights-focused processes required in primary law-making do not apply in the case of the Made Affirmative Procedure and because, in practice, the Scottish Parliament demonstrated apparent inertia in respect of the rights-related implications of relevant secondary instruments by simply failing to subject them to the realistic possibility of defeat when they came up for consideration in the Chamber. In Part III we reflect on what might be learned from these different practices that appear to sit in tension with one another. In particular, we reflect on the ways in which our analysis suggests the importance of centring rights in Scottish law-making procedures, exposes limitations to the Scottish Government’s apparent willingness to avoid exploiting the emergency context of the pandemic, and underlines the need to ensure effective substantive and procedural safeguards for rights protection in future-looking public health legislation, which anticipates continued reliance on secondary legislation in practice. In this sense it adds to the growing literature on what the Scottish experience of law-making in the pandemic may illustrate about rights in crisis law-making.<sup>7</sup>

## **I. The Making of the Scottish Acts**

In making the Scottish Acts the Scottish Government and Parliament had little choice but to be attentive to rights to some extent. After all, the Scottish Parliament has no competence to

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<sup>7</sup> McCall-Smith K, “Good better best? Human rights impact assessment in crisis lawmaking” (2022) *International Journal of Human Rights* <https://doi.org/10.1080/13642987.2022.2057955>

legislate in a manner incompatible with human rights,<sup>8</sup> whether in an emergency or not. While a Scottish Minister can propose, and Parliament can agree, that a Bill be treated as an emergency bill and thus have an abridged passage—as was the case with both Scottish Acts—the limitation of competence still applies.<sup>9</sup> Any analysis of whether and to what extent human rights were treated as an effective constraint in the making of emergency legislation must thus go beyond merely attending to whether rights were discussed *at all* and examine what work both the Government and the Parliament sought to do with rights during these debates.

The Scottish Parliament has several statutory and other processes by which the competence of legislation can be tested and assured. Two of these arise at the pre-legislative phase: statements of competence by the Presiding Officer<sup>10</sup> and by the person in charge of the bill.<sup>11</sup> To augment these, Rule 9.3 of the Standing Orders requires the addition of a policy memorandum that includes an assessment of the effects of the bill on inter alia human rights, which can include a proportionality assessment.<sup>12</sup> Policy memoranda are, thus, important documents in the Scottish legislative process for they are both framing instruments (inasmuch as they explain the policy frame for the proposal) and quasi-legal instruments (inasmuch as they present a view of the lawfulness of the proposed legislation), although in practice they emerge from a highly legalistic and bureaucratic process.<sup>13</sup> These statements of competence and policy memoranda are required for emergency bills as well as ordinary legislation, and thus were produced for the two Scottish Acts,<sup>14</sup> as were extensive *ex ante* impact assessments.<sup>15</sup>

Despite the pressing nature of the circumstances in which they were prepared, these memoranda engage productively and sometimes quite precisely with legal questions of rights protection, ECHR rights, and, where appropriate, relevant case law and proportionality

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<sup>8</sup> s. 29, Scotland Act 1998.

<sup>9</sup> Scottish Parliament, Rule 9.21, Standing Orders, 6<sup>th</sup> Edition, 3<sup>rd</sup> Revision (8 October 2021).

<sup>10</sup> s. 31(2) Scotland Act 1998.

<sup>11</sup> s. 31(1) Scotland Act 1998 as amended.

<sup>12</sup> As recognised in *A v Scottish Ministers* 2002 SC (PC) 63, at 66.

<sup>13</sup> Christopher McCorkindale and Janet Hiebert, “Vetting Bills in the Scottish Parliament for Legislative Competence” (2017) 21 *Edinburgh Law Review* 319.

<sup>14</sup> Coronavirus (Scotland) Bill, Policy Memorandum (2020). Available at: <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/coronavirus-scotland-bill/introduced/policy-memorandum-coronavirus-scotland-bill.pdf> [Accessed 5 January 2022]; (“Policy Memorandum No. 1”). Coronavirus (Scotland) (No. 2) Bill, Policy Memorandum (2020). Available at <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/coronavirus-scotland-no2-bill/introduced/policy-memorandum-coronavirus-scotland-no2-bill.pdf> (“Policy Memorandum No. 2”) [Accessed 5 January 2022].

<sup>15</sup> See the discussion in McCall-Smith K, “Good better best? Human rights impact assessment in crisis lawmaking” (2022) *International Journal of Human Rights* <https://doi.org/10.1080/13642987.2022.2057955>

analysis. In general the rights-related analysis is substantive rather than a mere ‘recitation’ of applicable rights standards without meaningful analysis;<sup>16</sup> in other words, it suggests that human rights were a framing concern in the formation of the measures being introduced rather than being ‘added in’ once the policy decisions in question had been taken. Even though express parliamentary engagement with these memoranda was scarce,<sup>17</sup> the memoranda themselves suggest that, notwithstanding the emergency situation, human rights continued to play an important role in policy formation and in the drafting of Scottish legislation, that the statutory scheme laid down in the Scotland Act 1998 and accompanying processes reflected in the Standing Orders and Ministerial Code ensured human rights continued to matter, and that the sometimes-bureaucratic processes by which rights have been mainstreamed into the pre-legislative phase in Scottish law-making held firm.

Some scholars have expressed concern that these pre-legislative schemes and their reliance on the advice of the Lord Advocate means that statements of competence are treated as effectively determinative by MSPs and Government ministers, and that MSPs rarely ‘second guess’ the claim of competence in respect of a piece of proposed legislation.<sup>18</sup> The concern, understandably, is that in reality this displaces Parliament as a critical partner in rights protection and replaces it, in practice, with lawyers and bureaucrats even though “effective legislative review requires that parliamentarians themselves are willing to make critical assessments of competence on its own terms”.<sup>19</sup>

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<sup>16</sup> See for example the analysis in Coronavirus (Scotland) (No. 2) Bill, Policy Memorandum (2020). Available at <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/coronavirus-scotland-no2-bill/introduced/policy-memorandum-coronavirus-scotland-no2-bill.pdf> (‘Policy Memorandum No. 2’), paras 182-89. [Accessed 5 January 2022].

<sup>17</sup> During the passage of the first Act, only Adam Tomkins MSP (Con) and Alex Cole-Hamilton MSP (LibDem) engaged with this document. Tomkins discussed the government’s justification for suspending the right to a trial by jury (Scottish Parliament Official Record 1 April 2020 col 35), and Cole-Hamilton, the scope of hearsay evidence (Scottish Parliament Official Record 1 April 2020 col 122). Similarly, during the passage of the second Act, there were only four mentions to the memorandum. The first was by the Law Society’s representative Michael Clancy, who welcomed the way the government had engaged with human rights in the memorandum, and went on to make some comments on aspects of the document (COVID-19 Committee Official Record 12 May 2020 cols 3, 4 and 6). Then, at stage one in the Chamber, two MSPs cited the memorandum to endorse the government’s claims on compatibility of the emergency measures with Convention rights (Scottish Parliament Official Record 13 May 2020 cols 41 and 64). Finally, in debates at the Chamber the Minister for Europe and International Development called MSPs’ attention to the content of the memorandum, specifically, to “the human rights analysis of the impact of each measure and the balance that has been struck by it” (Scottish Parliament Official Record 13 May 2020 col 88).

<sup>18</sup> Christopher McCorkindale and Janet Hiebert, “Vetting Bills in the Scottish Parliament for Legislative Competence” (2017) 21 *Edinburgh Law Review* 319.

<sup>19</sup> *Ibid*, 339.

If these concerns have purchase one would expect that they would manifest quite clearly in an emergency context which is generally considered to produce a lack of robust challenge in legislative settings.<sup>20</sup> Both MSPs and the Scottish Government were confront with a situation of scientific and policy complexity, and genuine indeterminacy about whether pandemic responses discharge the state’s human rights obligations or impermissibly restrict human rights enjoyment.<sup>21</sup> In those circumstances one might not be surprised if human rights were displaced as a focus in legislative debates. However, in the debates on the Scottish Acts MSPs remained meaningfully engaged with rights. This was evident not only in rights talk but also in rights-related action.

Across the debates we find numerous examples of explicit (references to human rights instruments or standards like the Human Rights Act 1998, European Convention on Human Rights, or UN Convention on the Rights of the Child,<sup>22</sup> or to human rights tests), implicit (references to broad concepts that are intimately bound up with rights enjoyment and protection, such as equality), and proxy (evoked through a focus on groups recognised within international human rights law as having both general and specific (i.e. ‘class based’) rights<sup>23</sup>) rights talk. Importantly, this is evident not only in the committees considering these Bills but also in the Chamber although, as Table 1 indicates, it was less prevalent in respect of the first than the second Bill.

*Table 1. Instances of rights talk per stage in each of the two Scottish Acts.*

Stage	Explicit	Implicit	Proxy
SCVA1 Stage 1	10	10	7
SCVA1 Committee Stage	9	8	4

<sup>20</sup> For a broad analysis of this phenomenon during the pandemic see Kevin Deveaux, Natália Švecová, Tim Baker, *Parliaments Responding to a Pandemic: Lessons Learned for Emergency Planning* (House Democracy Partnership and The Swiss Agency for Development and Cooperation, 2021).

<sup>21</sup> See e.g. the discussion of concerns that for MSPs rights ‘lacked any bite’ in Adam Tomkins, “Book Review: Emergency Powers in a Time of Pandemic” [2021] Public Law 660, p. 660.

<sup>22</sup> See for example Ross Greer MSP (Green) discussing his amendment three at committee stage (Scottish Parliament Official Record 19 May 2020 col 71).

