

Expert Report for the UK Covid-19 Public Inquiry

Module 2A: Core UK decision-making and political governance – Scotland

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About the author

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Author statement

I confirm that this is my own work and that the facts stated in the report are within my own knowledge. I understand my duty to provide independent evidence and have complied with that duty. I confirm that I have made clear which facts and matters referred to in this report are within my own knowledge and which are not. Those that are within my own knowledge I confirm to be true. The opinions I have expressed represent my true and complete professional opinions on the matters to which they refer.

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Materials

In order to compile this report, I have been given access by the Inquiry to the following materials which relate to the matters on which my opinion has been sought:

Statement by DG Strategy and External Affairs	INQ000215495
Statement by DG Strategy and External Affairs (Addendum)	INQ000339039
Statement by DG Strategy and External Affairs (Legislation)	INQ000216655
Statement by DG Strategy and External Affairs (Legislation) (Addendum)	INQ000366267
Statement by DG Corporate	INQ000215474
Statement by DG Corporate (Addendum)	INQ000340111
Statement by DG Scottish Exchequer	INQ000216653
Statement by DG Communities	INQ000215472
Statement by DG Health and Social Care	INQ000215488
Statement by DG Health and Social Care	INQ000215470
Statement by DG Health and Social Care (Care)	INQ000346089
Statement by DG Health and Social Care (Addendum)	INQ000343900
Statement by DG Economy	INQ000215478
Statement by Dr Andrew Morris (Chair)	INQ000215468
Statement by DG Communities	INQ000215482
Statement by DG Communities (Addendum)	INQ000340113
Statement by DG Education and Justice (Education)	INQ000215480
Statement by DG Education and Justice (Justice)	INQ000216651
Statement by DG Education and Justice, Education (Addendum)	INQ000340112
Statement by DG Scottish Exchequer	INQ000215484
Statement by DG Exchequer (Addendum)	INQ000340114
Statement by DG Net Zero	INQ000215497
Statement by DG Strategy and External Affairs (Response Structures)	INQ000348720
Statement by Nicola Sturgeon	INQ000339033
Statement by John Swinney	INQ000287771

This report's bibliography provides a list of additional materials, including Scottish Government strategy documents, Scottish Parliament reports, Audit Scotland reports, and reviews commissioned in 2022 by the Scottish Covid-19 Inquiry.

Background to Topics 1-8: Scottish Government decision-making in a devolved political system

1. To help explain decision-making in an emergency, and during the Covid-19 pandemic, this section describes how the Scottish Government would normally be expected to make decisions - such as to pass legislation, allocate resources, and direct public bodies - in a devolved political system legitimised by the Scottish Parliament. This section explains that:
 - Devolution promised 'new Scottish politics' but delivered a Westminster-style system.
 - Organisations such as the Scottish Parliament and public bodies matter, but their role is primarily to scrutinise or influence Scottish Government decision-making or deliver policy.
 - The Scottish Government describes aspirations for effective decision-making based on a Scottish policy style that differs from UK decision-making.
 - This aspirational decision-making style is characterised generally by greater consultation with stakeholders, and more faith in public sector bodies and professions to deliver policy.
 - The aspirational Scottish 'model' involves establishing a 'national performance framework' (NPF) with a 'core purpose', replacing sectoral government departments with cross-sectoral directorates, co-producing public sector commitments to deliver the NPF, and focusing on long-term aims – such as to reduce inequalities – rather than short-term targets based on a fixation with national elections.
 - In practice, the Scottish Government retains UK decision-making procedures. National Scottish elections and Scottish Parliament scrutiny are the main means of accountability, and the Directorates system is hierarchical to ensure ministerial accountability.
 - The Scottish Government is central to devolved government decision-making in largely the same way that the UK government is central to UK decision-making.
 - However, Scottish Government decision-making powers are more limited in relation to the authorising environment overseen by the UK parliament and government (e.g. to determine devolved responsibilities and the size of the Scottish Government budget).
 - Although Scottish and UK government ministers make decisions separately, in effect they share overall responsibility for the policy decisions that impact Scotland. In other words, reserved UK and devolved Scottish policies both impact policy outcomes.
 - The boundaries between reserved UK and devolved Scottish Government responsibilities are blurry. Overlaps are inevitable when problems transcend individual policy sectors.
 - Covid-19 overlaps to relate responsibilities to prepare for an emergency, emergency health protection, and health improvement (to reduce non-communicable diseases).
 - There are formal and informal intergovernmental relations (IGR) procedures to address overlaps in responsibilities, but UK-Scottish Government IGR was poor in 2020.

- Academic policy research shows that the ability of any central government minister to understand and address policy problems, and control their policymaking environment, is limited.
- Therefore, it is generally difficult to identify the extent to which Scottish Government ministers are responsible for the outcomes of decisions made in their name. In other words, they make – and are responsible for – key decisions, but those decisions only explain a limited proportion of policy outcomes.
- The emergency response to Covid-19 accentuates these general conclusions. Covid-19 decision-making is characterised by Scottish Government responsibility for the devolved Scottish response, but subject to (1) dependence on UK government authority and funding, (2) high uncertainty about the problem and (3) and limited control over policy outcomes.
- I make this collection of statements to highlight the broader systemic aspects of policymaking, and relate decision-making to a wider context, not to diminish the importance of key decision-makers such as Scottish government ministers and civil servants.

Broad aspirations for a new Scottish Parliament and political culture

2. The phrase ‘new Scottish politics’ summed up general aspirations for decision-making in a new political system. This ambition would include broad changes to improve political culture, give high powers to the Scottish Parliament, and ensure that stakeholders and citizens could engage in politics and influence decision-making routinely (Cairney and McGarvey, 2013).
3. The Scottish Constitutional Convention was a broad coalition of proponents of Scottish devolution, including Scottish Labour, Scottish Liberal Democrats, and organisations representing public bodies, religious groups, and civic society. It made the case for political reforms to accompany constitutional change. It drew on the argument that Westminster was contributing to citizen disenchantment by reproducing a style of British politics characterised by (a) adversarialism between government and opposition parties, (b) a winner-takes-all mentality in which power is concentrated in a single party with a majority in Parliament, and (c) a powerful central government that makes decisions from the top down instead of seeking consensus with stakeholders. The Scottish Constitutional Convention (1995) described its hope that a Scottish Parliament would oversee a culture that was ‘radically different from the rituals of Westminster: more participative, more creative, less needlessly confrontational’.
4. This argument informed the selection of a more proportional electoral system (Mixed Member Proportional), in which a single party majority would generally be unlikely. Parties would be expected to cooperate more, either as part of a coalition government commanding a majority, or a single party minority government needing support from others in the Scottish Parliament (Cairney and McGarvey, 2013).
5. In preparation for devolution in 1999, the UK Government’s Scottish Office established the cross-party Consultative Steering Group (CSG) to design the principles and rules (Standing Orders) for the new Scottish Parliament. The CSG (1998: Section 2) described four principles to underpin its plans:

- 'the Scottish Parliament should embody and reflect the sharing of power between the people of Scotland, the legislators and the Scottish Executive;
 - the Scottish Executive should be accountable to the Scottish Parliament and the Parliament and Executive should be accountable to the people of Scotland;
 - the Scottish Parliament should be accessible, open, responsive, and develop procedures which make possible a participative approach to the development, consideration and scrutiny of policy and legislation;
 - the Scottish Parliament in its operation and its appointments should recognise the need to promote equal opportunities for all'.
6. The CSG informed the design of a Scottish Parliament with more powers to:
- initiate legislation (by an MSP or committee)
 - influence and scrutinise legislation
 - oblige the Scottish Government to consult with stakeholders before drafting legislation
 - encourage wider participation in politics (such as via a petitions process managed by a dedicated Petitions Committee) (Cairney and McGarvey, 2013).
7. The Scottish political system does not have a second chamber able to request revisions to draft legislation. Rather, the unicameral Scottish Parliament would front-load policy influence and scrutiny via powerful committees. Scottish Parliament committees combined two separate functions: standing committees to scrutinise legislation, and select committees to monitor government departments or the responsibilities of Scottish Government ministers. Committees took primary responsibility for agreeing to the principles of draft legislation (Stage 1) and processing amendments (Stage 2) before plenary debate and the processing of final amendments (Stage 3). The Stage 1 process included:
- inviting individuals or organisations to provide written and/ or oral evidence
 - establishing if the Scottish Government had worked with stakeholders during policy development
 - obliging ministers to explain the principles and details of the bill.
8. The Scottish Parliament would also normally engage in Westminster-style activities, such as to use plenary discussions for regular debate, use oral (and written) questions to hold ministers to account in plenary, and oblige ministers to attend committees as regular witnesses.
9. In a very small number of cases, the Emergency Bills procedure accelerates this process and leaves minimal time for wider engagement (described in Topic 6). The *Scotland Act 1998* (s.36(2)) provided that the Scottish Parliament might expedite proceedings in relation to particular Bills. An Emergency Bill is a Government Bill that the Parliament agrees 'needs to be enacted more rapidly than the normal timetable allows, for example to amend the law in response to a recent court judgement which has exposed a loophole or problem of interpretation in an existing enactment' (Scottish Parliament Directorate of Clerking and Reporting, 2007:

para.3.45). Once a Bill has been classed as an Emergency Bill, the rules allow all three stages to be taken in a single day and remove the need for a Stage 1 committee inquiry. As Topic 6 describes, this lack of normal Scottish Parliament committee scrutiny would be two-fold in relation to Covid-19 policy scrutiny, since it would have no role in scrutinising Westminster legislation and a reduced role during the Scottish Parliament emergency bills process.

Broad aspirations for a new Scottish Government policy style

10. Since devolution, each Scottish Government has used the aspirational 'new politics' language to describe hopes for a new culture of decision-making. This language is based partly on (a) criticisms of the UK government as too centralist and top-down, and (b) the expectation that the smaller scale of decision-making could be used to the Scottish Government's advantage, such as by fostering more meaningful consultation with stakeholders and policy coordination across government. Both elements contribute to the story of a Scottish 'policy style' that differs from its UK counterpart (Cairney, 2019). This purported style is characterised by:
 - a. *More consultation and collaboration.* Ministers and civil servants would meet routinely and frequently with stakeholders – including interest groups, professions, and other public sector organisations - to help define policy problems and identify feasible solutions.
 - b. *More faith in public bodies and public sector professions to deliver policy.* Ministers would place high trust in traditional ways to make and deliver policy - such as through collaboration with local government – and rely less on the top-down and remote performance management measures associated with the UK government (Greer and Jarman, 2008; Cairney and St.Denny, 2020).
11. Former Scottish Government Permanent Secretaries – John Elvidge (2003-10), Peter Housden (2010-15), and Leslie Evans (2015-2021) - have told versions of this story with reference to a distinctive Scottish 'model' or 'approach' that has been enhanced by SNP-led governments since 2007. At the same time, the Scottish Government has described positively its attempts to foster relatively smooth relations between Scottish central and local government.
12. Elvidge (2011) described the development of a 'Scottish model' of policymaking as an attempt (from 2007) to improve the effectiveness of decision-making, characterised by:
 - a. Establishing an overarching ten year vision for the Scottish Government via the National Performance Framework (NPF). The NPF established (1) a 'core purpose' to 'create a more successful country, with opportunities for all of Scotland to flourish, through increasing sustainable economic growth', supported by (2) 'strategic objectives', such as 'Healthier - Helping people to sustain and improve their health, especially in disadvantaged communities, ensuring better, local, and faster access to health care', and (3) related to measures of progress ('national outcomes' and 'national indicators').
 - b. Reducing silos between separate government departments by replacing sectoral departments with 'Directorates' holding cross-cutting responsibilities. These Directorates were connected strongly to NPF objectives, but could also be renamed to reflect new issues or priorities (a key feature of Directorates addressing Covid-19 – this report paras 142-6).
 - c. Using the NPF vision to foster collaboration between central government and the public sector. Central government and public bodies were obliged to relate their policies and

practices to the NPF, such as via the 'single outcome agreements' produced by local authorities. There were also more collaborative forums to align public sector and NPF aims, such as the Scottish Leaders Forum (2023), self-described as 'a collaborative forum of over 300 senior leaders (Chief Executive or equivalent) drawn from across public services, third sector organisations, equality groups, and organisations that are delivering public services.

