

## *COVID-19 legislation: next steps in 2021*

### **Evidence to the Scottish COVID-19 Committee**

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

COVID-19 Review Observatory, Birmingham Law School, University of Birmingham

NB: this evidence was submitted through the Scottish Parliament website [www.yourviews.parliament.scot](http://www.yourviews.parliament.scot)

#### **About you**

*What is your name?*

Professor Fiona de Londras, Dr Pablo Grez, Daniella Lock

*What is your email address?*

[p.grezhidalgo@bham.ac.uk](mailto:p.grezhidalgo@bham.ac.uk)

*Are you responding as an individual or on behalf of an organization?*

Yes

*Name*

University of Birmingham COVID-19 Review Observatory

[www.birmingham.ac.uk/CVRO](http://www.birmingham.ac.uk/CVRO)

#### **Questions**

##### **1. Should Part 1 of the Coronavirus (Scotland) Acts be extended to September 2021?**

1.1 When the Coronavirus (Scotland) Acts were passed before Parliament, [the Scottish government made a commitment that its provisions would only continue in force insofar as they were an appropriate and proportionate response to the scale of the risk posed by the pandemic](#). This commitment is reflected in various provisions of the Acts such as those providing ministerial powers to bring forward expiry dates of any provisions in both Acts. More significantly, this commitment underpins the very decision to set an expiry date, which currently is 31 March 2001 in the case of Part 1 of both Acts.

1.2 To the best of our knowledge, the Scottish Government has not confirmed whether it will make regulations extending these Acts until the 30 of September 2021. We recognise that it is for the Scottish Parliament to decide, under the affirmative procedure, whether to approve these regulations or not. Nevertheless, we would like to stress two points regarding the future decision on whether to extend Part 1 of the Coronavirus (Scotland) Acts. The first one relates to the importance of robust parliamentary review as a means of holding the Government to account for its responses to the COVID-19 pandemic. The second one stresses the significance of an evidence-based and rights informed decision-making process.

1.3 Robust parliamentary scrutiny of governmental action enhances the legitimacy, accountability and transparency of emergency responses to COVID-19. These objectives ought to inform the Scottish Parliament's approach to scrutiny of government regulations extending the Acts until September 2021. In preparation for the forthcoming review of these acts, it is worth bearing in mind the past experience of parliamentary review of the current expiry dates of Part 1 of the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No. 2) Act 2020, which took place last September. What emerges is a mixed picture in terms of parliamentary scrutiny.

1.4 On 24 August 2020 the Scottish Government laid before Parliament a draft of [The Coronavirus \(Scotland\) Acts \(Amendment of Expiry Dates\) Regulations 2020](#), which extended the expiry date of Part 1 in both Act from the 30 September 2020 to the 31 March 2021. This was more than a month in advance of their commencement date, modelling good practice in giving Parliament sufficient time to scrutinise these regulations. Fulfilling its statutory duty, it laid those regulations along with a supporting [Statement of Reasons](#), making the case for the extension of each of the provisions detailed therein. In addition, it laid before Parliament [The Coronavirus \(Scotland\) Acts \(Early Expiry of Provisions'\) Regulations 2020](#), which provided for the early expiry of provisions that the Scottish Government no longer considered necessary.

1.5 The Delegated Powers and Law Reform Committee, at its [1 September 2020](#) meeting, refrained from calling these instruments to the attention of the Chamber, declaring itself content with them. Not surprisingly, the Scottish Parliament [approved the regulations amending the expiry dates on 23 September 2020](#), without a vote and [without debate](#).

1.6 For these reasons, it is worth commending the work that the COVID-19 committee made scrutinising these regulations. The committee took evidence on the two regulations mentioned above on the [9 September 2020](#). That day, the committee heard from Professor Linda Bauld; as well as from a representative of the Scottish Human Rights Commission; the director of Law Reform at the Law Society of Scotland; and the deputy general secretary for policy, political liaison and equalities at the Scottish Trades Union Congress. Furthermore, the committee held a second session on the [16 September](#), in which heard evidence and questioned the Cabinet Secretary for the Constitution, Michael Russel MSP, and Pamela Wilkinson, a civil servant in the coronavirus legislation co-ordination reporting team in the Scottish Government. Hence, this committee was the only select committee that examined in depth the regulations concerning expiry date and early expiry of provisions. We commend the work of the COVID-19 committee in holding the Government to account for the decision to extend the expiry date of the Coronavirus (Scotland) Acts 2020 on that occasion. However, the lack of further scrutiny by other parliamentary actors highlights the need for further engagement by both other select committees and individual MSPs by debating the regulations in the chamber when the motion for approval is tabled. Such further engagement would ensure even more robust scrutiny, and test claims of the necessity and proportionality in extending the provisions as well as offering opportunities to explore further their adequacy in addressing the pandemic.