<sup>23</sup> Throughout the debates particular attention was devoted to discussing the ‘vulnerabilities’ of e.g. prisoners (Scottish Parliament Official Record 1 April 2020 cols 26 and 29), persons with mental illness (Scottish Parliament Official Record 1 April 2020 col 168 and 169; Scottish Parliament Official Record 13 May 2020 col 64), persons with disabilities and communication needs (Scottish Parliament Official Record 19 May 2020 cols 98 and 99), and women (Scottish Parliament Official Record 1 April 2020 col 168; Scottish Parliament Official Record 13 May 2020 cols 61, 62, and 86; Scottish Parliament Official Record 19 May 2020 cols -101; Scottish Parliament Official Record 20 May 2020 cols 45 and 46) all of whom enjoy class-based as well as general human rights protection in international law.

SCVA1 Stage 3	1	0	0
SCVA2 Stage 1 at Committee	9	19	3
SCVA2 Stage 1 at the Chamber	13	8	5
SCVA2 Committee Stage	8	20	5
SCVA2 Stage 1	3	16	4

The increased attention to rights in the debates on the second Act is especially interesting. While we might expect the effects of an emergency on parliamentary discourse to dissipate over time, the debates on the second Act took place only five weeks after those on the first and in a continuing situation of real public health crisis and epidemiological volatility. This suggests that human rights have a kind of ‘stickiness’ within Scottish parliamentary proceedings; that they are a benchmark to which parliamentarians are inclined to reach even in times of emergency or crisis and have become embedded as one of the modes of doing politics and accountability in that setting. More importantly, however, than ‘mere’ rights talk is the fact that a large proportion of the amendments MSPs proposed to both Bills<sup>24</sup> had clear human rights connections, which we map in Appendix 1 to this paper.

Our analysis suggests that rights-related interventions and amendments played four roles in these debates. First, they exposed disagreements of legal interpretation between the Government and MSPs about whether the proposed actions were sufficient to protect rights or whether something more could be done.<sup>25</sup> In debates leading to the second Scottish Act some

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<sup>24</sup> The list of amendments for each of the two Scottish Acts can be found in the following links:

A list of “Groupings of Amendments for Stage 2” of the Coronavirus (Scotland) Bill can be found at: <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/coronavirus-scotland-bill/stage-2/groupings-of-amendments-at-stage-2-coronavirus-scotland-bill.pdf> [Accessed 6 January 2022].

A List of “Groupings of Amendments for Stage 2” of the Coronavirus (Scotland) (No. 2) Bill can be found at: <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/coronavirus-scotland-no2-bill/stage-2/groupings-of-amendments-at-stage-2-coronavirus-scotland-no2-bill.pdf> [Accessed 6 January 2022].

A List of “Groupings of Amendments for Stage 3” of the Coronavirus (Scotland) (No. 2) Bill can be found at: <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/coronavirus-scotland-no2-bill/stage-3/groupings-of-amendments-at-stage-3-coronavirus-no2-scotland-bill.pdf> [Accessed 6 January 2022].

<sup>25</sup> See for example debates on the sufficiency of proposed protections for tenants in private rented accommodation and whether further measures would result in violations of landlords’ ECHR rights. Scottish Parliament Official Record 1 April 2020 cols 103-104 (discussion of Article 8(2) and Protocol 4, Article 2 ECHR); Scottish Parliament Official Record 20 May 2020 col 55 (discussion of what Andy Wightman MSP described as the ‘human rights issue’ of tenancy protection). See also the government’s opposition to Andy Wightman MSP (Green)’s amendment 50 in committee stage of the first Bill, on requisition of property to provide temporary

of these disagreements resulted in non-government amendments being approved despite the government's opposition,<sup>26</sup> while during debates on the first Act the Government changed direction entirely on its proposal to suspend trial by jury. This proposal attracted so much criticism, including right-based criticism, that the Government removed the relevant provisions from the Bill.<sup>27</sup> Second, rights-related interventions surfaced instances of agreement and cooperation between Government and MSPs about the possibility and importance of rights-related further action, including action that imposed duties on Government.<sup>28</sup> This is consistent with an observed trend of cooperation in law-making within the Scottish Parliament whereby amendments are withdrawn and changes made by Government rather than defeats being suffered,<sup>29</sup> which also took place during this process,<sup>30</sup> or, as also happened, government simply supporting non-governmental amendments.<sup>31</sup> Third, they acted as a springboard for MSPs to identify issues not dealt with in the proposed legislation but which they considered

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accommodation, on the grounds that it raised ECHR issues (Scottish Parliament Official Record 1 April 2020 col 106-108).

<sup>26</sup> At committee stage, amendments 30, 33, 45 and 49 (see Scottish Parliament Official Record 19 May 2020 cols 50, 51, 91 and 97). At stage three, amendments 84 and 92 (see Scottish Parliament Official Record 20 May 2020 cols 109-110 and 117-119).

<sup>27</sup> See Scottish Parliament Official Record 1 April 2020 cols 11, 18, 30, 34-35, and 120-121.

<sup>28</sup> See for example amendment 54 to the first Scottish Act lodged by Ruth Maguire MSP (The Scottish National Party ('SNP')), which sought to introduce a statutory duty on Scottish Ministers to have regard to opportunities to advance equality and non-discrimination in exercising the emergency powers under the Act, including in the making of secondary legislation. The Cabinet Secretary for the Constitution supported Maguire's amendment, which was agreed without a vote, and s.6 of the Coronavirus (Scotland) (No 2) Act 2020 included a provision on the "advancement of equality and non-discrimination", worded precisely as Maguire's proposed amendment had been. Furthermore, in the second Scottish Act the Government not only welcomed amendment 52 proposed by Pauline McNeill MSP (Labour), which sought to impose a duty to request information about domestic violence from police and certain other bodies, but also lodged further amendments to widen the obligation to domestic abuse, instead of violence, and increase the scope of the duty: Amendment 4 at stage 3 of the Coronavirus (Scotland) (No 2) Bill. See section 15A Coronavirus (Scotland) Act 2020 and section 13 Coronavirus (Scotland) (No 2) Act. For the parliamentary debates, see Scottish Parliament Official Record 20 May 2020 cols 45-47.

<sup>29</sup> Mark Shephard and Paul Cairney, "The impact of the Scottish Parliament in Amending Executive Legislation" (2005) 53 *Political Studies* 303.

<sup>30</sup> See e.g. withdrawal of Adam Tomkins MSP's (Con) amendment requiring public bodies to ensure that the solemnisation of marriages and civil partnerships continued to be available throughout the pandemic, which eventually led to amendments 73 and 76, approved at stage three (Scottish Parliament Official Record 19 May 2020 cols 59-60; Scottish Parliament Official Record 20 May 2020 cols 93-94).

<sup>31</sup> At stage two on the first Act the Government supported and amendment tabled by Alex Cole-Hamilton MSP (LibDem) limiting the admissibility of hearsay evidence in criminal trials (Scottish Parliament Official Record 1 April 2020 col 124). During debates on the second Act government supported Ross Greer MSP's (Green) amendment raising the age at which fixed penalty notices could be issued for breaking lockdown regulations (Scottish Parliament Official Record 19 May 2020 cols 70-71) Mark Griffin MSP's (Lab) amendment mandating the procurement of inclusive communication when exercising the powers under the Scottish Acts (Scottish Parliament Official Record 19 May 2020 col 100) and Monica Lennon MSP's (Lab) amendment creating the "Social Care Staff Support Fund" (Scottish Parliament Official Record 20 May 2020 col 82).



posed significant rights-related challenges during the pandemic.<sup>32</sup> And fourth they allowed for a re-litigation of issues that have long been contentious within the Scottish political *milieu* such as Government attempts to adjust its obligations in respect of freedom of information requests,<sup>33</sup> and in respect of which the Government did eventually suffer a defeat.<sup>34</sup>

Far from receding as a focus in legislative debates, or being relegated to a concern on which Parliament would defer to Executive judgement, rights were a central concern in legislative debates on the Scottish Acts. This was consistent with the debates that took place during the Legislative Consent Motion on the Coronavirus Act 2020 and the evidence sessions held by the Finance and Constitution Committee, the Health and Sport Committee, and the Delegated Powers and Law Reform Committee (closed session) that preceded it.<sup>35</sup>

## II. Delegated Law-Making under Schedule 19, Coronavirus Act 2020<sup>36</sup>

The analysis in Part I suggests that pandemic-related law-making in the Scottish Parliament seems to have maintained a meaningful engagement with human rights as a set of standards that not only delimit competence but also underpin in positive terms a sense of what the Government ought to seek to achieve in primary legislation. However, even in an emergency setting, primary law-making is structured to create opportunities for challenge from and accountability to the legislature; it has at its heart engaged debate on proposed statutory text and it cannot proceed without the agreement of the majority in Parliament. When primary legislation is in play, in other words, Parliament cannot be excluded. The ways in which

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<sup>32</sup> See for example Scottish Parliament Official Record 19 May 2020 col 55 (statements by Adam Tomkins MSP (Conservative) raised Article 12 ECHR concerns due to reporting difficulties people were experiencing in getting married).

<sup>33</sup> See for instance Motion ref. S5M-06126, taken in the Chamber on Wednesday, June 21, 2017. See also Motion ref. S5M-10438. In the first Bill, the Scottish Government proposed measures to extend the default deadline to respond to an FOI request from 20 to 60 days, with an option for an additional extension for up to 40 days in particularly complex cases. MSPs lodged 18 amendments to the government's proposals. Although all were defeated (albeit only due to the Presiding Officer's deciding vote), their advancement through the rights-talk of necessity and the "fundamental right to freedom of information"—an implicit reference to Article 10 of the ECHR—was notable: Scottish Parliament Official Record 1 April 2020 col 134

<sup>34</sup> The Government having succeeded with changes to FOI in the first Act through the deciding vote of the Presiding Officer (Scottish Parliament Official Record 1 April 2020 cols 148-156), the Parliament approved Neil Findlay MSP (Lab)'s amendment 45 at stage two of the second Scottish Acts, imposing a duty on Scottish Ministers to lay reports on the number of FOI requests they have failed to comply with, the number of requests received, and what the backlog is. A government amendment that sought to reach consensus on the issue had been defeated at stage two (See Scottish Parliament Official Record 19 May 2020 col 80-91).