- d. Harnessing this approach to address problems for the long term, such as to foster coherent and integrated approaches to health and education inequalities.
13. Housden (2014: 73–4) used the phrase 'Scottish approach to policymaking' to describe attempts (from 2010) to accentuate a Scottish policy style, including to foster:
 - greater 'co-production' between policymakers, stakeholders, and citizens, such as when bringing together public service providers and users to inform policy design.
 - combining high trust in the public sector organisations delivering policy with the means to measure and improve their performance, such as via 'improvement methods' that encourage practitioner innovation and learning.
 - an 'assets based' language, to avoid describing policy only as a means to address the 'deficits' or problems of individuals or communities.
 14. From 2015, the Scottish Government used its revision of the NPF ten year plan to:
 - align it with UN Sustainable Development Goals.
 - identify priorities in relation to addressing poverty and reducing inequalities (then First Minister Nicola Sturgeon made strong commitments to reduce education and health inequalities).
 - seek ways to harness high participation during the 2014 independence referendum in the hope that it would 'translate into participation to inform the direction of policy' (Cairney and St.Denny, 2020: 76).

These stories of Scottish politics are aspirational

15. Stories of new Scottish politics, and a new Scottish policy style, were designed to signal aspiration; to encourage rather than guarantee political reforms. They exist in the context of a devolved Scottish political system that shares key elements with the Westminster model, characterised by expectations for:
 - The central government to govern, and parliament to delegate responsibility then scrutinise and legitimise its activity.
 - The primary means of democratic accountability comes from national (Scottish Parliament) elections, in which parties present manifestos and parties in government are expected to deliver on their promises. Local authority elections matter, but are – to all intents and purposes - subordinate to national elections.

16. There was an initial period of Scottish Parliament experimentation in the 1999-2003 session, in which MSPs and committees proposed relatively high amounts of legislation. However, the primary role of the Scottish Parliament has been to scrutinise and modify legislation initiated by the Scottish Government, and hold Scottish ministers to account for decision-making.
17. This expectation for central government to govern extends to dealing with expected or unexpected emergencies, since there were no provisions in the Scotland Act 1998, or in new guidance on the design of the Scottish Parliament, to shift responsibilities to organisations other than the Scottish Government (Cairney and McGarvey, 2013).

Local government in Scotland

18. The important role of local authorities should be understood in that context. Devolution was accompanied by commitments to restore good central-local relations under Scottish devolution. This broad agenda related to strong local government involvement in the devolution movement of the 1990s, fuelled partly by local government opposition to UK central government reforms initiated from the Thatcher period (1979-90). The most notable reforms demonstrated that local authorities were - and are - subordinate to central government, including:
 - a. reforming local government finance by introducing the 'poll tax' in Scotland before the rest of the UK (then replacing it with the council tax after a major backlash across the UK).
 - b. the enforced sale of council housing to individuals (right to buy), followed by the mass transfer of social housing to Housing Associations.
 - c. the imposition of measures including 'compulsory competitive tendering' to oblige local authorities to contract out some delivery services.
 - d. the establishment of new public bodies to take policy delivery out of the hands of local government.
 - e. the major reform of local authority boundaries and functions in 1995-6, to create 32 unitary local authorities, which still exist today, and whose main responsibilities include compulsory education, social care, social work, waste services, planning, and libraries (Cairney and McGarvey, 2013: 135-8; e.g. INQ000346089: 50 notes that 'the Scottish Government does not have direct statutory responsibility for the provision of adult social care services in Scotland, which rests with local authorities').
19. From 1999-2007, efforts to improve relations related to Scottish Government legislative and financial measures to promote 'best value' which allowed local authorities more control over service delivery, place limits on the 'right to buy' scarce social housing, and a general commitment to respect the legitimacy of elected local authorities, such as by committing to not reform their boundaries or functions (Cairney and McGarvey, 139-42). The Scottish Government generally treated local government as its most important partner – such as via routine links with the Convention of Scottish Local Authorities (COSLA) – and also played a key role in improving relations between teaching unions and local authorities as part of a tripartite network (Cairney, 2013). At the same time, the Scottish Government maintained its dominance over local authority finance and legislated to reform local government elections 'despite considerable local authority opposition' (Cairney and McGarvey, 138).

20. From 2007, SNP led Scottish Governments have sought to improve central-local relations further, such as (1) in 2007 by signing a concordat with COSLA, designed to move from highly centralised performance management and funding models towards a more respectful partnership (Cairney, 2011: 130), and (2) in 2012 signing a 'statement of ambition' with COSLA with similar intent. At the same time, the Scottish Government holds local authorities to multiple statutory commitments, has high influence over the largest local authority function (primary and secondary schooling), and either provides or directs the vast majority of local authority general funding. For example, the Scottish Government (2023c) identifies £14 billion of local government 'general funding' in 2021-22, of which '£9.0 billion, or 66 percent of general funding' came directly from the Scottish Government, and the Scottish Government uses general funding rules to control the local authority collection of council tax (£2.6 billion, 19 percent), which leaves 'Non-domestic Rates, paid mainly by businesses' (£2.0 billion, 15 percent) under some council control. Overall, COSLA/ local government is an important but subordinate partner in Scottish central-local relations. For example, during Covid-19 responses, the Scottish Government had responsibility for the management of emergencies in Scotland, while local government was a key strategic partner for the delivery of policy in each local authority area.

There are many competing aspirations for effective Scottish Government decision-making

21. A key aim of Inquiry Module 2A is to focus on the effectiveness of Scottish Government decision-making during an emergency, when acting autonomously or in cooperation with the UK government and other bodies.
22. When organisations such as the Scottish Government and Scottish Parliament try to define 'effective', and articulate their aspirations for decision-making, they refer to many different principles (Scottish Parliament Finance and Public Administration Committee, 2023a). Consequently, they assess effectiveness in different – and potentially contradictory – ways. Cairney (2023) summarises these principles as follows:
- a. *'Responsible and accountable government'*. There should be a direct link between the choices of elected governments and the citizens they serve. Key mechanisms for accountability include regular elections, clear rules on who is responsible for decision-making, the systematic application of a coherent set of decision-making procedures, and the means to record and make decisions transparent.
 - b. *'Anticipatory or preventive policymaking'*. Governments should not lurch from crisis to crisis. They should engage for the long-term to anticipate problems, assign resources to long-term solutions, and seek societal consensus and cross-party support to maintain a policy trajectory over electoral cycles.
 - c. *'Power sharing and co-production'*. Central government ministers should avoid power hoarding. They should share responsibilities with local and supranational organisations, and delegate tasks to specialist organisations. They should seek routine partnerships with stakeholders and citizens to co-produce policy-relevant knowledge and policy, foster widespread ownership for decisions, and maintain high levels of trust in decision-making.
 - d. *'Policy coherence and policymaking integration'*. Governments need to consider how each new policy instrument interacts with existing instruments (the 'policy mix'), such as when seeking to 'mainstream' a policy agenda across government (e.g. 'health in all policies'), use performance management to monitor and influence multiple bodies, foster

collaborative multi-level governance or intergovernmental relations, and monitor overall policy outcomes.

- e. *'Evidence-informed policymaking'*. Governments should maintain fair and consistent procedures to gather evidence on problems and the feasibility of solutions. Effective learning organisations have the ability to reflect continuously on: current knowledge, from whom it is gathered (and why), and its implications for policy.
 - f. *'Fostering equity, fairness, or justice'*. 'Essential elements include: Recognition justice, to ensure that all relevant social groups feel included and are not marginalised by policy or policy processes; Procedural justice, to ensure that participants are treated fairly and that the opportunities to contribute to policy deliberation are distributed fairly; Distributional justice, to ensure that the costs and benefits of policy choices (or their social and economic outcomes) are distributed fairly'.
 - g. *'Delivering services well'*. The design and delivery of public services should be technically and politically feasible and have a clear value to citizens (as individuals and as part of society) (Moore, 1995: 22; O'Flynn, 2007).
23. In theory, many of these principles could be *mutually reinforcing*, such as if high citizen and stakeholder participation boosts transparency, long-term consensus, and the gathering of knowledge relevant to policy and delivery. Or, they could be *mutually contradictory*, when governments prioritise short-term accountability for ministerial choices and performance management over long-term collaborative governance, narrow their evidence search to known and trusted experts, play the blame game rather than share policy responsibilities in a meaningful way, and act defensively in a partisan environment where error represents failure rather than an opportunity learn.
24. In practice, a model of decision-making in which each effective government principle is *mutually reinforcing* remains aspirational, rather than an accurate representation of how things work, in two key ways (Cairney, 2023). First, new aspirations for decision-making (associated with concepts such as 'public value') have been applied rather patchily to the old ways of doing things (associated with the legacy of 'new public management'). Second, new organisational reforms to foster whole-of-government approaches did not remove the need for traditional hierarchical structures to maintain clear lines of authority between ministers and civil servants.
25. In that context, it is incumbent on governments – and the organisations holding them to account – to define what effective government means in theory and practice, how to pursue it, and what evidence could be used to evaluate effectiveness. Only then can we determine if Scottish Government Covid-19 decision-making was effective. This aim requires a clear and convincing narrative of how each effective government principle fits into a coherent whole, making a clear distinction between:
- How the Scottish Government would like decision-making to work, with reference to its aspirations and the means to support them, and;
 - How Scottish Government decision-making actually works in practice, during normal times and emergencies.

How Scottish politics and government decision-making works in practice

26. *The Scottish Parliament has some influence on Scottish Government decision-making.* MSPs of government and opposition parties influence the amendment of government legislation (MacGregor, 2021). Scottish Parliament committees influence the policy agenda via inquiries and influence ministers via routine scrutiny (Cairney and McGarvey, 2013; St.Denny, 2020).
27. *The relative influence of parties has varied.* During periods of coalition majority government, policy was driven by cooperation between two parties in government (Labour/ Liberal Democrat 1999-2007; SNP/Green 2021-). The SNP minority government required support from different opposition parties at different times (2007-11, 2016-21). The SNP majority government (2011-16) was less subject to opposition influence, and able to pass legislation that had been blocked by opposition parties in the previous parliamentary term (e.g. to initiate a referendum on Scottish independence subject to UK government consent). The minority SNP government (63/129 seats) was in office in 2020, followed in May 2021 by a majority government led by the SNP (64 seats) and supported by the Scottish Green Party (8).
28. *The Scottish Government governs.* Resources for decision-making are held predominantly by the Scottish Government. Scottish Parliament resources for committee staffing are low, opposition parties have limited resources to perform additional scrutiny, and governing party MSPs rarely vote against the government (Cairney and McGarvey, 2013).
29. *There is some evidence for a 'Scottish policy style'.* Devolution prompted the development of new 'policy communities' around the Scottish Government. When asked to compare Scottish and UK government policymaking, many organisations reported improved and more fruitful access to government, and better central-local government relations (Keating et al, 2009).
30. *There is a clear link between the 'Scottish model' and reorganisation of government departments, but also the maintenance of hierarchy.* In 2007, the Scottish Government replaced a small number of sectoral departments with a larger number of Directorates, with Cabinet Secretaries overseeing multiple Directorates whose purview would cross-cut traditional sectors. This reform projected the idea of 'the Scottish Government as a single, coherent unit rather than a group of departments with separate identities' (Staff Message from Permanent Secretary, 'Changes in Our Structures', May 16, 2007). Nevertheless, named Cabinet Secretaries take responsibility for specific Directorates (although this report para 51 notes that 1 in 5 Directorates have more than one named Cabinet Secretary). There is also a hierarchical line management structure to connect Directors Generals to Directors (see *Key roles and rules in the Scottish Government: Directorates*). In other words, two organisational purposes drive Scottish Government decision-making: to (1) share cross-cutting responsibilities and (2) assign specific ministerial responsibilities.
31. *The NPF matters, but was not designed to inform emergency decision-making.* Civil servants and public bodies are expected to refer to the NPF to describe their work, and show how their work contributes to the strategic priorities of the NPF. However, as Topic 1 discusses, the NPF does not feature strongly in civil contingencies or pandemic preparation. It represents Scottish Government agendas and aspirations, not a specific decision-making tool.
32. *There is limited evidence of wider citizen engagement.* While there is evidence of national and local innovation to encourage 'community engagement', there is also a major gap between Scottish Government rhetoric on engagement and actual policies and practice, particularly in

relation to equal citizen engagement (Lightbody and Escobar, 2021; Social Renewal Advisory Board, 2021).