1.7 A second theme relates to the standards against which Parliament shall assess the government's regulations extending the operation of Part I of the Acts. In our view, high quality and robust parliamentary review ought to be evidence-based and rights informed. In other words, a decision to extend Part 1 of these Acts should consider the epidemiological and social evidence pertaining to the necessity of maintaining the powers, and whether any adjustments

might be needed in order to enhance protections contained in the provisions. Such questions can be explored by both committees and the Parliament in plenary, through a combination of inquiry, written and oral evidence, stakeholder engagement, questioning government ministers and civil servants, and debate. Furthermore, a rights-based approach to parliamentary review of the decision to extend would ensure that human rights impacts are integrated with epidemiological, social, and public health insights in order to underpin robust decision-making. The overarching aim of emergency responses to the COVID-19 pandemic is the protection of public health. A rights-based analysis requires the establishment of a rational connection between Part 1 of the Coronavirus (Scotland) Acts and that aim. Furthermore, a rights-based decision-making process would explore alternative legislative and policy options that may be less intrusive of rights, as limitations on rights in pursuit of public health should be minimally intrusive when compared with other legislative and policy options. Furthermore, a rights-based approach may indicate that the government ought to take different or further steps to fulfil its obligations to respect, protect, and fulfil, among others, the right to life, the right to health, the right to education, the right to food, and the right to adequate housing.

1.8 Finally, a rights-based approach requires a broadly proportionate relationship between the degree of public health protection secured by the provisions, and any interference with protected rights. Considering proportionality would enrich parliamentary assessments of whether to extend of Part 1 of the Coronavirus (Scotland) Acts. Such an approach would involve MSPs considering whether a more appropriate and proportionate response to the pandemic would require issuing separate regulations providing for the early expiry of certain powers and protections, if the evidence suggested that their continuation was not justified on the basis of ineffectiveness, lack of rational connection with the protection of public health, or disproportionate interference with rights.

## **2. Are sufficient equality and human rights safeguards in place to extend the powers?**

2.1 As noted above, we commend the present call for evidence as a testament to the continuing commitment of the COVID-19 committee to proactive and strong parliamentary review of government responses to COVID-19 in the Scottish Parliament. We also welcome the committee's commitment to rights, reflected in its concern about the equality and human rights safeguards contained in the Acts.

2.2 Equality and human rights will be best protected if rights-awareness is a feature of both government decision-making and legislative and policy design, and parliamentary review of government proposals. Looking back at the Scottish Government's Statement of Reasons for the proposed extension of The Coronavirus (Scotland) Acts, published in August 2020, we recognise that this document provided a good assessment about the continuing necessity of the key provisions engaging human rights, including reasoning supporting the proportionality of these measures and their impact on equality and protected groups. We commend this as an example of best practice in integrating rights in government justification for continuation of powers relating to the pandemic. We submit that, once again, Parliament ought to be furnished with a fully-fleshed Statement of Reasons, which sets out clearly the Government's argument for the continuing necessity and proportionality of the continuing measures. The report should be evaluative, evidence-based, and engage with rights-based proportionality standards.

2.3 We note that, due to time pressure, the Government did not launch a public consultation on extending the Acts in August 2020. We argue that such a consultation ought to be undertaken on this occasion in order to generate evidence of the qualitative impact of the response on everyday rights enjoyment. If the Government does not seek views from the wider public, the Statement of Reasons should set out why this was the case, state clearly which parties have been directly consulted, and provide a brief account of their inputs to the decision-making process. Any direct consultation should be designed to ensure the participation of persons disproportionately impacted by the pandemic, including People of Colour, children, poorer people, older people, and people with disability and those deemed clinically vulnerable.