<sup>35</sup> Scottish Parliament, Official Report, Finance and Constitution Committee, 24 March 2020; Scottish Parliament, Official Report, Health and Sport Committee, 24 March 2022.

<sup>36</sup> This part builds on the short analysis published in Pablo Grez Hidalgo, Fiona de Londras, Daniella Lock, "Use of the Made Affirmative Procedure in Scotland: Reflections from the Pandemic" (2022) 26(2) *Edinburgh Law Review* 219.

governments pursue, and Parliaments oversee, delegated law-making pose a stricter test of the commitments of both institutions.

In Scotland, as in other parts of the United Kingdom, statutory instruments have formed a substantial part of the legislative response to the pandemic.<sup>37</sup> Although Scotland did have public health legislation prior to the pandemic in the form of the Public Health etc. (Scotland) Act 2008, there was some uncertainty about whether Scottish ministers were empowered to make the range of regulations under that Act that were available to the government in Westminster under the (amended) Public Health (Control of Disease) Act 1984.<sup>38</sup> Schedule 19 of the Coronavirus Act 2020 thus empowered Scottish ministers to exercise an equivalent range of powers by SSI. Under both the Public Health etc. (Scotland) Act 2008 and Schedule 19 of the Coronavirus Act 2020, such SSIs could be made using the Made Affirmative Procedure where a Scottish Minister considered there to be a reason of urgency for so doing.<sup>39</sup> Such regulations are made by laying a draft before the Scottish Parliament, and they cease to have effect after twenty-eight sitting days unless they are approved by Parliament.<sup>40</sup> In other words, where it is used the Made Affirmative Procedure dramatically reduces Parliament's capacity to act as a meaningful legislator and scrutiniser<sup>41</sup>—and thus as an effective rights actor—in delegated law-making because the law in question is made and operating (and thus institutional and human behaviours are adjusted in response) before Parliament has any opportunity properly to scrutinise it.

In principle one might consider that a pandemic is precisely the kind of situation in which delegated law-making is appropriate, because regulations may be introduced or amended at great speed, and be underpinned by a highly technical analysis of scientific and other information.<sup>42</sup> However, even if that is conceded, how the Executive uses and justifies the use of its power to make secondary legislation can reveal something about its general posture towards scrutiny by Parliament. Similarly, how Parliament uses whatever scrutiny

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<sup>37</sup> See the Hansard Society's tracking of the use of statutory instruments in Westminster here: <https://www.hansardsociety.org.uk/publications/data/coronavirus-statutory-instruments-dashboard>

<sup>38</sup> Scottish Parliament Official Record, Health and Sport Committee session 5 col 10 24 March 2020 (Cabinet Secretary for Health and Sport).

<sup>39</sup> Coronavirus Act 2020, s 49 and Sch 19 ss 1 and 6(3); Public Health etc. (Scotland) Act 2008 ss 94(1)(b)(i), 122(2), (6), (7).

<sup>40</sup> Coronavirus Act 2020, Sch 19(6)(3); Public Health etc. (Scotland) Act 2008 s 122(2), (6), (7).

<sup>41</sup> On meaningful scrutiny see Adam Tucker, "Parliamentary Scrutiny of Delegated Legislation" in Horne and Drewry (eds), *Parliament and the Law* (2018; Hart Publishing).

<sup>42</sup> See e.g. Report of the Committee on Ministers' Powers ('Donoughmore Report'), *Report* (Cmd 4060 1932) 14; Cabinet Office, *Guide to Making Legislation* (July 2017) 132 - 133.

opportunities it enjoys in respect of delegated legislation uncovers the depths of its willingness (or perhaps ability) to undertake robust scrutiny of the detail outside of the political spectacle of legislative debates.<sup>43</sup> It is thus instructive to consider delegated law-making in Scotland during the pandemic as part of our overall enquiry into rights, Parliament, and scrutiny.

To do this we have analysed a sample of the SSIs introduced in Scotland during the pandemic, namely SSIs made between 26 March 2020 and 29 November 2021 “for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Scotland” under s. 1(1) of Schedule 19 of the Coronavirus Act 2020. The total sample comprises 64 SSIs, of which 63 were made using the Made Affirmative Procedure.<sup>44</sup> A full list of these regulations together with a summary of their timelines is contained in Appendix 2. Among our sample SSIs there are ‘parent SSIs’ containing sets of regulations introducing lockdown restrictions,<sup>45</sup> replacing those schemes by new tier-based systems of restrictions,<sup>46</sup> and amending those parent SSIs.<sup>47</sup> The SSIs in our sample regulate matters as varied as mandatory mask wearing, social distancing, closure of business and places of worship, stay at home rules,<sup>48</sup> and vaccination certification schemes<sup>49</sup> and have clearly significant implications for human rights.

This raises an initial question of whether the urgency threshold for using the Made Affirmative Procedure operates as a constraint in practice. From a rights-based perspective this question is of real significance because by triggering the Made Affirmative Procedure a Scottish Minister

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<sup>43</sup> This builds on Tucker’s two components of meaningful scrutiny of delegated legislation: public justification by Government and vulnerability to defeat by Parliament: Adam Tucker, “Parliamentary Scrutiny of Delegated Legislation” in Horne and Drewry (eds), *Parliament and the Law* (2018; Hart Publishing).

<sup>44</sup> The exception is The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 4) Regulations 2021, SSI 2021/453, which was subject to the affirmative procedure. These regulations contain an amendment to the COVID-19 vaccine certification scheme. It was laid on draft on 29 November 2021, and approved four days later on 2 December 2021.

<sup>45</sup> For instance, The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, SSI 2020/103; The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020, SSI 2020/279; The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020, SSI 2020/318.

<sup>46</sup> The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020, SSI 2020/344.

<sup>47</sup> The parent act introducing a tier system of restriction (SSI 2020/344) was subject to 32 amendments before being replaced by The Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021, SSI 2021/277, which is currently in force.

<sup>48</sup> For instance, see The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, SSI 2020/103 ss 3, 4, 5, 6.

<sup>49</sup> The Health Protection (Coronavirus) (Requirements)(Scotland) Amendment (No. 2) Regulations 2021, SSI 2021/349.

effectively minimises procedural, practical, and political avenues for rights-based contestations about alleged proportionality, necessity, and legality of measures proposed in the SSI in question. In other words, the decision effectively determines the opportunity for Parliament to contest claims of the measure's rights-compatibility and, as we discuss more below, creates a scenario in which parliamentarians may consider themselves unable in practice to refuse to approve the measure when it finally comes before them. In a system where it is broadly understood that the parliament is to be the primary institution engaged in limiting government action,<sup>50</sup> including on the basis of rights, squeezing the space in which such rights-protecting work can take place by using the Made Affirmative Procedure is, clearly, a consequential manoeuvre. Ultimately the notion of urgency is a matter of judgment for the relevant Scottish Minister. The frequent use of the Made Affirmative Procedure over the period from which our sample is extracted suggests that Scottish Ministers were of the view that there was a constant condition of urgency justifying its use. However, on at least one occasion—in respect of regulations to mandate the use of 'COVID certification' for entry to certain premises—consideration of the policy timeline raises clear questions about how any robust claim of urgency could be advanced and, given the very clear rights-related criticisms of restricting access to such locations on the basis of either vaccination or recovery, how or when MSPs could push the Scottish Government to establish the proportionality of the measure.

The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No 2) Regulations 2021 was made at 11:39 am on 30 September 2021. A draft of the regulations was provided to MSPs on 29 September, and the instrument itself was laid before Parliament at 3:30 pm on 30 September. It came into force on 1 October at 5am. While the timeline might well suggest that introduction of the measure was urgent, the instrument had a much longer policy formation provenance. The decision to impose a certification scheme was first announced to the Chamber by the First Minister of Scotland on 3 August 2021,<sup>51</sup> almost two months before the instrument was made. At that time MSPs questioned the First Minister on the policy. On 9 September—still three weeks before the SSI was made—the Government published a 'Strategy/Plan' which contained proposals for the scheme, and the Chamber held a debate of just over two hours on a motion on a COVID Vaccination Certification Scheme that was introduced by the Cabinet Secretary for Covid-19 Recovery. However, like the published

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<sup>50</sup> This draws on Horsley's functional approach as outlined in Horsley T., "Constitutional functions and institutional responsibility: a functional analysis of the UK constitution" (2022) 42(1) *Legal Studies* 99-119.

<sup>51</sup> Scottish Parliament Official Record 3 August 2021, col 4.

Strategy/Plan, the motion presented only a very broad outline on how the Government proposed such a scheme would work.<sup>52</sup> Nevertheless this debate made it very clear that the issue was fraught with controversy, with the Conservatives, Labour and the Liberal Democrats all voting against it. The Covid-19 Recovery Committee held three evidence sessions (on 16, 23 and 30 September) to gather views on the scheme, although the draft SSI was not laid before Parliament until late on the afternoon of 30 September. This capsule chronology of the Regulation makes it very difficult to understand how it could be that the Scottish Minister considered that there was such urgency about introducing the measure as to require use of the Made Affirmative Procedure, and gestures towards the potential for the Made Affirmative Procedure to be used as a mode of scrutiny-avoidance (or at least minimisation) rather than being limited to situations of *bona fide* urgency including when, as here, there was clearly substantial contestation as to its rights-compliance.

When compared to the process for making primary legislation, the Made Affirmative Procedure is an extraordinarily light-touch process. SSIs made under the Made Affirmative Procedure must be laid before Parliament but can come into force before being laid. In our sample most SSIs were laid before they came into force (n=58), but the time between being laid and coming into force was generally extremely short, varying from one sitting day (n=28) to seven (n=2) and many being laid on the same day as they came into force (n=12).