33. *The Scottish Government is responsible for decision-making during normal times and emergencies.* During 'normal' policymaking in Scotland, we would expect the Scottish Government to be primarily responsible for decision-making (on devolved matters), subject to scrutiny by the Scottish Parliament, informed by consultation with key stakeholders, and with citizen engagement reflected largely in voting. During an emergency, we would expect an accentuation of this dynamic, with less time for parliamentary scrutiny or consultation (e.g. this report para 242). This centrality of the Scottish Government, coupled with the inheritance of a Westminster-style political system, ensured that Scottish Government ministers have broadly equivalent powers – in relation to devolved decision-making - to those associated with the UK government.

Decision-making roles and rules in the Scottish Government: Cabinet and Ministers

34. Scottish ministerial powers are restricted to devolved policy areas (unless authorised to act in relation to reserved matters via 'executive devolution', this report para 55). They need to cooperate with the more powerful UK government when devolved/reserved areas intersect.
35. In devolved areas, the Scottish Government First Minister enjoys comparable powers to the UK Prime Minister in relation to (a) appointing Cabinet colleagues, (b) leading Cabinet government decision-making (including setting the overall strategy of the Scottish Government) and (c) overseeing government decision-making rather than running a sectoral department (such as for health or education policy) (Cairney and McGarvey, 2013).
36. The Scotland Act 1998 (S46) states that the First Minister is appointed by the Scottish Parliament after a vote by MSPs, and this vote must take place within 28 days of a general election or resignation of the First Minister (MSPs tend to vote for their own party leader or leader of their coalition).
37. The First Minister appoints Ministers to Cabinet posts. This process is subject to routine Scottish Parliamentary approval. However, the First Minister is effectively in charge of choosing the number of ministers of the Scottish Cabinet and allocating their portfolios, with the exception of two law officers - the Lord Advocate and the Solicitor-General for Scotland – named in the Scotland Act 1998. The First Minister can also remove a minister from office without Scottish Parliament approval. In theory, the Scottish Parliament can oblige ministerial resignation with a successful vote of no confidence (in practice, they are used by opposition parties to criticise government performance).
38. The terminology of these positions has changed since 2007. The Scotland Act 1998 described the 'Scottish administration' (the collective term, including ministers and civil servants) as the 'Scottish Executive'. The SNP government in 2007 rebranded as 'Scottish Government', and the Scotland Act 2012 confirmed this change. The Scottish Government now describes senior ministers as 'Cabinet Secretary' (not to be confused with the most senior civil servant, 'Cabinet Secretary of the United Kingdom') and junior/ non-Cabinet ministers as Ministers.
39. The Scotland Acts do not describe the role of a Deputy First Minister (DFM). This role resulted initially from the coalition government agreements (1999-2007) that allowed for a Scottish Labour First Minister and Scottish Liberal Democrat Deputy First Minister. From 2007, the DFM

role was retained to signal relative seniority in the single party SNP government. It has been held by Nicola Sturgeon (2007-14), John Swinney (2014-23) and Shona Robison (2023-). The SNP-Scottish Green party cooperation agreement allows for the appointment of two Scottish Green Ministers (more junior than Cabinet Secretaries) but the SNP retained the DFM role. For example, John Swinney's role was to coordinate activity across government – and often the wider public sector - during the COVID-19 emergency (as well as take primary responsibility for education policy), and this role did not change substantively after the change of government in 2021 (confirmed by John Swinney's testimony for Module 1, and John Swinney's written statement for Module 2A, INQ000287771: 9).

40. Scottish Government ministers are expected to follow the Scottish Ministerial Code, which relates closely to the UK Ministerial Code on which it was based (and is updated slightly by the Scottish Government during each Scottish Parliament term). It includes the expectation that Ministers will observe the principle of collective responsibility (primarily via Cabinet decision-making) and the Seven Principles of Public Life set out by the Nolan Committee on Standards in Public Life (Selflessness, Integrity, Objectivity, Accountability, Openness, Honesty, Leadership) (Scottish Government, 2018a).
41. The Nolan principle of Openness includes the statement that 'Information should not be withheld from the public unless there are clear and lawful reasons for so doing' (Scottish Government, 2018: Annex A). This commitment is enshrined in the *Freedom of Information (Scotland) Act 2002*. The design of this FOI Act was led by the Scottish Liberal Democrat DFM who promised a 'more open system of FOI than UK ministers in equivalent UK legislation' (Cairney, 2011: 74). However, this system relied on not only (1) the 'the robustness of the Scottish Information Commissioner' charged with enforcing the rules, and an energetic media willing to use them, but also (2) the 'willingness of public bodies to cooperate', in the context of a 'public sector perception that FOI had produced greater-than-expected costs (either financial, or the opportunity costs related to what civil servants could be doing instead)' and a desire to devote limited resources to fulfilling FOI requests (Cairney, 2011: 74). The Act also identifies exemptions for up to 15 years - including: 'the formulation or development of government policy; Ministerial communications; the provision of advice by any of the Law Officers (or any request for the provision of such advice) or the operation of any Ministerial private office' – albeit 'unless the public interest in withholding the information outweighs the public interest in disclosing it' (Scottish Information Commissioner, 2023: 1). The Scottish Information Commissioner can make rulings on that basis, but the First Minister can reject its decision 'provided the information is of exceptional sensitivity and provided the First Minister has consulted the other members of the Scottish Government' (Scottish Information Commissioner, 2023: 1).
42. The Scottish Cabinet performs equivalent functions to the UK Cabinet. It is the ultimate decision-making body and the main formal mechanism to coordinate ministerial decision-making. While Cabinet Secretaries are individually responsible for departmental decisions made in their name, Cabinet binds them to collective responsibility for the overall strategy of the Scottish Government. It 'reconciles Ministers individual responsibilities with their collective responsibility... and is the ultimate arbiter of all policy on devolved matters' (Scottish Government *Guide to Collective Decision Making*, 2008: para 4.1). For example, John Swinney (INQ000287771: 19) describes Cabinet proceedings as the place to consider 'different views and proposals' before the First Minister 'would generally sum up the discussion and an agreed position would be arrived at' (and 'Cabinet never held a vote on any issue in connection with Covid-19'; the latter is confirmed by former First Minister Nicola Sturgeon, INQ000339033: 28).

43. While there is no clear line between decisions that must be discussed in Cabinet or delegated to ministers, high-level decisions would be subject to Cabinet responsibility. The Scottish Ministerial Code (Scottish Government, 2018: para.2.10) describes Cabinet-level decision-making on matters which ‘significantly engage the collective responsibility of the Government, either because they raise major issues of policy or because they are of critical importance to the public’. The *Guide to Collective Decision Making* states that: ‘as a general rule, any proposal which involves a change in the Government’s agreed objectives or priorities, a change in the general allocation of public expenditure, primary legislation ... or the making of a statement to the Parliament on a significant or sensitive policy issue’ (Scottish Government, 2008: para.4.7). For example, Cabinet-level decision-making would include choices to regulate social behaviour directly (such as to issue stay-at-home orders), and reallocate major budgets (such as to initiate emergency spending to address new aspects of a pandemic). Ministers would not need to bring decisions to Cabinet if solely ‘within the responsibility of a single Minister’ but ‘should put before their colleagues the sorts of issues on which they themselves would wish to be consulted’ (Scottish Government, 2018: para.2.11).
44. As Topic 1 describes, the balance between Cabinet and ministerial decision-making would shift during an emergency: the former would still meet weekly (or more), and intragovernmental preparation would be geared towards that meeting; but Cabinet would delegate more day-to-day decisions to the ministers dealing quickly with emergencies (and often in consultation with UK ministers). The Scottish Ministerial Code (Scottish Government, 2018: Section 2) addresses this possibility indirectly (in other words, without specifically describing emergency decision-making). It allows for ‘Ministerial Discussions below the Level of the Cabinet’. They can take place in named Cabinet sub-committees involving more than one minister (including the FM and DFM) or an ad hoc ‘collective Ministerial meeting’ as long as it is ‘minuted, with decisions and any outstanding issues recorded clearly, usually with input from the Cabinet Secretariat and/or the relevant Private Office’ (2018: para 2.16). Such meetings would be appropriate for two purposes: (1) to ‘relieve the pressure on the Cabinet itself by enabling business to be settled at a lower level, where appropriate’, or (2) to ‘support the principle of collective responsibility by ensuring that, even though an important question may not be discussed at a meeting of the Cabinet, the decision will be given full Ministerial consideration, and the final judgement reached will be sufficiently authoritative to ensure that the Government as a whole can properly be expected to accept responsibility for it’ (Scottish Government 2018: para 2.17).
45. Compared to the UK Cabinet, there is a greater potential for the Scottish Cabinet to perform a more meaningful collective function. Its relatively small size is more conducive to collective conversation, and the cross-cutting nature of ministerial responsibilities means that there are fewer issues that could be deemed the sole responsibility of one. This potential is not necessarily or always realised. For example, before 2020, there were many instances of ministers describing their personal opinions that contradicted those of the Cabinet (e.g. when the matter related to a minister’s constituency), particularly during the 1999-2007 period in which there was an imbalance of power between the parties that shared a coalition government (Cairney and McGarvey, 2013: 115).

Key roles and rules in the Scottish Government: The civil service and Directorates

46. Scottish Government civil servants remain part of a UK civil service. The rules governing the roles and expected conduct of civil servants are UK-wide. They include frameworks of rules governing: the role of the Permanent Secretary and Directors-General as Accounting Officers

(responsible for spending public money), standards of recruitment of civil servants and appointments of special advisors, the terms and conditions of the civil service, and the civil service code (e.g. Scottish Government, 2010; 2023a).