2.4 Parliament would benefit from a ministerial statement clarifying whether the Government intends to seek an extension to Part 1 of the Acts. It is worth noting that on 11 February 2021 the Government published its most recent two-monthly report on the Coronavirus (Scotland) Acts. [The report](#) states that Ministers are currently conducting the analysis to take such decision. On 11 February, the Secretary of State for the Constitution made a statement before Parliament, announcing the publication of the report. In his [statement](#), he suggested that the Government was considering the matter carefully, yet he also added: “it seems unavoidable that many of the provisions of the acts will be required after 31 March, to enable us to deal with the on-going effects of the pandemic.” This seems to suggest that the Government is already clear on the necessity of extending at least some powers. Hence, we see no reasons to delay the publication of the Statement of Reasons. This document will prove extremely helpful as a starting point for conducting parliamentary review of the government proposals.

2.5 Given the implications for human rights protection, Parliament may want to pay special attention to the Government’s remarks insofar as provisions related to the following matters are concerned: tenancy agreements and protection from eviction, guardianship of vulnerable people, access to justice, the extra Coronavirus Carer’s Allowance Supplement, support to social care workers, and intervention and acquisition of Care Homes.

2.6 We stress the significance of the two-monthly reports on the Coronavirus (Scotland) Acts, which together provide a useful account of the impact, use, and continuing necessity of the powers in question. These reports are published and laid before Parliament in fulfilment of a statutory duty contained in sections 15 and 12 of the Coronavirus (Scotland) Acts. The reports contain a review of the operation of the provisions of the Acts, with a view to identifying whether they remain necessary. The Government also sets out how it has exercised the powers provided by these Acts.

2.7 High quality and evaluative reporting of the operation of these Acts is essential to inform Parliament’s decision on whether to approve or not any extension to Part 1 of the Acts. We welcome the Government’s practice of announcing the publication of these reports by a ministerial statement.<sup>1</sup> This practice has enabled MSPs to question the Secretary of State for

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<sup>1</sup> The dates of each ministerial statement, regarding the publication of each two-monthly reports, and a link to the debates that followed these statements, are as follow:

1. 9 June 2020: <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12684>

2. 11 August 2020:

<https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12735&i=115164&c=2306722&s=report%2520to%2520Scottish%2520Parliament>

the Constitution for approximately 20 minutes, although it is not clear that MSPs have received the report in sufficient time to review it fully prior to the ministerial statement and associated questions. If this is not the case, we recommend ensuring MSPs are furnished with the report with sufficient time to maximise the utility of the opportunity to pose questions on it.

**3. What impact might the pre-election recess period have on the governance and scrutiny of Scotland's Covid-19 response? How can this be addressed?**

N/A

**4. What can be done to support the public to understand and comply with the public health restrictions in 2021?**

N/A

**5. What priorities should inform the Scottish Government's strategy and response to Covid-19 in 2021?**

5.1 In developing a strategy and response to COVID-19 in 2021, the Scottish Government's decision-making process ought to be informed by a human rights framework. International human rights obligations and obligations under the Human Rights Act 1998 apply to all government activity, including emergency responses to the pandemic.

5.2. Furthermore, COVID-19 and human rights are interconnected. While the disease itself does not discriminate, it is now well established that its effects are unevenly distributed across society, and that the distribution patterns of the disease and the effects of the pandemic [reflect pre-existing inequalities](#). These [include](#) inequalities based on age, race, ethnicity, socio-economic status, and dis/ability. It is thus critical that in responding to the pandemic, in reviewing and improving responses, and in ensuring preparedness for future pandemic or similar events, the Scottish Government employs a human rights framework, which complies with positive obligations under international human rights law, limit intrusive emergency measures in light with proportionality assessments, employs human rights considerations as design principles and accountability standards.

5.3 As noted above, in respect of the immediate reaction to the Coronavirus, human rights play four important roles.

1. Human rights impose some positive obligations on the state. That is, they require the state to take certain actions in order to secure the practical and effective protection of rights. In the context of the pandemic these include, *inter alia*, an obligation to protect

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3. 6 October 2020:

<https://www.parliament.scot/parliamentarybusiness/report.aspx?r=12875&i=116376&c=2306724&s=report%2520to%2520Scottish%2520Parliament>

4. 9 December 2020:

<https://www.parliament.scot/parliamentarybusiness/report.aspx?r=13004&i=117556&c=2304494&s=report%2520to%2520Scottish%2520Parliament>

5. 11 February 2020: <https://www.parliament.scot/parliamentarybusiness/report.aspx?r=13117&i=118750>

life by taking steps to address clear health threats<sup>2</sup> including in places of detention or accommodation (e.g. prisons, detention centres for asylum seekers, places of refuge); the absolute obligation of non-discrimination; and the obligation of due diligence in respect of potential negative consequences on rights enjoyment (e.g. exacerbations of domestic violence during lockdown<sup>3</sup>).