Unless already expired (as four of our sample were), SSIs made under the Made Affirmative Procedure must be approved within 28 sitting days of being made. However, recess—during which there are no sitting days—necessarily extends this time. Five SSIs within our sample were made while Parliament was in recess, and in other cases recess took place within 28 calendar days of the SSI being made thus extended the ‘real’ time during which they were in force without being approved. Indeed, 22 SSIs within our sample were not approved until more than twenty-eight *calendar* days had passed after being made. While this might, perhaps, be considered unavoidable (after all, recesses are necessary), it is apposite to consider how quickly after recess the SSI was approved; in other words, were efforts made to ensure that the recess did not *unduly* extend the time it was in force prior to approval? Within our sample there is a mixture of practice in this respect. While the 2020 Summer recess ended on 9 August, SSIs made before or during that recess were approved only on 26 August. Likewise, SSIs whose periods were extended due to the recess for the 2021 General Elections were approved on 9

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<sup>52</sup> Scottish Parliament Official Record, 9 September 2021, cols 77-127.

June although Session Six had started on 13 May. In contrast, 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 *per se* was complied with.

Importantly, within our sample we identified one case where the Government made a ‘chain’ of SSIs, all extending in substance a particular set of regulations but by different instruments expired or superseded within the 28-sitting-day period. The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020 (SSI 2020/318) contained a series of measures regarding, for example, closure of premises, restrictions on public gatherings and mask wearing, and was made on 9 October 2020. However, no motion of approval was moved because on 22 October the Scottish Government used another SSI also made by the Made Affirmative Procedure, The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) Amendment (No.2) (Scotland) Regulations 2020 (SSI 2020/329), to extend them in substance to 2 November. As each individual SSI within the chain is expired before the 28-sitting-day rule is engaged the need for approval never arises, and the substantive law continues in force without being subjected to real scrutiny and, although exceptional, such a ‘chain’ of SSIs exposes sharply the dilemma posed by the Made Affirmative Procedure and importance of self-restraint in its use.

While the way in which the Scottish Government has used the Made Affirmative Procedure during the pandemic is suggestive of an inclination towards reducing exposure to scrutiny, the Scottish Parliament does generally have some opportunity to scrutinise; an opportunity that it seems not to have taken full advantage of in the Chamber. While almost all the SSIs in our sample were approved by the Chamber, only six of the SSIs within our sample were debated by the Chamber at all, and two of those were debated on the same day.<sup>53</sup>

The debates themselves are very short (in our sample they lasted for between 5 and 10 minutes) and feature very few speakers (usually only the Minister and one or two MSPs). In total, over the 20 months that our sample covered, the Chamber spent a mere 35 minutes debating the 64 SSIs made by Scottish Ministers under s. 1(1) of Schedule 19 of the Coronavirus Act 2020: SSIs that introduced substantive limitations on everyday life including lockdowns, calling into

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<sup>53</sup> Scottish Parliament Official Report cols 97-100 (20 January 2021).

question the extent to which the Chamber is actively engaged in scrutinising this substantial body of legislative activity. The procedure for approving of SSI made using the Made Affirmative Procedure did very little to prompt meaningful scrutiny. Until the end of November 2020, motions of approval were put to a vote without even a statement by a Scottish Minister introducing the content and significance of the SSI in question, although now a Scottish Minister usually introduces the SSI through a short statement. Nevertheless, as MSPs almost never speak against an approval motion: from our sample only seven SSIs (including the six that had been debated) were subject to a vote on a division.

### **III. Rights, Parliament, and the Pandemic: Lessons for the Future**

We contend that the hardwiring of rights into the legislative machinery of the Scottish Parliament—both through the Scotland Act 1998 and through practices of rights-mainstreaming and parliamentary process—has had impressive effects in the context of primary law-making. In other words, the pandemic context does not seem unduly to have disturbed rights as a critical part of the legislative landscape in Scotland as it relates to the making of primary legislation. It further seems to be the case that these effects are quite well amplified by practices of the Scottish Government that suggest a broad commitment to shared power with the Parliament. In part, we contend that this can be understood as a product of more than 20 years of the Scottish Parliament developing and implementing modes of seeking to ensure that rights are meaningfully engaged with in the legislative process. In other words, effective and meaningful engagement with rights even in emergency primary law-making is enabled by legal, procedural, and politico-cultural factors all of which require a little more elaboration at this point.

The Scotland Act 1998 placed human rights at the heart of parliamentary law-making in Scotland by making it clear that the Parliament has no competence to legislate in a manner incompatible with human rights.<sup>54</sup> So central is this delineation of competence that Adamson has claimed that “[t]he Parliament developed its processes and procedures around this competence and has prided itself on the fact that its grounding in human rights principles...ensured that legislation received robust scrutiny”.<sup>55</sup> There is no emergency

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<sup>54</sup> s. 29, Scotland Act 1998.

<sup>55</sup> Bruce Adamson, “The Protection of Human Rights in the Legislative Process of Scotland” in Murray Hunt, Hayley J. Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Oxford: Hart Publishing, 2015), 195.

exception to this; the Scottish Parliament's competence is *always* limited by human rights and thus it must always attend to rights, to some extent, in its deliberations. The legal design of its competence thus means that the Scottish Parliament is, simply put, accustomed to talking about rights in its legislative and other deliberations; rights are, and are taken seriously as, an ordinary part of parliamentary process and, where they exist, contestations are around their demands and content and not around their relevance to legislative and government activity.

Reflecting and supporting this is the development of procedural norms and requirements that tend to support the mainstreaming of rights into parliamentary processes through ensuring that questions of competence (which include, necessarily, questions of rights-compliance) are considered. We have already mentioned the requirements for statements of competence by the Presiding Officer<sup>56</sup> and the person in charge of the bill,<sup>57</sup> as well as the policy memorandum required by the Standing Orders and which often includes a proportionality analysis.<sup>58</sup> Notwithstanding their bureaucratised provenance as a matter of parliamentary practice,<sup>59</sup> these memoranda force a serious engagement with human rights *law* on the part of the Executive and generate opportunities for rights-related concerns to be raised in committees and the Chamber and for the Government's claims of rights compliance to be contested and tested seriously.

Further, as it is the Scottish Parliamentary Bureau that manages the arrangement of business,<sup>60</sup> rather than the government through programme motions and standing orders, the Executive cannot 'set the pace'—or at least not entirely. When it comes to the Scottish Acts, for example, considerable time could be allocated to debate them so that, for example, that every single substantive amendment lodged by MSPs and by the government could be debated.<sup>61</sup> This was the case even though the Scottish parliament passed the two Scottish Acts as 'emergency bills' subject to the 'fast-track' legislative procedure.<sup>62</sup> The default position in these cases is that the three stages of the Bill are taken on the same day, that committee stage is taken in a Committee of the Whole Parliament, and bills are not referred to a subject select committee to report to the

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<sup>56</sup> s. 31(2) Scotland Act 1998.

<sup>57</sup> s. 31(1) Scotland Act 1998 as amended.

<sup>58</sup> As recognised in *A v Scottish Ministers* 2002 SC (PC) 63, at 66.

<sup>59</sup> McCorkindale, C and Hiebert, J "Vetting Bills in the Scottish Parliament for Legislative Competence" (2017) 21 Edinburgh Law Review 319.

<sup>60</sup> Scottish Parliament, Standing Orders, 6<sup>th</sup> Edition, 3<sup>rd</sup> Revision (8 October 2021), Chapter 5.

<sup>61</sup> In the case of the first Act, 59 amendments were lodged at committee stage. In the case of the second Act, a total of 56 amendments were lodged at committee stage; and further 94 amendments were lodged at stage three.

<sup>62</sup> Scottish Parliament, Standing Orders, 6<sup>th</sup> Edition, 3<sup>rd</sup> Revision (8 October 2021).



Chamber on its general principles. However, in the case of the second Scottish Act this accelerated procedure was extended,<sup>63</sup> its stages were spread out, and the Bill was referred at stage one to the COVID-19 Committee, which held two oral evidence sessions on it a day later.<sup>64</sup> By not having the three stages on three consecutive days, MSPs had more opportunities to prepare amendments, have informal talks, engage with the government, and consult with relevant stakeholders (especially in the COVID-19 Committee)<sup>65</sup> on the issues arising from the government's legislative proposals. It thus gestures towards a willingness to use processes for emergency law-making in a manner that is less constraining on parliament than the standing orders would permit.<sup>66</sup>

Finally, there are important if somewhat unquantifiable politico-cultural factors that are no doubt important here. In some ways such factors may appear intangible. The practice of the First Minister to always make pandemic-related policy announcements to the Parliament, for example, rather than by means of press conference,<sup>67</sup> may be perceived as a matter of mere etiquette, however it is better understood within the broader context of the 'vision' underpinning the Scottish Parliament (as one of shared power between Government, Parliament, and people)<sup>68</sup> as a decision that indicates the Executive's willingness to open itself to scrutiny—including rights-based scrutiny—in Parliament. A similar observation might be made about the Scottish Government's commitment to review and report to the Scottish

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<sup>63</sup> The first Act was introduced on 30 March 2020, just a week after the Legislative Consent Motion on the Coronavirus Act 2020, and had all of its parliamentary stages on 1 April 2020 thus conforming more closely to the 'usual' acceleration associated with emergency bills.

<sup>64</sup> COVID-19 Committee Official Record 12 May 2020 cols 2-39.