47. This maintenance of a UK system contributed to the idea that the civil service would undermine policy divergence between UK and devolved governments (Cairney and McGarvey, 2013: 126). However, the main effect was the maintenance of intergovernmental relations via civil servants, while the regular movement of civil service staff between UK government departments and the Scottish Government has fostered common understandings about different departmental cultures across the UK (Parry, 2012).
48. Although it is a UK-wide system, the rules create the expectation that Scottish Government civil servants serve Scottish Government ministers: 'As a civil servant you are accountable to Scottish Ministers, who in turn are accountable to the Scottish Parliament' (Scottish Government *Civil Service Code*, 2010, para.2). The Scottish Government also has delegated authority to recruit and manage the Scottish Government civil service within the framework now laid down by the *Constitutional Reform and Governance Act 2010* (SA 1998 s.51(4)). UK rules are generally enforced by the Scottish Government, and 'Accountable Officers are personally answerable to the Parliament for the exercise of their functions' (Scottish Government, 2023a). The result is a Scottish Government that is integrated within a UK-wide administrative machinery, but with the ability to develop its own policies and decision-making processes. This balance became more politically significant from 2007, when the SNP entered office with a commitment to Scottish independence. In that context, Parry (2020: 392) describes the value of recruiting Permanent Secretary Housden from Whitehall in 2010: 'The advantage was that Housden had no Scottish baggage at all and could focus on his previous speciality of service delivery without becoming a principal adviser on constitutional matters. Housden's Whitehall connections enabled the system to navigate as an honest broker in the face of accusations that Scottish officials might either owe loyalty to the unionist cause or have been taken over by nationalism' (although Housden's role was occasionally criticised during the 2014 independence referendum campaign (Johnson, 2014)).
49. The rules governing Special advisors to ministers (Spads) are also UK-wide but adaptable to the Scottish decision-making context. The *Constitutional Reform and Governance Act 2010* (CRGA 2010 s.8) states that a special advisers code must make clear that they may not '(a) authorise the expenditure of public funds; (b) exercise any power in relation to the management of any part of the civil service of the State; (c) otherwise exercise any power conferred by or under this or any other Act or any power under Her Majesty's prerogative'. The UK-wide rationale for Spads is also present in the *Scottish Ministerial Code* (Scottish Government, 2018: para.4.15), which states that their separate party political role helps to 'reinforce the political impartiality of the permanent Civil Service by providing a separate channel for political advice and assistance available to Ministers'. However, Scottish Government Spads clearly serve only Scottish Government ministers. They are appointed by the First Minister personally and their appointment must end with the end of the First Minister's term of office (CRGA 2010 s.15(1)). Responsibility for Spad management and conduct rests with the First Minister (Scottish Ministerial Code 2018: paras 4.16-4.19), who is required to lay an annual report containing information about their number and cost before the Scottish Parliament (CRGA 2010 s.16; *Public Services Reform (Scotland) Act 2010* s.33). The role of specific Spads is not a key feature of Scottish Government witness statements (although Nicola Sturgeon INQ000339033:

18 describes working closely with 'my Chief of Staff (until May 2021) Liz Lloyd, Davie Hutchison, and Colin McAllister' and states that 'special advisers are not decision-makers').

50. From 2007, the Scottish Government civil service has been organised according to the 'Scottish model' described above. One Permanent Secretary, the most senior Scottish Government civil servant, takes overall administrative responsibility for the NPF's overall vision and coordination. Directors General (currently eight) complete the senior management team. Each DG takes primary responsibility for one part of government (e.g. the Director General for Health and Social Care is also the Chief Executive of NHS Scotland), and works with other DGs to oversee the broad strategic objectives of the NPF (e.g. the DG for Health and Social Care would work with others on health inequalities). Each DG is responsible for multiple Directorates (described by INQ000215486: 8 as 'Director General families' responsible for policymaking and operational matters). Directors (currently over 50) manage Directorates that combine sector specific responsibilities with a cross-cutting role (e.g. the Population Health Directorate relies on multiple partners to address health inequalities).
51. While Cabinet Secretaries no longer oversee 'Departments', the minister-civil service relationship is still akin to the UK government system, in which ministers are in charge of, and responsible for, government decision-making. The hierarchical minister-civil servant relationship is reflected in civil service organisation: Directors oversee the management of Directorates, and in turn are overseen by a named Director General (overseen by the Permanent Secretary). The Scottish model applies to that context: approximately 1 in 5 Directorates name two Cabinet Secretaries, to signal (1) cooperation and joint responsibility for cross-cutting issues (such as public service reform, local government and housing, employment and wellbeing, economic development, and climate change) and (2) a coordinating role for the Deputy First Ministers. In December 2023, of the 50 (of 54) Directorates with a named Cabinet Secretary, 40 had one and 10 had two, and the Deputy First Minister held joint responsibility in 6 of those 10 (Scottish Government, 2023d).
52. From 2007, the original Directorates connected strongly to the NPF's strategic priorities and indicators of performance, but could also be updated in relation to emerging priorities and/ or a 10 yearly revision of the NPF's overall purpose. From 2020, the Scottish Government renamed, reorganised, or added new Directorates to reflect the emergency COVID-19 response (this report paras 142-6).

Policy areas reserved to Westminster and devolved to the Scottish Parliament

53. The Scotland Act 1998 lists the policy sectors reserved to Westminster and the UK government ('reserved matters'), and the issue is devolved to the Scottish Parliament or government if it is not on the list.
 - The list of reserved UK powers includes: 'international relations, defence, national security, fiscal and monetary policy, immigration and nationality, drugs and firearms, regulation of elections, employment, company law, consumer protection, social security, regulation of professions, energy, nuclear safety, air transport, road safety, gambling, equality, human reproductive rights, broadcasting, copyright' (Cairney and McGarvey, 2013: 3).

- Therefore, a simple list of devolved issues in 1999 included: 'health, education and training, economic development, local government, law and home affairs, police and prisons, fire and ambulance services, social work, housing and planning, transport, environment, agriculture, fisheries, forestry, sport, the arts, devolved research, statistics' (2013: 3).
54. The Scotland Act 2012 and Scotland Act 2016 introduced additional devolved responsibilities, to be phased in over time. The 2016 Act included:
- 'Further income tax powers, including the power to set rates and bands
 - Assignment of Value Added Tax
 - Certain social security benefits
 - Provisions to introduce a new Scottish tax on the carriage of passengers by air from Scottish airports, and to disapply Air Passenger Duty in Scotland
 - Provisions to introduce a new Scottish tax on the commercial exploitation of aggregates, and to disapply the UK Aggregates Levy in Scotland
 - Fines, forfeitures and fixed penalties' (Scottish Government, 2023b).
55. It is also routine practice to produce 'executive devolution' or the 'devolution of executive competences', in which the matter remains reserved but Scottish Government ministers are authorised to act (Cairney et al, 2019). The formal process may take place via S.63 of the Scotland Act 1998 ('Power to transfer functions') which states that 'Her Majesty may by Order in Council provide for any functions, so far as they are exercisable by a Minister of the Crown in or as regards Scotland, to be exercisable - (a) by the Scottish Ministers instead of by the Minister of the Crown, (b) by the Scottish Ministers concurrently with the Minister of the Crown, or (c) by the Minister of the Crown only with the agreement of, or after consultation with, the Scottish Ministers'. UK legislation may also identify Scottish Government ministerial responsibilities (subject to a legislative consent motion in the Scottish Parliament). Further, the UK government can take equivalent steps to authorise some degree of delegation (such as in regulations or guidance).
56. In practice, there is a blurry boundary between UK and Scottish Government responsibilities, particularly when (a) policy problems transcend traditional policy sectors or government departments, (b) both governments produce policy instruments that contribute to a policy mix, and (c) the Scottish Government seeks to influence the policies of the UK government. Examples since 1999 included UK and Scottish Government attempts to take responsibility for 'industrial policy' in Scotland, the mix of UK and Scottish Government funding and influence over higher education (including UK rules governing international students), and uncertainty about the ability of the Scottish Parliament to legislate to introduce a ban on smoking in public places (which the UK government helped to resolve) (Cairney and McGarvey, 2013: 197).
57. Before Brexit, some policy areas – such as environmental policies – were devolved but also highly Europeanised. Further, the UK was the EU member state overseeing the Scottish Government's implementation of EU policies. Such ostensibly devolved policy sectors would be multi-level in practice, and often leave limited room for a Scottish Government to manoeuvre (in other words, when EU regulations were binding on UK and devolved governments).

Subsequently, Brexit removed key aspects of multi-level governance, but also created (1) a period of confusion about who would take on former EU responsibilities, then (2) tensions related to the UK government's repatriation of powers that the Scottish Government expected to hold. The *UK Internal Market Act 2020* exemplified the sense that devolved Scottish Government policies would have to be consistent with an overall UK-wide post-Brexit system to which it would take time to understand and adapt (Dougan et al, 2022).

Three ways to identify UK and Scottish Government responsibilities for Covid-19 policy

58. I describe three distinct but connected ways to identify UK and Scottish Government Covid-19 policy responsibilities in relation to what academic researchers would call *problem definition* which informs the identification of the most appropriate *policy instruments* (Cairney, 2020). In other words, the responsibility for 'Covid-19 policy' is not clear until governments identify what 'Covid-19 policy' means in practice, including (a) the extent to which the state has a responsibility to respond, (b) the primary means to address the problem (e.g. to treat it as a public health problem), and (c) the most appropriate policy instruments to address that problem (e.g. preparing for emergencies, gathering evidence and providing information and advice to the public, legislating to regulate behaviour, and providing financial support to people and business). Therefore, I argue that to describe Covid-19 policy as a 'public health problem' is a decision in itself. Further, as the following three examples introduce, even though public health is a devolved matter, this problem definition and assignment of responsibility is not as clear as simple legal definitions might suggest. First, as Topic 1 describes, UK and Scottish Government roles related initially to emergency preparation and response, with reference to the choice between civil contingencies or pandemic preparation. The former may have been more UK-centric in relation to who coordinates the response. Still, even when taking a public health approach to a pandemic, the Scottish Government was initially reliant on the UK government taking the policy lead (as part of a four nations approach).
59. Second, Topics 3, 4, 6 and 7 show that UK and Scottish Government Covid-19 *health protection* responsibilities (i.e. to prevent or manage the spread of disease) were somewhat blurry, and changed over time. The Scottish Government has been responsible for 'public health' since 1999. However, (1) The UK government produced the initial legislation used by Scottish ministers to issue stay-at-home orders (Coronavirus Act 2020), (2) the UK government provided the additional resources to fund the consequences of Covid-19, and (3) the UK government science advisory system was initially the main source of scientific evidence and advice for UK and devolved governments. On that basis, I suggest that:
- a. Generally, the Scottish Government had operational responsibility for responding to Covid-19 when treated as a public health problem. It was responsible for the health service, the direction of emergency services, and overseeing local government services (including schools and housing).
 - b. The UK government took primary responsibility for funding new Covid-19 schemes, largely by borrowing then distributing funds to the Scottish Government - or spending directly - to support employment furlough schemes, support for business, and social security (Topic 7).
 - c. The UK government legislated - via the Coronavirus Act 2020 - to confer powers on Scottish ministers equivalent to the powers of UK government ministers, such as to issue stay at home orders and order the closure of public places. Subsequent Scottish

Parliament legislation covered issues largely associated with the knock-on effects of lockdown measures (Topic 6).

- d. The UK government led a 'four nations' approach, in which (a) the UK and devolved governments cooperated to introduce the same measures at the same time (most notably the first 'lockdown' in March 2020), and (b) the UK government coordinated the procurement (then supply to devolved governments) of personal protective equipment (PPE) and vaccines.
 - e. In that context, the following counterfactual question is important, and explored further in Topics 4 and 6: could the Scottish Parliament have introduced its own legislation rather than relying on the UK Coronavirus Act? The answer from Scottish Government correspondence on this report is: yes, but the decision was made to use UK legislation as a 'rapid legislative vehicle, building on work already in hand collaboratively between the four governments on legislation for pandemic flu'. Further, INQ000339039 (para 59) confirms that Scottish Government ministers were in charge of Scottish Government strategy 'throughout the entire pandemic'. If so, the Scottish Government is confirming its decision not to legislate in this instance (then, as Topic 6 shows, legislate more than once later) but also that it would have been able to do so. In other words, the Scottish Government made a decision to not legislate earlier to allow Scottish ministers to issue stay at home orders before March 26th. On the other hand, written testimony from Nicola Sturgeon and John Swinney suggests that the absence of UK government funding for 'lockdown' would have prevented the Scottish Government from acting sooner (e.g. this report paras 185 and 261-2). In other words, the Scottish Government had the formal responsibility but not the financial means to act. This is a key example of the blurry boundaries between UK and Scottish government responsibilities in practice.
60. Third, Covid-19 policy also relates strongly to *health improvement/ promotion* measures before and during the pandemic, including measures to address health inequalities such as the unequal spread of non-communicable diseases (NCDs) (see Bambra and Marmot's 2023 report to Inquiry Module 1). Bambra et al (2021: 8-9) describe how health inequalities increase COVID-19 'vulnerability' and 'susceptibility'. People are more vulnerable to COVID-19 illness and death when they have pre-existing conditions such as heart disease, cancers, diabetes, and respiratory diseases, and the spread of these NCDs is unequal. People are more susceptible to illness if they face 'long term exposures to adverse living and environmental conditions', and these exposures are distributed unequally. Further, there was unequal 'exposure' to COVID-19, such as when lower-paid workers in service jobs were less able to work safely from home, and unequal 'transmission', since more deprived neighbourhoods have smaller homes shared by more people. Overall, such descriptions highlight the 'social determinants' of health, in which health inequalities relate strongly to inequalities in social and economic factors such as income and wealth, education, and housing. These factors influence the ability of people to live healthily and safely. Social determinants arguments also counter the idea that health inequalities relate primarily to individual 'lifestyle' choices, such as to smoke, drink, eat unhealthily, and avoid exercise (Bambra et al, 2021).
61. It is not possible to produce a simple breakdown or map of the distribution of UK and devolved government responsibilities to address the unequal spread of ill health, partly because there is high contestation about which policy instruments should be used for which purposes (Cairney et al, 2022: 43-6). In that context, the Scottish Government pursued its own health inequalities agenda before and during the pandemic, but in a UK-wide political system where the policies to

reduce health inequalities – including measures to redistribute income and wealth - are not in the full gift of Scottish ministers or health sectors.