2. Human rights constitute limitations on the actions that the state may take in response to the virus. Some rights cannot be limited at all; they are absolute rights. Other rights may be limited, but only where such limitations are necessary and proportionate. Human rights compliance requires rigorous engagement with questions of necessity and proportionality in respect of responses to the pandemic. It also requires regular revisiting of these questions in order to assess whether, against changing epidemiological and other evidence, measures remain necessary and proportionate, and whether the measures in place constitute the minimum intrusion with rights possible while pursuing a legitimate objective (i.e. the protection of public health).
3. Human rights constitute ‘design principles’ for longer-term responses to the pandemic. A human rights approach requires us to identify and understand the long-term rights-related impacts of the pandemic, and to design responses to those impacts that operate to enhance, and do not unlawfully limit, the enjoyment of rights.
4. Human rights play an accountability role in respect of pandemic responses, ensuring that where rights have been violated in the response to the pandemic one has access to justice and to an effective remedy,<sup>4</sup> and requiring the state to take steps to ensure non-repetition of such violations in this or any future analogous situations.<sup>5</sup>

5.4 Promoting, protecting, fulfilling and integrating rights into political decision-making is not limited to individual rights. Emergency responses to the pandemic ought to be designed as well by reference to IHRL obligations arising from socio-economic rights. We note in particular the state’s international obligation to achieve progressively the realisation of rights protected by the International Covenant on Economic, Social and Cultural Rights<sup>6</sup> and the international prohibition on retrogression.<sup>7</sup> The combined effect of these doctrines is to obligate the state to ensure responses to the COVID-19 pandemic further the realisation of, and do not

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<sup>2</sup> UN Human Rights Committee, General Comment No. 36: Right to Life UN Doc. CCPR/C/GC/36, esp. para 26; *Stoyanovi v Bulgaria* App. 42980/04, Judgment, 9 November 2010, [61].

<sup>3</sup> CEDAW Committee, General Comment No. 19: Violence against Women UN Doc. A/47/38, para 9; UN General Assembly Declaration on the Elimination of Violence against Women, GA Res. 48/104, Article 4; *Opuz v Turkey* [2009] ECHR 870, [131].

<sup>4</sup> Article 2, International Covenant on Civil and Political Rights; Article 13, European Convention on Human Rights.

<sup>5</sup> The right to a remedy is understood in international human rights law as involving a guarantee of non-repetition and, where necessary, changes in relevant laws and practices. UN Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant. UN Doc. CCPR/C/21/Rev.1/Add.13

<sup>6</sup> Article 2(1), International Covenant on Economic, Social and Cultural Rights.

<sup>7</sup> UN Committee on Economic, Social and Cultural Rights, *General Comment No 3: The Nature of States Parties Obligations*, 14 December 1990, at para 9; Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education*, 8 December 1999, at para 45.

have the design or effect of reducing, the protection and enjoyment of socio-economic rights, including the right to life, health, non-discrimination, and adequate housing, among others.

## **6. If a similar emergency happens again, what powers should be re-used? What powers should be modified?**

6.1. Without prejudice to the policy decisions involved in crafting the powers, we would like to stress the significance of processes of review. In our view, looking back to almost a year of emergency responses to the COVID-19 pandemic, key themes emerging from the experience of the past 11 months are:

- the significance of designing built in review mechanisms, such as statutory duties on the Government to report to Parliament;
- implementing a preference for the affirmative over the made affirmative and negative procedures insofar as subordinate legislation is concerned;
- ensuring that government decision-making is informed by consultation processes that ensure the maximum possible participation;
- ensuring robust review of government legislation, to the maximum extent possible; and
- putting rights-based thinking at the heart of the response.

6.2. Insofar as the Scottish Parliament is concerned, we stress that Parliament plays a critical role in the constitutional structure of the United Kingdom and, in particular, in ensuring accountability and legitimacy in respect of government action. Where circumstances have required especially swift action with appreciable implications for rights protection, [parliamentary review is of particular importance](#). It is therefore critical that human rights are integrated into parliamentary review wherever appropriate, playing close attention to how human rights protection was designed into the response and its review and revision.