<sup>65</sup> In oral evidence sessions the Committee heard evidence from representatives of the Law Society of Scotland, and the Cabinet Secretary for the Constitution, Michael Russell MSP (SNP) accompanied by Mr Luke McBratney, Bill Team Leader, and the sessions engaged in depth with questions of human rights. *Ibid.*

<sup>66</sup> This is not to suggest that there has been no controversy as to the timing of debates on primary legislation during the pandemic. The Coronavirus (Extension and Expiry) (Scotland) Act 2021 was announced on 9 June 2021, and it was made clear that the Government intended to complete its passage through Parliament before recess on 27 June 2021. Not surprisingly this led to criticism and expressions of concern about the need to secure proper parliamentary scrutiny for this Bill (Scottish Parliament Official Report 9 June 2021 cols 25-28, Murdo Fraser MSP, Conservative and Alex Cole-Hamilton MSP, LibDem) and on 22 June, Conservative and Liberal Democrat MPs opposed the business motion scheduling the Extension Act as an emergency Bill for the third week of June 2021, effectively the very last week before summer recess (Scottish Parliament Official Record 22 June 2021 cols 3-7). It is also worth noting that although this Bill also had its three stages in three separate days, these were consecutive days (22, 23 and 24 of June), thus effectively constraining MSPs participation, when compared to the second Act. It is thus not to be taken as inevitable that the Scottish government was wholly committed to scheduling these debates in a way that alleviated time pressures on the Parliament, but merely that it could and, on one occasion, did take that approach.

<sup>67</sup> See further Ewing, K, 'Covid-19: Government by Decree' (2020) 31 *King's Law Journal* 1, 24.

<sup>68</sup> St Denny E, 'The Scottish Parliament' in *The Oxford Handbook of Scottish Politics* (Oxford University Press 2020), 483.

Parliament on the use of powers under the Coronavirus Act 2020 even though that was not required by the statute,<sup>69</sup> or the willingness of ministers to engage regularly and under robust questioning in parliamentary committee's legislative hearings on the Scottish Acts. Importantly, MSPs also enacted a politico-cultural commitment to mainstreaming human rights within legislative debates through both the rights talk already mentioned and their express reliance (in committee and in the Chamber) on representations from civil society organisations<sup>70</sup> to outline criteria for assessing the legitimacy of restrictions on individual rights,<sup>71</sup> to raise specific concerns regarding human rights<sup>72</sup> or parliamentary scrutiny,<sup>73</sup> to call for the adoption of legislative<sup>74</sup> or non-legislative measures,<sup>75</sup> to support or to reject an amendment,<sup>76</sup> to acknowledge that the evidence motivated the MSP to lodge an amendment,<sup>77</sup> or to recognise assistance in writing amendments.<sup>78</sup> Not only, then, were rights recognised as a matter for parliamentary debate and discussion within pandemic-related legislative processes, but so too were principles of Executive accountability to Parliament honoured by both Government and MSPs even when time was short. This is not, of course, to suggest a constitutionalist utopia in Holyrood, or to discount the fact that 'mere' politics (including parliamentary arithmetic or the desire to show that parliament considered rights carefully in case of future litigation) played its part in the Scottish Executive's commitment to these practices, but it is to say that the persistence of these practices in an emergency context suggests a kind of embeddedness that gestures towards the resilience of rights in processes of primary law-making in this and future crises in Scotland.

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<sup>69</sup> Scottish Parliament Official Report col 59-60 24 March 2020.

<sup>70</sup> See for example references in Scottish Parliament Official Record 1 April 2020 cols 13, 17, 21, 23, 84, 98, 122, 129; Scottish Parliament Official Record 13 May 2020 col 86; Scottish Parliament Official Record 19 May 2020 col 38, 99; Scottish Parliament Official Record 20 May 2020 cols 52-59, 78.

<sup>71</sup> Scottish Parliament Official Record 1 April 2020 col 17 (Alex Rowley MSP, Labour).

<sup>72</sup> Scottish Parliament Official Record 13 May 2020 col 74 (Jaimie Greene MSP, Conservative).

<sup>73</sup> Scottish Parliament Official Record 13 May 2020 col 81-82 (Liam Keer MSP, Conservative).

<sup>74</sup> Scottish Parliament Official Record 20 May 2020 cols 31, 34, 36 and 38 (Alison Johnstone MSP, Green), 53 and 54 (Patrick Harvie MSP, Green), 58 and 59 (Andy Wightman MSP, Green). See also Scottish Parliament Official Record 1 April 2020 cols 163 and 164 (Andy Wightman MSP, Green).

<sup>75</sup> Scottish Parliament Official Record 1 April 2020 col 22 (Rona Mackay MSP, SNP).

<sup>76</sup> Scottish Parliament Official Record 1 April 2020 col 129 (support, Minister for Europe and International Development), 35 (reject, Adam Tomkins MSP, Conservative), 21 (reject, Alex Cole-Hamilton MSP, LibDem); Scottish Parliament Official Record 19 May 2020 cols 9 (reject, Minister for Local Government, Housing and Planning), 16 (support, Neil Findlay MSP, Labour), 66 (reject, Monica Lennon MSP, Labour), 70 (support, Ross Greer MSP, Green).

<sup>77</sup> Scottish Parliament Official Record 1 April 2020 col 99 (Shelter Scotland), 118 (Law Society of Scotland), 119 (Law Society of Scotland).

<sup>78</sup> Scottish Parliament Official Record 1 April 2020 cols 99 and 100 (Andy Wightman MSP, Green), 118 (Monica Lennon MSP, Labour).

However, in future pandemics, as in this one, there is a clear plan for most day-to-day responsive law-making to take the form of delegated legislation. Part 1 of the Coronavirus (Recovery and Reform) (Scotland) Bill proposes to insert a new Part 5A to the Public Health etc., (Scotland) Act 2008. Proposed Part 5A would comprise new sections 86A, 86B, 86C, 86D, 86E, 86F 86G, 86H of the 2008 Act, laying out new powers for Scottish Ministers to make regulations in response to public health emergencies. These powers are extensive. To a large degree, they mirror those that were contained in Schedule 19 of the Coronavirus Act 2020, but there are two important differences worth noting here. The first is that the Bill prescribes a clear threshold to trigger the powers, namely that the 'infection or contamination' in response to which regulations may be made is to be understood as one that 'presents or could present significant harm to human health';<sup>79</sup> a standard that is familiar from the broader content of the 2008 Act. However, proposed section 86F (d) contains a significant Henry VIII power that enables Scottish Ministers to modify any enactment, including the Act itself, by means of regulation. There does not seem to be any explanation for this in the policy memorandum. While section 5 of Schedule 19 to the Coronavirus Act 2020 outlines several things the regulations may do, many of these are reflected in the proposed new section 86(f) but the permission to modify any enactment seems fresh in the Bill. This is clearly a matter of concern, not only because of the in principle undesirability of Henry VIII powers of this kind, but also because as introduced the Bill does not contain any provisions or proposals to limit the use of the Made Affirmative Procedure in spite of its manifest overuse in the pandemic and the sense—as outlined in our analysis in Part II—that in the absence of the disciplines of competence and parliamentary processes familiar in respect of primary legislation, both the Scottish Government and Parliament engage less effectively with rights as a limitation in the realm of delegated law-making.

The Bill envisages that regulations under these new – now permanent – powers would be subject to the affirmative procedure as the default position. This is confirmed in the policy memorandum (paras 63-65), and results from s. 1(3) of the Bill, which inserts proposed s. 86(A)(1) in s. 122 of the Public Health etc (Scotland) Act 2008. The effect of that amendment is that regulations made under section 86A(1) are to be made under the procedure stated in section 122(5) (affirmative procedure), but may be made under 122(6) (made affirmative procedure) “if the Scottish Ministers consider that the regulations need to be made urgently”.

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<sup>79</sup> S. 86A(2)(a) Coronavirus (Recovery and Reform) (Scotland) Bill.

At present the urgency ‘threshold’ is entirely subjective; the test is merely that the Scottish Minister considers the regulation needs to be made urgently. There is no mechanism by which the Scottish Parliament can effectively challenge the grounds or robustness of this determination and the practices outlined in Part II certainly open the possibility that the Scottish Government had gotten into a habit of overusing this scrutiny-lite procedure, at least in respect of the pandemic. Certainly, there are indications that the Scottish Parliament itself is concerned about this. In its recent *Inquiry into the use of the made affirmative procedure during the coronavirus pandemic* (2022), the Delegated Powers and Law Reform Committee (DPLRC) expressed concern that the urgency requirement does not operate as an effective constraint on the power to use the Made Affirmative Procedure and recommended that in the future a ministerial statement of reasons should be required explaining *why* the Minister considers there to be urgency such that this is the appropriate procedure to use.<sup>80</sup> It has also recommended that Ministers provide an assessment of the impact of the delegated legislation to be made using the Made Affirmative Procedure.<sup>81</sup> The Committee reiterated these principles in its recent report on the Coronavirus (Recovery and Reform) (Scotland) Bill, and recommended that, for each of the delegated powers in the bill, the Scottish Government ought to bring forward amendments to introduce the following statutory requirements for Scottish Ministers employing the Made Affirmative Procedure: (i) a written statement on the evidence and explanation as to why the regulations need to be made urgently; and (ii) an assessment of the impact of the instrument on those affected by it,<sup>82</sup> and the Deputy First Minister so far seems quite open to the suggestion. The apparent purpose of justification statements would be to assist the Scottish Parliament and its committee(s) to determine whether it agreed that the use of Made Affirmative Procedure was effectively justified and thus to enable more effective parliamentary oversight. *Ex ante* impact assessments would be intended to provide a focus for rights-related (and other) contestation and to impose a bureaucratic burden on the Government that would require it to both forecast and justify impacts through a human rights lens in a manner presumably less extensive (for the purposes of time) but similarly illuminating to the policy memoranda that accompany primary legislation.

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<sup>80</sup> Delegated Powers and Legislative Reform Committee, *Inquiry into the use of the made affirmative procedure during the coronavirus pandemic*, SP 110 (Session 6), at para 75.

<sup>81</sup> *Ibid.*, at paras 9-10 and 87.