Intergovernmental relations before 2020

62. Overlaps between UK and Scottish Government responsibilities can be addressed by formal mechanisms for intergovernmental relations (IGR) supplemented by informal relations between civil servants (see Henderson's 2023 expert report). However, the UK parliament and government are the more powerful partners, and none of the conventions or IGR agreements described below produce legally binding constraints on unilateral UK action. My interpretation of these arrangements is as follows.

63. *The UK government seeks, but does not need, legislative consent from the Scottish Parliament.* The main mechanism to foster a formal relationship between UK and Scottish legislatures has been the legislative consent motion (LCM). First, it began as the 'Sewel motion' which was used frequently in a relatively innocuous – albeit often criticised - manner (Cairney and Keating, 2004; Henderson, 2023: 17 lists 195 passed and 4 rejected from 1999-2021). The Sewel convention signalled a degree of respect for devolution rather than a means to make or reject decisions (or to signal the intention to use this function during emergencies). It was named after Lord Sewel following his description of expectations for legislative consent during the House of Lords debate on the Scotland Bill (July 2, 1998, Vol.592, col.791). It states that 'the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature' (Cabinet Office, 2013: para.14). Second, the Scotland Act 2016 amended the Scotland Act 1998 Section 28 to state that 'the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament'. Third, however, 'The UK Supreme Court decided in 2017 that the Scottish Parliament does not have a "legally enforceable veto". This means that if the Scottish Parliament votes against a legislative consent motion, it can still become the law' (Scottish Parliament, 2023, referring to Supreme Court 17.1.17 para 150, R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)). For example, the Scottish Parliament withheld consent for the European Union Withdrawal Bill 2020, but with no impact on the subsequent Act (Henderson, 2023: 17).

64. *The UK government leads processes to foster agreement with devolved governments, but does not need – or always seek – devolved government consent or agreement.* The main agreement between the UK Government and devolved governments was the Memorandum of Understanding, which set out a shared understanding of key principles – including good communication, co-operation, and confidentiality - and provided for the establishment of a joint ministerial committee ('JMC') of UK and devolved government ministers (Cabinet Office, 2013). There were separate documents to describe agreements on the role and functions of the JMC, how to handle EU relations and policies, financial assistance to industry, and international relations, and guidance on common working arrangements. There were also bilateral concordats between individual Whitehall departments and the Scottish Government (Henderson, 2023).

65. *These agreements and procedures are neither legally binding nor useful in an emergency.* Each agreement exemplified the broad aim of smooth working relationships to foster positive IGR, not the production of a legally binding document. Meetings of the JMC became opportunities to

resolve disputes: (1) that could not be addressed by informal means, such as via civil service discussion or agreements between political parties, or (2) to avoid recourse to the UK Supreme Court. The JMC met irregularly and infrequently, to reflect a relative reluctance of the UK government (compared to devolved governments) to use them for regular discussion or dispute resolution (Henderson, 2023: 22). The JMC format was not an established mechanism that could be easily adapted to four nations Covid-19 response (2023: 21-2). For example, Nicola Sturgeon (INQ000339033: 38) describes the JMC generally as 'not effective' and confirms that it 'did not meet at all between January 2020 and April 2022'.

66. *The Office of the Secretary of State for Scotland has a limited role in IGR, and is not equipped to facilitate cooperation during emergencies.* Before devolution, the Secretary of State for Scotland was a member of the UK Cabinet and oversaw the delivery of policy in Scotland. After devolution, this role changed to represent a conduit between UK and Scottish Governments, and Cabinet status was not guaranteed. The role was of low importance to the UK government when Labour led the UK and Scottish Governments until 2007 (Cairney and McGarvey, 2013: 197-8). Its importance grew from 2007, as a means to defend a Labour or Conservative led UK government's position as much as to foster good relations with the SNP led Scottish Government (2013: 197-8). Henderson (2023: 38) describes 'limited evidence' that the Scottish Secretary performed an enhanced IGR role during the pandemic. John Swinney (INQ000287771: 16; 35) states that 'I experienced no tangible presence of Alister Jack MP, the Secretary of State for Scotland, or the Office of the Secretary of State for Scotland in any aspect of our work in handling the pandemic in Scotland ... if the Scottish Government had an issue, we went direct to the decision makers in the UK Government'. Nicola Sturgeon (INQ000339033: 68) provides the same assessment, noting that 'To go through the Scotland Office would have added an unnecessary and unhelpful layer of bureaucracy' to IGR.
67. *By 2020, there was a climate of poor and worsening IGR, particularly between UK and Scottish Government ministers* (McEwen, 2021). This poor climate related to the competing parties in each government: the SNP tends to be critical of the Conservative party in the UK and Scotland, and Boris Johnson's tenure as UK Prime Minister provided a stark contrast to David Cameron's and Theresa May's more respectful tone (Nicola Sturgeon INQ000339033: 48 also makes this comparison). The SNP government also expressed stark opposition to a Brexit imposed by the Conservative UK government (Henderson, 2023). As Module 1 testimony by Nicola Sturgeon and John Swinney suggests, UK-Scottish ministerial relations were unusually poor in the lead up to the Covid-19 pandemic.
- 67.1. In that context, John Swinney (INQ000287771: 21; 24; 30; 125; 171-5) describes the increased use of formal IGR measures to address Covid-19 as insufficient, such as when describing (a) COBRA meetings as too infrequent and short, with 'no real appetite to ensure the views and priorities of the Devolved Governments were fully addressed', (b) by the time that the Scottish Government was involved in discussions, 'there was a strong sense that decisions had already been taken on what approach was to be taken by the UK Government', and (c) frustrations with a tendency for the UK Government, as the 'dominant partner', to make unilateral decisions rather than seek to resolve UK-devolved government differences (IGR was 'not a relationship of equals'), such as in relation to funding or border control. John Swinney (para 34) describes these exchanges as 'courteous and professional' and not hampered by any poor 'personal relationships'.

67.2. Nicola Sturgeon (INQ000339033: 46; 50) provides a similar assessment of COBRA as meeting too infrequently (and being too ad hoc and ill-prepared) to be effective, and describes formal IGR mechanisms as largely existing to 'rubber stamp' rather than make decisions. Nicola Sturgeon (INQ000339033: 42-3; 66) describes a commitment to putting aside previous disagreements (e.g. on Brexit), but also the mixed effectiveness of IGR, which she relates to 'the culture and mindset that the different governments brought to bear and the levels of trust and mutual respect that existed between us'. For example, Nicola Sturgeon (INQ000339033: 43; 56) describes (1) her perception that the UK Government expected the devolved governments to follow its lead, and would describe policy divergence between UK and Scottish governments as politically motivated (rather than genuine disagreements about the best policy), and (2) that the lack of UK government consideration of devolved governments became increasingly problematic, such as when making quick decisions on international borders without considering the knock-on effects.

How UK and Scottish Government decision-making works in theory and practice

68. Comparing the roles of Scottish political actors – such as its government, parliament, public bodies, and stakeholders - helps to place most devolved decision-making responsibility in the hands of Scottish Government ministers. Comparing UK and Scottish responsibilities helps to show that UK government ministers still lead policies with reserved and devolved elements. Consequently, the preceding sections on ministers and civil servants are essential to understand formal rules and procedures in the UK and Scottish Governments.

68.1. However, I argue that this focus on formal procedures also (1) exaggerates the powers of ministers in relation to their ability to understand and address policy problems effectively, and therefore (2) makes it difficult to identify for what ministers could reasonably be held to account. More realistic academic studies help to inform explanations and evaluations of decision-making in the UK and Scotland, such as by asking: did this problem result from the choice of a named individual, procedures of an organisation, and/ or systemic limits on decision-making? The answer is difficult to provide without highly detailed resource-intensive accounts of decision-making (based on more evidence than provided in this report).

69. Academic theories and studies of policymaking identify and explain the inevitable systemic limits to ministerial powers with reference to the gap between ideal-type versus real world policymaking (visualised simply in Figure 1.1, in which the policy cycle is the ideal-type and the policy spirograph represents messy real world policymaking).

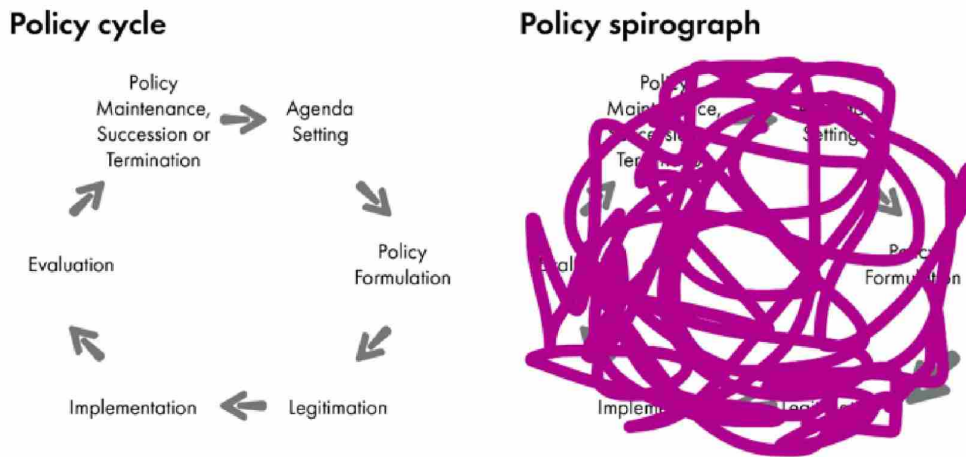


Figure 1.1: Images of ideal-type and real world policymaking

(Source: Cairney 2017, reproduced in Cairney, 2023a)

