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BIRMINGHAM

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Dear John Swinney
MSP for Perthshire North
Deputy First Minister of Scotland and Cabinet Secretary for Covid Recovery

I am writing to you from the COVID-19 Review Observatory, an AHRC-funded research project based in the University of Birmingham School of Law and focused on parliamentary scrutiny of government responses to COVID 19.

In our view, the passage of the Coronavirus (Extension and Expiry) (Scotland) Bill this week provides an opportunity for the Scottish Parliament to reflect on more than one year of pandemic parliamentary review practices, to secure on a statutory footing good political practices developed by the government and Parliament, and to strengthen review and renewal processes by maximising the impact of the Covid-19 Recovery Committee's scrutiny work. To achieve these aims, we are writing to outline a series of proposals that the government may want to consider by way of amendments to its Bill.

I. Putting political commitments on a statutory footing and securing consistency in reporting throughout

The Scottish government has developed a strong practice of reporting to Parliament on the operation of the Scottish Acts, through two-monthly reports pursuant to by clauses 15 of the Coronavirus (Scotland) Act 2020 and 12 of the Coronavirus (Scotland) (No.2) Act 2020. Importantly, the Scottish government goes beyond what is required under these provisions, reporting also on the exercise of its powers under the Coronavirus Act 2020, including on Scottish Statutory Instruments (SSIs) made under powers granted by that Act (although the reports do not include a statement of why Scottish Minister considered these SSIs to be necessary). This is not a statutory requirement, but enacts a political commitment given during debate on the Legislative Consent Motion on the Coronavirus Act 2020. Furthermore, the reports include not only data and information on the operation of the relevant Acts, but also information about the evidence supporting government decision-making, cases where there was consultation with relevant stakeholders, figures and statistics, and sometimes detailed human rights analysis (usually in 'supplementary information').

We submit that the passage of the proposed Extension and Expiry Act is an opportunity to level up reporting regarding the operation of powers under the two Scottish Acts and the devolved powers under the Coronavirus Act 2020 to ensure more consistency in reporting practices and thus equip Parliament will the fullest information possible for the purposes of robust scrutiny.

To this end we suggest MSPs should:

- Ensure all existing reporting duties are maintained in the Extension and Expiry Act, ideally consolidating all reporting requirements into a single provision
- Broaden the existing statutory reporting duties to include an equivalent reporting requirement on the exercise of devolved powers under the Coronavirus Act 2020



- Specify that all such reports should include the following information:
 - An explanation of relevant measures and what they are intended to achieve;
 - Information on whether and how the powers have been exercised;
 - Explanation of whether and why the powers remain necessary;
 - Evidence in support of the government's view regarding the continuing necessity of measures;
 - Statement of whether the government has engaged with relevant stakeholders on continuation and operation of powers and, if so, who;
 - Statement of human rights impacts of measures and of steps taken to ensure proportionality;
 - Statement of equality impacts of measures and of steps taken to ensure non-discrimination and mitigate any disproportionate impacts of measures.
- Ensure that the duty contained in clauses 9 of the Coronavirus (Scotland) Act 2020 and 6 of the Coronavirus (Scotland) (No.2) Act remain in force. These clauses impose a duty on the Scottish Ministers, when exercising a function conferred by Part 1 of these Acts, to “have regard (a) to the importance of communicating in an inclusive way, (b) to opportunities to advance equality and non-discrimination”.

II. Strengthening Parliament's Role in Further Expiry

There has been limited, if any, engagement in the Chamber with the six months review and the extension of the expiry dates of the two Scottish Acts thus far. Parliament approved regulations providing the first extension on 23 September 2020 with neither debate nor a vote. Debate on the second extension in the Chamber on 17 March 2021 lasted only five minutes, and extension was approved on a division. These extensions have taken the form of regulations. Their approval has been bundled together with a variety of other regulations making policy changes to lockdown rules, thus preventing Parliament from having a discrete debate on the renewal.

While Parliament has benefited from the significant contribution of the Covid-19 Committee in scrutinising these two review and renewal processes, this scrutiny work has not had an impact in fostering debate in the Chamber on these processes. In part, this may be because the two Scottish Acts are renewed using Henry VIII powers, meaning that extension is done by means of the affirmative procedure (pursuant to clauses 12(1) and 9(1) of the first and the second Scottish Acts, respectively). In contrast, if a minister decides that the expiry date of a power should be brought forward, this is subject to the negative procedure, in the case of the first Scottish Act (clause 13(3)), and subject to the negative procedure, unless the regulations “add to, replace or omit any part of the text of an Act”, in the case of the second Scottish Act (clause 10(4)), in which case is subject to the affirmative procedure.

The Coronavirus (Extension and Expiry) (Scotland) Bill provides for an extension of the expiry date of the two Scottish Acts to 31 March 2022, and enables Scottish Ministers through regulations subject to the affirmative procedure a further six months extension until the 30 September 2022, while also providing powers to bring to an early expire specific emergency provisions which are no longer considered necessary. Hence, the Bill does not introduce a new procedure on this regard.



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We submit that the passage of the extension and expiry Act is an opportunity to strengthen parliamentary involvement in future renewal and extension processes, and thus to enhance the democratic and constitutional legitimacy of such processes.

To this end we submit that MSPs should ensure the Act:

- Requires government to lay a statement of reasons making the case for the extension of the expiry date of the two Scottish Acts at least 45 days in advance of their expiry.
- Requires that extension of the two Scottish Acts for a period of six months on March 2022 should be subject to the approval of a motion moved by a Scottish Minister “that the Scottish Parliament approves to extend the expiry dates for six months”. The debate on this motion should take place no later than 15 days in advance of the expiry date of the two Scottish Acts, and should have sufficient time allocated to it (at least 2 hours).

As a matter of practice, we recommend that during the period preceding this debate:

- The Covid-19 Recovery Committee should conduct an inquiry scrutinising the statement. This would provide an opportunity to receive written evidence and to hold oral evidence sessions with the Cabinet Secretary for Covid Recovery, other relevant ministers and civil servants, as well as key stakeholders.
- The Covid-19 Recovery Committee should publish a report to inform debate at the Chamber.

We are available to discuss any of the above proposals with you at your convenience. Should you find that of use, please contact Dr Pablo Grez Hidalgo by email (p.grezhidalgo@bham.ac.uk) or by telephone on 07478243018.

Yours sincerely,

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