<sup>82</sup> Delegated Powers and Law Reform Committee, *Coronavirus (Recovery and Reform) (Scotland) Bill: Stage 1*, SP 147 (Session 6) at paras 21-24. The Committee also proposed that statutory instruments made under these powers be subject to sunset clauses (para 23).

## Conclusion

The COVID-19 pandemic is widely considered to have ushered in a situation of *de facto* emergency requiring and justifying the imposition of significant limitations on everyday life with clear implications for human rights.<sup>83</sup> In such circumstances, the seriousness of Parliament's engagement with core questions of justification, necessity, proportionality, and sufficiency is self-evident. The Scottish Parliament certainly cannot be described as having been passive over the course of the pandemic so far. Instead, as we have shown in this paper, it has challenged Government claims, insisted on attention to human rights, and engaged in significant levels of scrutiny in respect of primary law-making. Although it has not always led to the changes MSPs desired, our analysis shows that parliamentary engagement with rights *did* go beyond mere rhetoric to bring about substantive changes to the proposed legislation; rights talk became rights action.

Importantly, the Scottish Government has accepted this; it has not only done what it is statutorily required to do (such as certifying competence to pass legislation) but also what shows a commitment to accountability to and shared decision-making with Parliament. By means of illustration, the First Minister of Scotland makes her statements of policy in the first instance to Parliament, not to the press; Ministers have developed systems of regular appearance before and coworking with committees;<sup>84</sup> reports on the status and impacts of powers under the Scottish Acts and under the Coronavirus Act 2020 have been extensive, detailed, and fully engaged with rights;<sup>85</sup> and both *ex ante* and *ex post facto* impact assessment has steadily improved in quality as the pandemic has developed.<sup>86</sup> Thus, when it comes to primary legislation, both the Parliament and the Scottish Government have shown themselves willing and able to maintain 'normal' commitments to rights, participation, challenge, and

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<sup>83</sup> For a broad analysis see esp. Alan Greene, *Emergency Powers in a Time of Pandemic* (Bristol: Bristol University Press, 2020).

<sup>84</sup> As part of the wider package of agreements to improve the scrutiny of COVID-19 regulations at Parliament agreed in November 2020, the Scottish Government agreed to make a Scottish Minister available to give evidence to the Covid Recovery Committee (previously, the COVID-19 Committee) on a weekly basis. This means that the Cabinet Secretary for the Constitution and the National Clinical Director plus other top civil servants appeared before the COVID-19 Committee on a weekly basis, with the Cabinet Secretary attending some 25 committee sessions as part of this commitment. This practice has continued during session six, although a variety of 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).

<sup>85</sup> These reports are all available at <https://www.gov.scot/collections/coronavirus-covid-19-legislation/#reportsoncoronaviruslegislation> [Accessed 5 January 2022].

<sup>86</sup> McCall-Smith K, "Good better best? Human rights impact assessment in crisis lawmaking" (2022) *International Journal of Human Rights* <https://doi.org/10.1080/13642987.2022.2057955>

effective oversight over the course of the pandemic. That this is so should not be taken for granted, after all situations of emergency often expose the fault-lines of ‘normalcy’: the dominance of executives, the pliancy of Parliaments, the marginalisation of rights. Just such a trend has been observed in numerous parliamentary systems over the last two years, and it is both welcome and notable that in Scotland the ordinary rigours of primary law-making seem to have been maintained. Certainly, the fact that for much of the pandemic the Scottish Government was a minority government<sup>87</sup> required to engage in the kinds of compromise and coalition building commonly observed when governments cannot easily command a parliamentary majority<sup>88</sup> is relevant, but arithmetic alone is not sufficient to explain the contestation over and engagement with rights that we detect across the processes of making, debating, and passing the Scottish Acts. Rather, this engagement reflects and perhaps testifies to the long-standing practices of cooperation, power-sharing, and rights-based challenge in the Scottish Parliament, and tends to suggest an embeddedness of rights-conscious political culture in that jurisdiction.

It is clear, however, that there are deficiencies in the acculturation of this commitment in respect of delegated law-making. Not only has the Scottish Government availed excessively of the Made Affirmative Procedure to make delegated legislation in the most scrutiny-lite way available, but the Scottish Parliament has failed effectively to challenge this practice. In part, the recent inquiry by the DPLRC suggests that MSPs are conscious of the ways in which Executive overuse of the Made Affirmative Procedure undermines and marginalise parliamentarians in their oversight and legislative roles, but there is less appreciation of the ways in which MSPs themselves have acceded to this practice by failing properly to challenge it. Certainly one may argue that SSIs passed using the Made Affirmative Procedure are a *fait accompli* by the time the Parliament comes to consider them because they are already in force, being implemented, and being complied with.

However, if the mere fact of an SSI being in force were sufficient to suggest that Parliament ought always to approve it, then the requirement for approval would be entirely redundant. It must be the case that a refusal to approve an SSI made using the Made Affirmative Procedure is not only possible but foreseeable. As Tucker has noted elsewhere, the possibility of defeat is

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<sup>87</sup> The 2016 elections delivered an SNP minority government, having elected 63 MSPs, two seats short of a majority. By April 2020, that majority had reduced to 61 seats, since two MSPs had resigned the SNP over allegations of inappropriate conduct in early 2018 (Mark McDonald) and early 2020 (Derek Mackay).

<sup>88</sup> James Mitchell, “New Parliament, New Politics in Scotland” (2000) 53(3) *Parliamentary Affairs* 605.

part of meaningful scrutiny.<sup>89</sup> It stands to reason, then, that without it the mechanisms of scrutiny are merely performative. Bearing in mind the very wide delegation of powers to make regulations that existed during the COVID-19 pandemic, and that is anticipated for future pandemics, such a possibility is worrying indeed and undermines the Scottish Parliament's performance in respect of primary law-making.

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<sup>89</sup> Adam Tucker, "Parliamentary Scrutiny of Delegated Legislation" in Horne and Drewry (eds), *Parliament and the Law* (2018; Hart Publishing), 363.

## Appendix 1: Rights-mapping of proposed amendments in the two Scottish Acts<sup>90</sup>

Right involved	Measures proposed 1 <sup>st</sup> Act	Measures proposed 2 <sup>nd</sup> Act <sup>91</sup>
Right to Housing	<p>Proposing rent-free periods (amendment 1 at stage two)</p> <p>Proposing various different types of protection from eviction (amendment 2-20 at stage two)</p> <p>Enabling students to ask for early termination of tenancy in student-purpose built accommodation (amendment 49 at stage two)</p>	<p>Enhancing students' proposed right to terminate student tenancies with seven days notice (amendments 6-8 at stage three)</p> <p>Proposing council tax exemptions for purpose-built student accommodation in certain circumstances (amendment 46-47 at stage two and amendment 91 at stage three)</p> <p>Establishing tenancy hardship funds for various purposes (amendment 16 at stage two; amendment 10 at stage three)</p> <p>Proposing 2-year rent freeze (amendment 17 at stage two; amendment 11 at stage 3)</p> <p>Disregarding rent arrears under varied conditions (amendments 18-20 at stage two; amendments 12-14 at stage three)</p> <p>Pre-action requirements for Landlords if they plan to apply for an order for possession or eviction</p>

<sup>90</sup> The list of amendments for each of the two Scottish Acts can be found in the following links:

A list of "Groupings of Amendments for Stage 2" of the Coronavirus (Scotland) Bill can be found at: <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/coronavirus-scotland-bill/stage-2/groupings-of-amendments-at-stage-2-coronavirus-scotland-bill.pdf> [Accessed 6 January 2022].

A List of "Groupings of Amendments for Stage 2" of the Coronavirus (Scotland) (No. 2) Bill can be found at: <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/coronavirus-scotland-no2-bill/stage-2/groupings-of-amendments-at-stage-2-coronavirus-scotland-no2-bill.pdf> [Accessed 6 January 2022].

A List of "Groupings of Amendments for Stage 3" of the Coronavirus (Scotland) (No. 2) Bill can be found at: <https://www.parliament.scot/-/media/files/legislation/bills/current-bills/coronavirus-scotland-no2-bill/stage-3/groupings-of-amendments-at-stage-3-coronavirus-no2-scotland-bill.pdf> [Accessed 6 January 2022].

<sup>91</sup> Unless otherwise stated, amendments indicated below were lodged at stage 2.



		on the grounds of rent arrears (amendment 9 at stage three).
Socio-economic rights	Establishing tenancy fund attached to the Scottish Welfare Fund administered by Local Councils for those that cannot pay their rent (Amendment 48 at stage two)	Supplementing young carer grant (amendment 23 at stage two) Social care staff support fund (amendment 24 at stage two and amendment 16 at stage three) Expansion of concessionary travel for various groups (amendment 38 at stage two; amendments 81-82 at stage three) Proposing living-wage requirements as a condition of procurement contracts (amendment 55 at stage two)
Rights of the child	N/A	Protection against criminal penalties arising from breaching COVID-19 regulations for young people under 18 (Amendment 3 at stage two)
Right to marry	N/A	Duty to continue the solemnisation of marriages and civil partnerships during the pandemic (amendment 36 at stage two and amendments 73-78 at stage three) Permission to host marriage ceremonies in places of worship (amendment 37 at stage two)
Right to a fair trial	Suspension of trial by jury (amendment 24 at stage two) Adjusting rules on admissibility of hearsay evidence (amendments 25-26 at stage two)	N/A
Right to association Labour rights	N/A	National collective bargaining for the private social care sector