70. UK and Scottish Governments may find this image of a policy cycle politically useful since it projects orderly policymaking through a series of stages (Cairney, 2023b). This image complements the ‘Westminster model’ story, which portrays the idea of a small number of powerful ministers making authoritative choices at the heart of government (Cairney and Kippin, 2023a). It also provides a useful portrayal of a list of essential policymaking functions or requirements. Effective decision-making requires policymakers to define policy problems, generate feasible solutions, legitimise their choice, implement, and evaluate success or failure before deciding whether to maintain or change policy.
71. However, if treated as a description of actual decision-making, the policy cycle would present highly unrealistic expectations. Consequently, academic studies use equally simple images – summed up by the ‘policy spirograph’ (Figure 1.1) – to state that policy processes are far messier than the cycle suggests, and seek more accurate ways to describe decision-making. Policy theories describe real world policymaking with reference to two main limits to decision-making that I introduce here and explore in Topics 3 and 4.
72. First, ‘bounded rationality’ describes the profound limits to the ability of policymakers to gather and process information on policy problems and solutions. Governments can only gather so much information, and policymakers must combine cognitive and emotional shortcuts to process enough information to inform their choices (Simon, 1976; Baumgartner and Jones, 2009; Cairney and Kwiatkowski, 2017). This limitation is ever-present and inevitable, but also pronounced during new emergencies when information is scarce, uncertainty is unusually high, and governments need to make decisions unusually quickly.
73. Second, ‘policymaking complexity’ describes a decision-maker’s lack of control of their policymaking environment, and the absence of one single centre of policymaking. Most policy is made in many ‘centres’ spread across political systems (Cairney et al, 2019). Ministers are formally responsible for this activity, but have to ignore most choices made in their name, and have limited control over the outcomes. These general concepts inform portrayals of decision-making in the UK and Scotland, including:

- a. *Policy communities*. Ministers can only pay attention to a small fraction of their responsibilities and ignore the rest. They delegate most issues to civil servants, who form relationships with the organisations and experts that give them information and advice. The result is that most policy is processed and influenced at lower levels of government, with minimal ministerial involvement (Richardson and Jordan, 1979; Cairney, 2020).
 - b. *Multi-level governance*. Multi-level describes the sharing of decision-making responsibilities vertically (e.g., local, Scottish, UK, supranational) and horizontally (e.g. across multiple public bodies). Governance describes blurry boundaries between actors with formal decision-making responsibilities and informal influence, such as in policy communities or policy areas influenced formally and informally by multiple governments (Rhodes, 1997; Bache and Flinders, 2004; Cairney, 2020).
 - c. *Complex systems*. Policy practices and outcomes emerge from policymaking systems in the absence of central government control. They are not amenable to top-down approaches to decision-making or performance management. They are also unpredictable, such as when the same decision works well in one context but fails in another (Cairney, 2020; Cairney and Kippin, 2023a).
74. These insights suggest that ministerial policy choices represent only one part of the sum total of 'government decision making' made in the name of ministers (in other words, all of the decisions made on behalf of government). Further, ministerial choices explain only a proportion of the policy outcomes that arise, since there are inevitable gaps between strategy and delivery, and between the effect of policy delivery and intended outcomes. Compared to a sole focus on Cabinet and ministerial decision-making, these insights can inform a context-based assessment of the choices that ministers could make, then use that assessment to reflect on the effectiveness of the procedures or systems used to support their decision-making.

Topic 1: Roles and responsibilities for emergency and pandemic preparedness

Two ways to address a pandemic: civil contingencies and public health policies

75. Topic 1 describes two separate ways to prepare for a pandemic in Scotland. First, to draw on legislation, regulations, guidance, and procedures to address civil contingencies. This approach would establish the UK government's primary responsibility to legislate and coordinate emergency planning, then delegate decision-making powers and functions to Scottish Government ministers (see this report para 55 on executive devolution). The Civil Contingencies Act 2004 Part 2 gives UK government ministers the powers to declare an emergency, while Part 1 places emergency planning duties on UK and devolved governments and 'Category 1' responders. Associated guidance, procedures, and decision-making structures help Scottish Government ministers to oversee emergency planning in Scotland. Second, to use public health legislation, planning exercises, guidance, and emergency plans and procedures. The UK government health department led 'four nations' planning for a pandemic. They planned largely (but not exclusively) for pandemic influenza (flu) when modelling the worst case scenario and appropriate responses.
76. Both possible ways to prepare for – and respond to - a pandemic were the primary responsibility of the UK government, to establish UK-wide legislation and lead a 'four nations' approach to policymaking (I use 'four nations' as a general description of cooperation between the UK and devolved governments in Northern Ireland, Scotland, and Wales, while noting that UK and devolved governments may attach different meaning to the term).
77. The civil contingencies approach appears to be relatively UK-centric, but Scottish Government ministers were also reliant on UK legislation and funding to pursue a public health approach (see paras 58-9 in this report). In March 2020, the UK and Scottish Government response to Covid-19 drew on emergency public health powers. Topic 6 describes the UK government decision to rely on public health legislation to initiate early 'lockdown' measures before passing emergency Covid-19 legislation in 2020 (*lockdown is used here as a general term to describe stay-at-home orders and the obliged closure of business and public places*). It describes the Scottish Government's relative lack of emergency public health provisions before the Coronavirus Act 2020 received Royal Assent.

The UK legislative and regulatory framework for civil contingencies (emergency preparedness)

78. The Civil Contingencies Act 2004 describes 'a Minister of the Crown' (in the UK government) and 'Scottish Ministers' (in the Scottish Government) but does not identify other specific roles or bodies in relation to informing decision-making during emergencies. It is not designed to indicate how a range of organisations will inform or contribute to ministerial deliberation or action (either in the UK or Scottish Governments). The Act Part 2 gives a senior Minister of the Crown (e.g. UK Prime Minister) the power to declare an emergency, defined as 'an event or situation which threatens serious damage to human welfare'. The Act does not describe a pandemic specifically, but the Act's definition could include a pandemic. If the UK government were to use these emergency powers, the Scottish Government would be prompted to support that response by making use of its emergency preparation plans and procedures. For example, it would 'appoint a Scottish Emergency Co-ordinator ... in consultation with the First Minister'

and the coordinator would chair meetings of, and be supported by, Scottish Government Resilience Room (SGoRR – see this report para 90) (Ready Scotland, 2016: 30).

79. The Act Part 1, on emergency preparation, places a duty on Scottish ministers to ('from time to time'): 'assess, plan and advise' on the risk of emergency' make contingency plans (including plans to direct public bodies); identify the extent to which they can prevent an emergency or reduce, control or mitigate its effects; publish guidance and reports on emergency assessments (such as exercises to test coordinative capacity); monitor and enforce relevant action make arrangements to keep the public informed'.

UK and Scottish Government guidance and planning to arise from the regulatory framework

80. Before 2020, UK Government guidance documents (regarding the Act) focused generally on emergencies, not pandemics specifically. They give more detail on roles and responsibilities. Cabinet Office (2013a) guidance:
- a. States that, in relation to devolved matters, the Scottish Resilience Division of the Scottish Government has 'overall responsibility for civil protection policy in Scotland' (Cabinet Office 2011b: 2 describes civil protection policy as 'largely a devolved matter', unless for example 'certain responders in Scotland operate in reserved areas').
 - b. Establishes broad Scottish Government responsibility for emergency responses in devolved areas ("the Scottish Government is designated as the lead on relevant issues in line with the 'lead department' principle at the UK level. In reserved areas the Scottish Government works closely with the UK government to ensure that Scottish needs are catered for"). In other words, it does not provide an in-depth guide to reserved/ devolved boundaries during a pandemic (this report para 53).
 - c. Identifies emergency response areas in relation to police boundaries. At the time, it described '8 strategic coordinating groups based on current police force areas' to 'promote effective planning for all types of incidents in their area, involving risk assessment, making generic and specific emergency plans, engaging with the community, training, testing, exercising and reviewing' (while this Cabinet Office document was not updated to reflect the establishment of a single force Police Scotland on 1.4.13, Ready Scotland, 2021: 2 notes the replacement of SCGs in November 2013 – see this report paras 95-6) .
 - d. Describes the role of (1) 'strategic co-ordinating groups', and (2) 'the Scottish Emergencies Co-ordinating Committee (SECC)' to determine the Scottish national strategy and foster coordination among a large number and wide range of organisations ('public (for example, local authorities, emergency services), commercial (for example, other businesses) and voluntary organisations (like charities and voluntary response organisations)').
81. Module 1 testimony confirms this understanding of Scottish Government responsibilities. Testimony by John Swinney (29.6.23: para 76) confirms that he had overall ministerial responsibility for 'resilience': 'my responsibility for resilience was held essentially as an ultimate point of responsibility, I considered myself to be, in the government, responsible for resilience matters, accountable to the First Minister, and it was my role to make sure that Scotland had in place effective resilience arrangements'.

82. Cabinet Office (2013a) guidance makes a general commitment to UK and Scottish Government cooperation to (a) foster a UK-wide response and (b) reflect the potential overlaps between devolved and reserved areas, by working closely 'to promote effective emergency planning that is, as far as possible, consistent with that of the rest of the UK'. To that end, it:
- a. Refers to a concordat with the Scottish Government (Cabinet Office, 2011a). In line with the Act, the concordat refers to 'Scottish Ministers' and no other roles in Scotland. In line with UK IGR, it focuses on broad principles rather than operational details (this report, paras 62-7).
 - b. Distinguishes between organisations subject to (1) *Scottish Government direction in relation to devolved matters*, such as emergency NHS, police, and fire services, or (2) *UK government direction in relation to reserved matters*, including 'Category 1' responders Maritime and Coastguard Agency, British Transport Police, and 'Category 2' responder Health and Safety Executive.
 - c. Refers to the Civil Contingencies Act Enhancement Programme chapter on Scotland (Cabinet Office 2011b). This chapter confirms that the Scottish Government is the lead department whenever the emergency 'primarily relates to a devolved matter'. It lists the responders under Scottish Government direction as 'Category 1' Scottish local authorities, police fire, ambulance, health boards, and Scottish Environmental Protection Agency, and 'Category 2' Scottish Water, Common Services Agency of the NHS Scotland, railway, harbour, and authorities responders. It identifies additional reserved sectors, such as Category 2 responders in gas, electricity, and telecoms. It then describes the strategy *Preparing Scotland* as consolidating the 'statutory guidance on the implementation of the Regulations, non-statutory guidance on good practice, and the integration of national and local planning for emergencies in respect of devolved functions' (Cabinet Office 2011b: 1-4).
83. *Preparing Scotland* describes a 'hub and spokes' model, with 'hub' describing a core philosophy and overall approach, and 'spokes' describing more specific guidance (Ready Scotland, 2016). Module 1 witness testimony by former Scottish Government Director of Safer Communities Gillian Russell (28.6.23: para 12-17) confirms that this approach was in place in 2020. *Preparing Scotland* (2016: 3) focuses on 'resilience' in relation to 'systems' (e.g. to maintain a fuel supply), 'communities' (e.g. to contribute to common goals in relation to emergency), and individuals. Its description of the legislative and regulatory framework includes categories of responders:
- Category 1 'Local Authorities, Police, Fire, Ambulance, Health Boards, Scottish Environment Protection Agency, Maritime and Coastguard Agency, Integration Joint Boards'.
 - Category 2 'Electricity Operators, Gas Suppliers, Scottish Water, Communications Providers, Railway Operators, Airport Operators, Harbour Authorities, NHS National Services Scotland, Health and Safety Executive' (Ready Scotland, 2016: 7).
84. Ready Scotland (2016: 8) describes 'Integrated Emergency Management (IEM) ... based on a multi-agency approach and the effective co-ordination of those agencies', involving not only Category 1 and 2 responders, but also 'voluntary sector, commerce and a wide range of communities' and individuals. It lists five key activities: 'Assessment, Prevention, Preparation, Response, Recovery' (2016: 9). Three types of management structure for 'Resilience

Partnerships' relate to ascending levels of decision importance: Operational (Bronze), Tactical (Silver), and Strategic (Gold).

85. Ready Scotland (2016: 24-7) identifies a list of key responsibilities for 'resilience governance', divided into 'the preparation stage' (SGoR and SRP) and 'the response/ recovery stage' (SGoR(M) and SGoRR), and described as follows.