		<p>(amendment 21 at stage two and amendment 15 at stage three)</p> <p>Trade union health and safety fund (amendment 32 at stage two)</p> <p>Conditionality of access to business financial support on allowing access to its employees for representatives of trade unions (amendment 54 at stage two and amendment 2 at stage three)</p> <p>Conditionality on public procurement contracts for goods and services for a COVID-19 related reason (amendment 3 at stage three)</p>
Human rights and equality duties	Duties to have regard to opportunities to advance equality and non-discrimination in exercising emergency powers (amendment 54 at stage two)	<p>Imposing inclusive communications when exercising the powers under the bill (amendment 51 at stage two and amendment 1 at stage three)</p> <p>Duty on Scottish Ministers to request information from the police on incidences of domestic violence/abuse (amendment 52 at stage two and amendment 4 at stage three)</p>
<p>Right to the highest attainable standard of physical and mental health</p> <p>Right to life</p>	Duties on local authorities and health boards to report on the use of powers relating to mental health provisions conferred by the Act in relation to their impact on human rights (Amendment 59 at stage two)	<p>Authorisation for pharmacists to prescribe, free of charge, oral or other self-administered contraception (amendment 25 at stage two)</p> <p>Imposing reporting duties regarding coronavirus deaths in care homes (amendment 33 at stage two)</p> <p>Imposing reporting duties on the care inspectorate on inspections to</p>

		<p>care homes (amendment 30 at stage two)</p> <p>Powers to set conditions, to intervene, and to purchase care homes in cases of emergencies (amendments 26, 27, 34 at stage two, and amendments 25-72 and 83 at stage three)</p> <p>Imposition of conditions to protect public health through regulations before businesses may re-open (amendment 29 at stage two)</p> <p>Imposition of a series of conditions and reporting duties on care homes (amendment 79 at stage three)</p>
Right to information	Restricting extension of time to respond to FOI requests (Amendments 28-47, 56-57 at stage two)	<p>Reducing the extension of time to respond to FOI requests (amendment 7 at stage two)</p> <p>Requiring Scottish Information Commissioner to take public interest into account assessing a public authority's failure to comply with FOI timescales (amendment 48 at stage two)</p> <p>Repealing rules on FOIs in the first Scottish Act (amendments 9-14 at stage two; amendments 87-89 at stage three)</p> <p>Requiring Scottish Ministers to report the number of FOI requests they have failed to respond to, number of requests received and backlog (amendment 45 at stage two)</p>

<b>Regulations</b>	<b>Made</b>	<b>Laid before Parliament</b>	<b>Came into force</b>	<b>Debated/approved before the Chamber</b>	<b>Comments</b>
<a href="#">The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (SSI 2020/103)</a>	7.15 pm, 26 March 2020	27 March 2020	When made	1 April 2020 Neither debated, nor voted on	Came into force before being laid in Parliament First SSI introducing lockdown regulations. Notable SSI: introduced comprehensive regulations on lockdown
<a href="#">The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment Regulations 2020 (SSI 2020/106)</a>	8.30 am, 1 April 2020	10.00 am, 1 April 2020	When made	1 April 2020 Neither debated, nor voted on	Came into force before being laid in Parliament
<a href="#">The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 2) Regulations 2020 (SSI 2020/126)</a>	9.00 am, 21 April 2020	11.00 am, 21 April 2020	When made	6 May 2020 Neither debated, nor voted on	Came into force before being laid in Parliament
<a href="#">Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 3) Regulations 2020 (SSI 2020/164)</a>	11.00 am, 28 May 2020	2.00 pm, 28 May 2020	29 May 2020	10 June 2020 Neither debated, nor voted on	Laid before coming into force
<a href="#">The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 4) Regulations 2020 (SSI 2020/182)</a>	12.00 pm, 18 June 2020	4.30 pm, 18 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	24 June 2020 Neither debated, nor voted on	Laid before coming into force

			prayer or contemplation. (22 June 2020)		
<a href="#">The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 5) Regulations 2020 (SSI 2020/190)</a>	11.45 am, 26 June 2020	3.00 pm, 26 June 2020	29 June 2020	26 August 2020 Neither debated, nor voted on	Laid before coming into force Approved by the Chamber two months after being made (2020 summer recess intervened)
<a href="#">The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 6) Regulations 2020 (SSI 2020/199)</a>	12.36 pm, 2 July 2020	4.00 pm, 2 July 2020	3 July 2020, except regulation 2(2) (6 July 2020)	26 August 2020 Neither debated, nor voted on	Laid before coming into force Approved by the Chamber one month and three weeks after being made (2020 summer recess intervened)
<a href="#">The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 7) Regulations 2020 (SSI 2020/210)</a>	1.50 pm, 9 July 2020	3.30 pm, 9 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 2020 Neither debated, nor voted on	Laid before coming into force Approved by the Chamber one month and two weeks after being made (2020 summer recess intervened).
<a href="#">The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No. 8) Regulations 2020 (SSI 2020/211)</a>	11.08 am, 14 July 2020	1.30 pm, 14 July 2020	15 July 2020, except regulation 2(5)(d) and (f) to (h) (22 July 2020)	26 August 2020 Neither debated, nor voted on	Laid before coming into force Approved by the Chamber one month and one week after being made (2020 summer recess intervened)
<a href="#">The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendments (No.9) Regulations 2020 (SSI 2020/232)</a>	30th July 2020	31 July 2020	31 July 2020, except regulation 2(2)(b)(i) and (d) (3 August 2020)	26 August 2020 Neither debated, nor voted on	Laid on the same day the SSI came into force

<a href="#">The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendments (No.10) Regulations 2020 (SSI 2020/236)</a>	11.05 am, 7 August 2020	3.00 pm, 7 August 2020	8 August 2020	26 August 2020 Neither debated, nor voted on	Laid before coming into force
<a href="#">The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendments (No.11) Regulations 2020 (SSI 2020/241)</a>	2.40 pm, 13 August 2020	4.30 pm, 13 August 2020	14 August 2020	9 September 2020 Neither debated, nor voted on	Laid before coming into force
<a href="#">The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendments (No.12) Regulations 2020 (SSI 2020/251)</a>	1.00 pm, 21 August 2020	3.00 pm, 21 August 2020	24 August 2020	9 September 2020 Neither debated, nor voted on	Laid before coming into force
<a href="#">The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendments (No.13) Regulations 2020 (SSI 2020/261)</a>	10.15 am, 27 August 2020	2.00 pm, 27 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 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
<a href="#">The Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Regulations 2020 (SSI 2020/262)</a>	1.14 pm, 27 August 2020	4.00 pm, 27 August 2020	28 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 of the sample to be subject to a vote in the Chamber
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations</a>	10.58 am, 11 September 2020	3.00 pm, 11 September 2020	14 September 2020	8 October 2020 Neither debated, nor voted on	Laid before coming into force Notable SSI: introduced comprehensive regulations on lockdown

<a href="#">2020 (SSI 2020/279)</a>					replacing SSI 2020/103
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Amendment Regulations 2020 (SSI 2020/300)</a>	24 September 2020	25 September 2020	25 September 2020	8 October 2020 Neither debated, nor voted on	Laid on the same day the SSI came into force
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020 (SSI 2020/318)</a>	11.55 am, 9 October 2020	4.00 pm, 9 October 2020	18.00 on 9 October 2020, except regulations 7, 11, 12, 16, and 17 (10 October 2020)	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 to a vote. Notable SSI: introduced a series of temporary measures and applies different measures to different areas within Scotland
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) Amendment (Scotland) Regulations 2020 (SSI 2020/325)</a>	1.50 pm, 15 October 2020	4.00 pm, 15 October 2020	16 October 2020, except regulations 2(3) and (4) (19 October 2020)	No motion of approval was moved before the Chamber This SSI introduced a series of specific changes on SSI 2020/318. This SSI was also revoked by SSI 2020/329	Laid before coming into force
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) Amendment (No.2) (Scotland) Regulations 2020 (SSI 2020/329)</a>	10.58 am, 22 October 2020	3.00 pm, 22 October 2020	24th October 2020	The purpose of this SSI expired on 2 November 2020. A motion to approve this SSI was never moved before the Chamber	Laid before coming into force
<a href="#">The Health Protection</a>	12.40 pm, 30 October 2020	2.45 pm, 30 October 2020	6.00 am, 2 November 2020	25 November 2020 Neither debated, nor voted on	Laid before coming into force

<a href="#">(Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 (SSI 2020/344)</a>					Notable SSI: introduced a “five tier” system of restrictions which regulated lockdown restrictions until August 2021
<a href="#">Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment Regulations 2020 (SSI 2020/347)</a>	12.40 pm, 30 October 2020	2.45 pm, 30 October 2020	6.00 am, 2 November 2020	25 November 2020 Neither debated, nor voted on	Laid before coming into force
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 2) Regulations 2020 (SSI 2020/374)</a>	12.57 pm, 12 November 2020	3.00 pm, 12 November 2020	6.00 am, 13 November 2020	2 December 2020 Neither debated, nor voted on	Laid before coming into force
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 3) Regulations 2020 (SSI 2020/389)</a>	11.20 am, 20 November 2020	2.00 pm, 20 November 2020	6.00 pm, 20 November 2020	8 December 2020. Debated for 6 minutes, the Chamber approved this SSI on <a href="#">a division</a> on 8 December 2020.	Laid on the same day that it came into force
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 4) Regulations 2020 (SSI 2020/392)</a>	23 November 2020	6.00 am, 24 November 2020	9.00 am, 24 November 2020	9 December 2020 Neither debated, nor voted on	Laid before Parliament after coming into force



<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 5) Regulations 2020 (SSI 2020/400)</a>	12.15 pm, 26 November 2020	3.45 pm, 26 November 2020	27 November 2020	23 December 2020 Neither debated nor voted on	Laid before Parliament before it came into force First SSI in sample to be preceded by a short statement about its content and significance before motion of approval being put to a vote
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 6) Regulations 2020 (SSI 2020/415)</a>	11.55 am, 3 December 2020	2.30 pm, 3 December 2020	4 December 2020	23 December 2020 Neither debated nor voted on	Laid before Parliament before it came into force
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 7) Regulations 2020 (SSI 2020/427)</a>	12.20 pm, 10 December 2020	2.45 pm, 10 December 2020	6 pm, 11 December 2020, except regulation 8 (6 am, 11 December 2020)	23 December 2020 Neither voted, nor debated	Laid before Parliament before it came into force
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/439)</a>	12.20 pm, 17 December 2020	3.30 pm, 17 December 2020	6.00 pm, 18 December 2020	20 January 2021 Neither debated nor voted on	Laid before Parliament before it came into force Approved more than one month after being made (2020 Christmas recess)
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland)</a>	20 December 2020	21 December 2020	21 December 2020, except Regulation 5 (26 December 2020)	23 December 2020 Neither debated nor voted on	Laid on the same day the SSI came into force Provided for lockdown regulations concerning