Preparation stage

86. During the preparation stage, the Scottish Government Resilience Cabinet Sub-Committee (SGoR) should meet to prepare the strategic response to an emergency response and keep 'abreast of matters related to promoting and improving civil protection, contingency planning and preparing for specific contingencies such as pandemic influenza' (2016:24). However, it does not meet frequently. Module 1 questioning (Inquiry transcript 29.6.23: para 79, 11-12) confirms that 'the last recorded meeting of it took place on 14 April 2010', which suggests a lack of its operational readiness (or expectation that other means of coordination would be used). John Swinney (Inquiry transcript 29.6.23: 82, 6-10) confirmed that the 'preparation of active resilience' work 'was taken forward through the Scottish Resilience Partnership. There was direct ministerial involvement in that. I would have attended a number of Scottish Resilience Partnership meetings to provide the strategic ministerial direction'. John Swinney also suggested that 'resilience' issues would arise during weekly Cabinet meetings. This arrangement was confirmed by Gillian Russell (Inquiry transcript 28.6.23: 33, 7-14) who stated that: 'probably Cabinet overall took decisions in relation to matters in relation to resilience rather than working through that Cabinet subcommittee'.
87. The Scottish Resilience Partnership (SRP) 'acts as a strategic policy forum for resilience issues, providing collective assurance to Ministers that statutory responders and key resilience partners are aware of significant resilience gaps and priorities, and are addressing these in line with appropriate and available resources' (Ready Scotland 2016: 24; see also Ready Scotland, 2023 which described the SRP as 'a core group of the most senior statutory responders and key resilience partners'). John Swinney in his M1 evidence (Inquiry transcript 29.6.23: 84, 23-5; 85, 1-5) confirmed that: 'around the table of the Scottish Resilience Partnership would be the leadership of Scotland's 32 local authorities, the Chief Constable of Police Scotland, the Chief Fire Officer of the Fire and Rescue Service, the chief executive of the Scottish Environment Protection Agency, the chief executive of the Scottish Ambulance Service' (and others). Gillian Russell (Inquiry transcript 28.6.23: 35-6) described that 'I set that up in 2016, bringing together the Cat 1 responders at more senior level and the regional resilience partnership leads, so it was a mix of local authority, chief execs, senior police and fire, senior ambulance, coastguard, SEPA were there, and the point of that Strategic Resilience Partnership was to provide that sort of guiding coalition across resilience as we were supplementing it in Scotland ... what I felt was needed was an open space for frank discussion about key issues in relation to resilience that was future facing, so the agenda was really set on the basis that - of looking ahead and looking at issues that perhaps needed more attention or just a bit of a step back: Are we doing everything that we need to be doing? And those leaders round that table were viewed as the people that could help challenge and discuss that frankly'.

Response/ recovery stage

88. Scottish Government Resilience (Ministerial): SGoR(M) 'sets the strategic direction for Scotland's response. It acts on behalf of, and reports to, the Scottish Cabinet' (Ready Scotland,

2016: 24). Its initial choices, including membership, are 'determined by the nature of emergency', but there is a general expectation that any emergency requiring 'some degree of central government co-ordination or support' will prompt it to activate the Scottish Government Resilience Room (SGoRR) (2016: 24-25).

89. Scottish Government Resilience Room (SGoRR) roles include to:

- 'provide strategic direction'
- 'co-ordinate and support the activity of SG Directorates'
- 'collate and maintain a strategic picture of the emergency response'
- 'brief Ministers'
- 'ensure effective communication between local, Scottish and UK levels'
- 'determine the Scottish Government's public communication strategy and co-ordinate national public messages', and 'disseminate national advice and information for the public' (supported by the Scottish Government Communications Team)
- allocate 'scarce Scottish resources'
- 'liaise and work in partnership with the UK Government', via the Cabinet Office generally and Cabinet Office Briefing Room, COBR in particular. In an emergency relevant to Scotland, 'Scottish Ministers and officials would attend COBR and the Scottish Cabinet will inform, advise and take account of the decisions made by UK Ministers ... the Home Secretary or Prime Minister would chair meetings of COBR' (2016: 25). In other words, the Scottish Government would have devolved responsibilities and rely on UK government cooperation in the context of good IGR (see this report paras 62-7 on poor IGR).

89.1. INQ000348720 (para 14) states that the SGoRR 'facilitates decision making', such as by 'ensuring that the right people are present; ensuring that the right information is in place; hosting meetings – at the right time and at the appropriate frequency; providing effective meeting facilitation; establishing clear roles and responsibilities; allocating tasks and setting out clear timelines for their completion, as well as systematically following up on their completion; ensuring that connections are made across the organisation and beyond'. In other words, rather than taking the lead or having a primary responsibility for action, it 'enables relevant parties to come together to make decisions and coordinate their activity' (INQ000348720: para 16). The SGoRR was activated ('stood up') to address Covid-19 on 29 January 2020 and 'the hours of operation and staffing resource grew as the situation deteriorated', such as to reach 'two shifts per day, seven days a week' by the 'first lockdown in March 2020' (para 17).

89.2. Gillian Russell's Module 1 testimony (Inquiry transcript 28.6.23: 6-8) described her view that Scottish Government Directorates were generally effective and that their overlapping roles and responsibilities were well-coordinated (on Directorates, see this report paras 46-52 and 142-6). INQ000348720 (paras 17-36) provides a similar assessment of SGoRR coordination activities from April 2020. Such testimony relates to iterations of the Scottish Government's positive story of its own procedures, known variously as the 'Scottish model' or 'Scottish approach to policymaking'. Each version describes making policy in a

more coordinated and collaborative way than (1) in UK government Whitehall, or (2) in the past (this report paras 10-14).

90. SGoRR is led by the Scottish Government Resilience Division, staffed from 'the main affected Scottish Government Directorates and representatives of relevant agencies' (2016: 26). It would be supported by the local or regional Resilience Partnerships established during the preparation stage, but with the assumption of non-interference in local responses (2016: 26). Instead, Scottish Government Liaison Officers (SGLO) would offer support, possibly in partnership with a UK Government Liaison Team, GLT) (2016: 26). John Swinney's Module 1 testimony (Inquiry transcript 29.6.23: 108) also described the Scottish Leaders Forum as a way to bring together public, private, and third sector bodies for discussions of continuous public sector improvement (rather than emergency planning specifically) (this report para 12).
91. Scottish Government Resilience (Officials): SGoR(O) is 'a group of senior Scottish Government officials drawn from all relevant Directorates' whose role is to 'analyse information received by the SG and provide advice to the SGoR(M) on options for handling the consequences of the emergency; oversee implementation of decisions taken by the SGoR(M); and ensure coordination of Scottish Government activity' (Ready Scotland, 2016: 25).
92. On the relationship between SGoRR, SGoR(M) and SGoR(O), Gillian Russell's Module 1 testimony (Inquiry transcript 28.6.23: 28) described: 'they're all really part of the same thing. ... we generally have SGoR Officials to try and flush out what are the issues, what need to be addressed, then we'd have a SGoR Ministerial if necessary. Generally the DFM or the FM might chair, depending on the nature of the incident, and you would have relevant ministers round the table. ... it's really all part of the same arrangement. So when you activate SGoRR, depending on the nature you would be put in placing your Officials meetings and your Ministerial meetings, and then you would have kind of a battle rhythm over the number of days or weeks it took to work your way through that particular incident'.

Additional Preparing Scotland guidance

93. Additional documents provide general guidance on specific aspects of emergency responses rather than a pandemic in particular, including topics such as 'responding to emergencies', 'recovering from emergencies', 'communicating and engaging with the public', 'risk and preparedness assessment', 'caring for people', 'community resilience', psychosocial and mental health needs', having and promoting business resilience', secure and resilient (critical national infrastructure)', 'mass fatalities', scientific and technical advice, and 'exercise guidance' (Ready Scotland, 2016: 5). Some documents focus on pandemic influenza. In particular, 'Dealing with mass fatalities' refers to the Public Health etc. (Scotland) Act 2008) powers to collect bodies from homes, store bodies in mortuaries, register the death, and burial or cremation (Ready Scotland, 2017: 4).

Providing expert advice

94. The Scottish Government did not maintain its own direct equivalent to the UK government's Scientific Advisory Group for Emergencies (SAGE). Rather, if SAGE is activated by the UK Government, the Scottish Government 'may be represented ... through the Scottish Government professional advisers ... Where SAGE is active and where its considerations touch on devolved matters, it will link directly to the SGoRR arrangements with professional advisers' (Ready Scotland, 2012: 14; Figure 1). John Swinney's Module 1 testimony (Inquiry transcript

29.6.23: 87, 7-10) described the Scottish Government's routine reliance on SAGE as a pragmatic measure before 2020: 'as an example of where we weren't trying to replicate what would be a very good and strong source of scientific advice and professional advice to government' (John Swinney, INQ000287771: 25 describes this use of SAGE as 'to have worked well during the pandemic'). The development of Scottish-specific advisory groups from 2020 (albeit to supplement rather than replace UK advice mechanisms) suggests that the Scottish Government then took a different view of the adequacy of these arrangements during a novel emergency (see Topic 3). This is confirmed by Nicola Sturgeon (INQ000339033: 22; 46).

95. There was some provision for regional arrangements to connect policymakers, practitioners, and expert advisers. The 'Scientific and Technical Advice Cell (STAC)' would provide expert advice to bodies formerly known as 'Strategic Coordinating Groups (SCGs)', which became three Regional Resilience Partnerships (Ready Scotland, 2021: 2 describes the establishment of N, E, and W RRP in November 2013). If the primary issue regards public health, 'statutory responsibilities place an onus on the NHS Board to provide a chair, normally the Director of Public Health (DPH) or a Consultant in Public Health Medicine (CPHM) on behalf of the DPH, and administration for the STAC during an emergency. The NHS Board should continue to chair the STAC as long as there are significant issues of public health to consider' (Ready Scotland, 2012: 5, before being updated in 2022). STAC would coordinate and consolidate expert advice, and provide 'recommendations on risk management action' and 'risk communication messages' (2012: 6).
96. Module 1 evidence by Gillian Russell (Inquiry transcript 28.6.23: 19, 22-5) confirms that the 8 former SCGs had mirrored the boundaries of police and fire regions at that time: 'there was a system of strategic coordinating groups, or SCGs, which then transferred into a series of regional resilience partnerships, or RRP, together with local resilience partnerships, which are LRP'. The expectation was that SCGs and their STACs would be dealing with a localised emergency (rather than a national emergency like Covid-19) (Module 1 testimony by Gillian Russell, 28.6.23: 23).
97. In 'some circumstances' – such as to address 'severe weather across many regions' - this SCG/STAC role may be superseded by Scottish Government action, to: 'consult with its own professional advisors such as the offices of the Chief Scientific Advisers (CSAs), Chief Medical Officer (CMO) ... and wider networks as required, to establish a body of scientific or technical advice. These bodies provide advice via SGoR Officials (SGoR(O)) meetings convened as necessary during the emergency. SGoRR coordinates this process, coordinating and sharing this advice as appropriate with the SCGs. The SCGs are responsible for disseminating this advice to their STAC' (Ready Scotland, 2022: 11).

Four nations planning for pandemic influenza

98. The Scottish Government (2020a; 2021a; INQ000215495: 47) confirmed that its pandemic planning was based on a UK-wide approach to pandemic influenza. Nicola Sturgeon's M1 testimony to the Inquiry (Inquiry transcript 29.6.23: 37) confirmed that pandemic influenza planning was coordinated by the UK government as part of a four nations approach to preparedness. The resultant strategy, by DH Pandemic Influenza Preparedness Team (2011), describes the need to plan for an influenza pandemic with higher than usual severity and population impact. It warns against 'complacency and any presumption that the relatively mild H1N1 (2009) influenza pandemic is representative of future pandemics' (2011: 13), and plans

for a 'reasonable worst case' (RWC) in which 'up to 2.5% of those with symptoms would die as a result of influenza, assuming no effective treatment was available' and that it would no longer be feasible for doctors to diagnose all affected (2011: 14). The RWC is used to generate one of many scenarios (not predictions) to inform planning (2011: 14), based on the question: what would we need to do in this scenario?