<a href="#">Amendment (No. 8) Regulations 2020 (SSI 2020/452)</a>					Christmas period
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 9) Regulations 2020 (SSI 2020/471)</a>	12.39 pm, 23 December 2020	3.00 pm, 23 December 2020	26 December 2020	20 January 2021 Neither debated nor voted on	Laid before coming into force
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 10) Regulations 2021 (SSI 2021/1)</a>	4 January 2021	5 January 2021	5 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 Notable SSI: reinstated the stay at home requirement and tightened social distancing rules
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 11) Regulations 2021 (SSI 2021/3)</a>	12.25 pm, 6 January 2021	3.00 pm, 6 January 2021	8 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
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 12) Regulations 2021 (SSI 2021/17)</a>	12.50 pm, 14 January 2021	3.00 pm, 14 January 2021	16 January 2021, Except 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
<a href="#">The Health Protection (Coronavirus) (Restrictions and</a>	12.10 pm, 19 January 2021	3.30 pm, 19 January 2021	20 January 2021	3 February 2021 Neither debated nor voted on	Laid before coming into force

<a href="#">Requirements (Local Levels) (Scotland) Amendment (No. 13) Regulations 2021 (SSI 2021/25)</a>					
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 14) Regulations 2021 (SSI 2021/35)</a>	1.30 pm, 22 January 2021	3.30 pm, 22 January 2021	23 January 2021	17 February 2021 Neither debated, nor voted on	Laid before coming into force
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Miscellaneous Amendment) (Scotland) Regulations 2021 (SSI 2021/49)</a>	1.30 pm, 22 January 2021	3.30 pm, 22 January 2021	23 January 2021	17 February 2021 Neither debated, nor voted on	Laid before coming into force
<a href="#">The Personal Protective Equipment (Temporary Arrangements) (Coronavirus) (Scotland) Regulations 2021 (SSI 2021/50)</a>	11.23 am, 28 January 2021	2.30 pm, 28 January 2021	1 February 2021	24 February 2021 Neither debated, nor voted on	Laid before coming into force
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 15) Regulations 2021 (SSI 2021/54)</a>	1.49 pm, 29 January 2021	3.00 pm, 29 January 2021	30 January 2021	17 February 2021 Neither debated, nor voted on	Laid before coming into force
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland)</a>	18 February 2021	19 February 2021	9.00 am, 19 February 2021	17 March 2021 Neither debated, nor voted on	Laid before coming into force

<a href="#">Amendment (No. 16) Regulations 2021 (SSI 2021/86)</a>					
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2021 (SSI 2021/117)</a>	11.26 am, 4 March 2021	2.45 pm, 4 March 2021	5 March 2021	23 March 2021 Neither debated, nor voted on	Laid before coming into force Notable SSI: extends the duration of the lockdown tier-system until 30 September 2021
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 17) Regulations 2021 (SSI 2021/136)</a>	11.47 am, 11 March 2021	3.45 pm, 11 March 2021	12 March 2021, except regulations 3 and 5(6)(c) (15 March 2021)	26 May 2021 Neither debated nor voted on	Laid before coming into force Notable SSI: relaxed restrictions on social gathering, among others. Approved after one month and a half after being made (2021 general elections recess intervened)  * Note that the Covid-19 Committee did not convene during recess, although it had been authorised to do so. The COVID-Recovery Committee only started working in practice in early September 2021
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 18) Regulations 2021 (SSI 2021/166)</a>	11.37 am, 24 March 2021	2.00 pm, 24 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 on	Laid before coming into force Debated more than two months after being made (2021 general elections recess intervened)

<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 18) Regulations 2021 (SSI 2021/168)</a>	24 March 2021	13 May 2021	25 March 2021	2 June 2021 Neither debated nor voted on	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 intervened)
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 19) Regulations 2021 (SSI 2021/180)</a>	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 on	Laid before Parliament a month and 11 days after being made Approved two months and one week after being made (2021 general elections recess intervened)
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 20) Regulations 2021 (SSI 2021/186)</a>	15 April 2021	13 May 2021	16 April 2021	9 June 2021 Neither debated nor voted on	Laid before Parliament a month and 11 days after being made Approved one month and three weeks after being made (2021 general elections recess intervened)
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 21) Regulations 2021 (SSI 2021/193)</a>	22 April 2021	13 May 2021	26 April 2021	9 June 2021 Neither debated nor voted on	Laid before Parliament three weeks after being made Approved one month and two weeks after being made (2021 general elections recess intervened)
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 22) Regulations</a>	4 May 2021	13 May 2021	5 May 2021	9 June 2021 Neither debated nor voted on	Laid one week after being made Approved more than a month after being made (2021 general elections recess intervened)

<a href="#">2021 (SSI 2021/202)</a>					
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 23) Regulations 2021 (SSI 2021/209)</a>	14 May 2021	11.30 am, 17 May 2021	17 May 2021	9 June 2021 Neither debated nor voted on	Laid three days after being made, on the same day as coming into force
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 24) Regulations 2021 (SSI 2021/211)</a>	1:20pm, 21 May 2021	2:45 pm, 21 May 2021	22 May 2021, except regulation 4 (24 May 2021)	16 June 2021 Neither debated, nor voted on	Laid before Parliament on the same day as being made
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 25) Regulations 2021 (SSI 2021/224)</a>	11:47 am, 27 May 2021	2:30 pm, 27 May 2021	31 May 2021	23 June 2021 Neither debated nor voted on	Laid before Parliament on the same day as being made
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 26) Regulations 2021 (SSI 2021/227)</a>	1:25 pm, 3 June 2021	3:30 pm, 3 June 2021	5 June 2021	23 June 2021 Neither debated nor voted on	Laid before Parliament on the same day as being made Notable SSI: adjusted the allocation of levels across Scotland
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 27) Regulations</a>	10 June 2021	9:30 am, 11 June 2021	11 June 2021	8 September 2021 Neither debated, nor voted on	Laid on the same that as being made Approved three months after being made (2021 summer recess intervened)

<a href="#">2021 (SSI 2021/238)</a>					
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 28) Regulations 2021 (SSI 2021/242)</a>	11:39 am, 17 June 2021	2:30 pm, 17 June 2021	21 June 2021	8 September 2021 Not debated, yet voted on a division For 64, Against 25, Abstentions 24	Laid before Parliament on the same day as being made Approved two months and three weeks after being made (2021 summer recess intervened)
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 29) Regulations 2021 (SSI 2021/252)</a>	1.57 pm, 24 June 2021	3.30 pm, 24 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 on	Laid before Parliament on the same day as being made Approved two months and two weeks after being made (2021 summer recess intervened)
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 30) Regulations 2021 (SSI 2021/255)</a>	1.59 pm, 29 June 2021	3.45 pm, 29 June 2021	30 June 2021	8 September 2021 Neither debated nor voted on	Laid before Parliament on the same day as being made Approved two months and one week after being made (2021 summer recess intervened)
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 31) Regulations 2021 (SSI 2021/262)</a>	11.30 am, 7 July 2021	2.30 pm, 7 July 2021	8 July 2021	8 September 2021 Neither debated nor voted on	Laid before Parliament on the same day as being made Approved two months after being made (2021 summer recess intervened)
<a href="#">The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 32) Regulations</a>	12.15 pm, 15 July 2021	3.00 pm, 15 July 2021	19 July 2021	8 September 2021 Neither debated nor voted on	Laid before Parliament on the same day as being made Approved one month and three weeks after being made (2021 summer

<a href="#">2021 (SSI 2021/263)</a>					recess intervened)
<a href="#">The Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 (SSI 2021/277)</a>	1.50 pm, 5 August 2021	4.00 pm, 5 August 2021	9 August 2021	8 September 2021 Neither debated, nor voted on	Laid before Parliament on the same day as being made Approved one month and three days after being made (2021 summer recess intervened)  Notable SSI: replaced the previous tier system for a new set of restrictions
<a href="#">The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment Regulations 2021 (SSI 2021/299)</a>	11.32 am, 2 September 2021	2.00 pm, 2 September 2021	3 September 2021	22 September 2021 Neither debated nor voted on	Laid before Parliament on the same day as being made
<a href="#">The Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Amendment Regulations 2021 (SSI 2021/329)</a>	21 September 2021	22 September 2021	29 September 2021	4 November 2021 Neither debated, nor voted on	Approved one month and two weeks after being made (two week October recess intervened)
<a href="#">The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 2) Regulations 2021 (SSI 2021/349)</a>	11.39 am, 30 September 2021	3.30 pm, 30 September 2021	5.00 am, 1 October 2021	9 November 2021 10 minutes debate, and voted on a division, For 60, Against 49	Laid before Parliament on the same day as being made Approved by Parliament one month and 10 days after being made. (two week October recess intervened)  Notable SSI: introduced Covid vaccination certificate scheme



<a href="#">The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 3) Regulations 2021 (SSI 2021/384)</a>	11.42 am, 29 October 2021	3.00 pm, 29 October 2021	30 October 2021	24 November 2021 Neither debated, nor voted on	Laid before Parliament on the same day as being made
<a href="#">The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 4) Regulations 2021 (SSI 2021/453)</a>	2 December 2021	29 November 2021 (in draft)	5.00 am, 6 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.