99. The DH Pandemic Influenza Preparedness Team (2011) also provided advice that informed early UK and devolved government COVID-19 advice, such as to:

- foster good communication with the public ('explain the outbreak' and 'establish confidence')
- promote 'individual responsibility and action to reduce the spread of infection through good hygiene practices'.
- protect health service capacity.
- minimise 'the potential impact of a pandemic on society and the economy', such as by 'Supporting the continuation of everyday activities as far as practicable', and 'Promoting a return to normality and the restoration of disrupted services at the earliest opportunity'.
- reject the need to stockpile masks for community use, on the grounds of insufficient evidence of their value in community settings.
- reject the need to close international borders, or restrict mass gatherings, but accept the limited value of some school closures (2011: 19; 37-9; 45).

100. In terms of responsibility for 'local and national coordination', the DH Pandemic Influenza Preparedness Team (2011) strategy described (each first sentence is my wording):

- *UK Government leadership via the health department.* The UK Government Department of Health was 'the lead government department for pandemic preparedness and response. It has overall responsibility for developing and maintaining the contingency preparedness for the health and social care response, maintaining liaison with international health organisations and providing information and specialist advice to Ministers, other Government departments and responding organisations' (2011: 32).
- *An oversight role for the NSC.* 'The National Security Council (Threats, Hazards, Resilience and Contingencies) (NSC (THRC)) Committee, comprising Ministers from across Central Government departments and the DAs, oversees and coordinates national preparations for all key UK risks including pandemic influenza ... It is also likely that Cabinet Office Briefing Room (COBR) will activate a Scientific Advisory Group for Emergencies (SAGE) to coordinate strategic scientific and technical advice to support UK cross-government decision making' (2011: 32)
- *UK and devolved government coordination via health staff.* They share a 'common strategic approach to pandemics' and would 'work closely together during both planning and response ... using meetings of the four nations' health departments at official and ministerial level, which worked particularly well during the H1N1 (2009) influenza pandemic, to agree health specific issues ahead of NSC(THRC) discussions'. Further, 'Strong clinical and senior official liaison across the four nations strengthens the UK-wide

coordination and cooperation' (2011: 32), and 'The four UK health departments are developing new ways of engaging proactively with journalists, the professions, and the public' (2011: 47).

101. Since publication in 2011, 'four nations' relationships have come under considerable strain. Multiple Module 1 statements highlight the lack of good working relations at a senior ministerial level in the run up to the pandemic. For example, John Swinney (Inquiry transcript 29.6.23: 105, 10-18) stated that 'generally relationships between the administrations were pretty poor by that point. Poor in the aftermath of Brexit ... in Scotland we were not happy with Brexit ... and you obviously had to spend a lot of time on the no-deal Brexit, as the Inquiry heard this morning from Nicola Sturgeon. But generally relations were pretty poor'. This problem with intergovernmental relations is also discussed in relation to Scottish Government witness statements in Topic 4, and by Henderson's (2023) report to the Inquiry.

Scottish Government pandemic preparedness exercises

102. Pandemic preparedness exercises help to inform Scottish Government decision-making, such as by generating reasonable emergency scenarios, identifying who should do what, and reflecting on the extent to which every relevant decision-maker or stakeholder knows their role.
103. The Scottish Government's most recent and relevant 'table top' pandemic preparedness exercise in Scotland was 'Exercise Silver Swan'. In addition, Exercise Cygnus was a UK 2016 exercise with Scottish Government involvement, and Exercise Iris focused largely on diagnosing and addressing a small outbreak of MERS (Scottish Government, 2018). The Scottish Government (2016a) report on Silver Swan stated that: 'Pandemic Influenza remains the highest risk faced in the UK and it is recognised as the single most disruptive event facing Scotland' (2016a: 2). The exercise:

'was part of the National Exercise Programme managed by the Scottish Resilience Development Service (ScoRDS). Support to develop the exercise was gained from the National Training and Exercising Functional Group before being approved by the Deputy First Minister. The exercise was sponsored by the Head of Resilience Division, Scottish Government ... A National Planning Group, made up of members from Scottish Government and agencies across Scotland, was formed to oversee the planning and delivery of the exercise. Task and Finish Groups were established for the different workstreams of the exercise with chairs of these groups being members of the National Planning Group' (2016a: 7).

104. Scottish Government (2016a: 2) recommendations included:
- **'Health and Social Care** – partners in each Resilience Partnership area need to ensure they have a comprehensive, multi-agency planning framework in place to respond to influenza pandemics of varying severities. This should include a multi-agency plan.
 - **Excess Deaths** – the extra deaths experienced during a pandemic mean that temporary body storage must be identified in advance as well as how to keep the whole system moving

- **Business Continuity (BC)** – most organisations depend upon contractors for the delivery of some aspect of their service so BC arrangements of these contractors becomes a critical issue
 - **Coordination of the Response** – it is important that SG and partners understand the multi-agency response structure required during an influenza pandemic’.
105. The report identified a list of roles and organisations who need to read the report, respond with details of their progress, and attend a follow up exercise in November 2016: ‘Scottish Government, Health Board Chief Executives, Local Authority Chief Executives, Health and Social Care Partnership Chief Officers, Regional Resilience Partnership Chairs and Health Protection Scotland’ (2016a: 3).
106. The report related specific responsibilities to:
- All partners. Review pandemic plans regularly, focusing on how to relate the scale of the emergency to staff capacity and deployment.
 - Scottish Government. Update national plans in relation to lessons from the exercise, and scenarios regarding the likely size and scale of pandemic flu. Identify how best to coordinate the response and avoid duplication, such as when gathering information. Identify how best to redeploy staff in emergencies. Establish a working group to identify how to maintain ‘business chains’, such as when using contracts to procure/ supply services and essential equipment.
 - Scottish Government and Health Boards. Review current ‘national pandemic stockpiles’ and the logistics of delivering antivirals on mass.
 - Scottish Government and Regional Resilience Partnership (RRPs). Review communications strategy and arrangements.
 - RRPs. ‘Produce multi-agency influenza pandemic plans which include Health and Social Care Partnerships’.
 - RRPs, aided by National Mass Fatalities Working Group. Monitor mortuary capacity and identify how best to increase it. Produce guidance on body storage.
 - Health Boards and RRPs. ‘Clarify the multi-agency response arrangements for an influenza pandemic in your Resilience Partnership area’.
 - Health Boards, Health Protection Scotland (HPS), RRPs. ‘Ensure a wide understanding of plans for distribution of PPE and prioritisation of key staff’. HBs and HPS to ‘Follow fit-testing procedures’ (2016a: 3-5).
 - HPS. To provide technical advice, including mediating information and advice from SAGE and Scientific and Technical Advice Cells (STAC) and Scientific Advice to Government in Emergencies (SAGE) (2016a: 6).
107. The follow-up event in December allowed the 95 attendees to discuss progress, such as to identify:

- The absence of a single and coherent piece of 'national guidance on moving from normal service to crisis' (Scottish Government, 2016b: 7).
- Broad agreement on the need for effective 'multi-agency response arrangements' but 'a feeling of uncertainty over multi-agency structures in responding to pandemic', particularly when there is a mismatch between Health Board and Local Resilience Partnership boundaries (2016b: 4).
- Uncertainty about the capacity of GP practices to address surges in demand (2016b: 5)

108. A Scottish Government Written Answer (FitzPatrick, 2020) confirms some improvements to guidance. They related largely to (a) general preparedness, such as 'Local and regional pandemic response plans' and 'NHS Standards for Organisational Resilience', (b) preparations for 'dealing with mass fatalities', including death certification and body storage, (c) infection prevention and control, and (d) communication to the public. Nicola Sturgeon's testimony to M1 (Inquiry transcript 29.6.23: 37) confirmed that mass testing and contact tracing were not part of these contingency plans. Further, the need for the clearer identification of multi-agency 'roles and responsibilities in the event of a pandemic', identified as a concern by pandemic preparedness exercise participants, was not resolved before 2020 (Audit Scotland, 2021a: 21).

The connection between civil emergency and pandemic flu preparations

109. This report para 76 states that both possible ways to prepare for and respond to a pandemic (civil contingencies or public health approaches) were the primary responsibility of the UK government. However, the relationship between those approaches was unclear. For example, in its report for the Scottish Inquiry, UNCOVER (2022a) describes a lack of clarity regarding the relationship between civil contingencies and pandemic planning approaches. There exists a broad regulatory framework for civil emergencies and specific guidance for pandemic flu preparedness, but the connection between both sources of direction and guidance was unclear. UNCOVER (2022a: 9) suggests that *Preparing Scotland* did not clearly incorporate pandemic flu preparedness in its guidance, and pandemic influenza guidance did not refer clearly to *Preparing Scotland*, contributing to the sense that key partners would be seeking advice from two separate sources of guidance, which would contribute to confusion during crisis.

110. It is difficult to know how this confusion unfolded in practice because the UK government did not invoke the Civil Contingencies Act 2004 to address Covid-19. Rather, to make policy changes for England, it relied initially on UK ministerial powers enabled by the Public Health (Control of Disease) Act 1984 (Bennett Institute for Public Policy, 2020). Equivalent powers were not available to Scottish Government ministers until the Coronavirus 2020 Act was given Royal Consent on 25th of March, and 'stay at home' orders were not legally enforceable until the 26th of March (the first 'lockdown' in Scotland). Until then, it is unclear to me on what legal basis the Scottish Government was responding to Covid-19 (e.g. the closures of public places may have resulted from strong recommendations, not legal obligation). Rather, its correspondence to the Inquiry confirms that, before March 26th, it was issuing 'guidance', while the timeline provided by INQ000339039 (para 65) highlights guidance to individuals (e.g. on 16 March 2020 to 'avoid crowded areas and gatherings and work from home if possible') and requests of private businesses (e.g. '20 March 2020. First Minister asked all restaurants, cafes, pubs, gyms and cinemas to close'). Before then, if the Scottish Government had sought to enforce stay-at-home orders or business closures, it may not have had the legal authority.

111. In theory, pandemic flu preparedness could be adapted to other forms of outbreak, such as MERS or SARS, but UNCOVER (2022a: 9-10) argues that there was insufficient guidance on how to do so. Further, table-top exercises based on such planning assumed that the outbreak would be relatively small compared to the worst case scenario of pandemic flu.
112. The Scottish Government has established a new advisory body - Standing Committee on Pandemics - with 'a remit to ensure that Scotland is as well prepared as possible for future pandemics', and described as 'a permanent advisory group to the Scottish Government, established to bring together scientists and technical experts to advise the Scottish Government on the future risks from pandemics and to ensure we are as prepared as it is possible to be for these' (Standing Committee on Pandemics, 2022). Its forthcoming report (due by February 2024) could become a valuable resource for the Inquiry since it would be able to compare (1) recommendations for best practice, with (2) Scottish Government arrangements in place by 2020, and (3) current Scottish Government preparedness activities based on continuous learning from its response to Covid-19.

Responsibility for preparedness: reducing health inequalities

113. In Module 1, multiple Scottish Government statements suggest that the desire to reduce health inequalities was more of a feature of Scottish than UK government preparedness strategies. For example, Director General of Health and Social Care Caroline Lamb (Inquiry transcript 28.6.23: 103-4) confirmed a relatively high desire to address health inequalities, expressed in multiple Scottish Government documents before 2019, and embodied by the establishment of Public Health Scotland in April 2020. According to witness statements, this desire reflects not only a normative commitment to address inequalities, but also a relatively unhealthy Scottish population – measured with reference to NCDs (para 60 of this report) – which is more vulnerable to the effects of a virus such as Covid-19 (e.g. Scottish Government Director General for Health and Social Care, INQ000215470: 46; INQ000215470, 163-5).
114. Yet, health outcomes in Scotland do not reflect the successful application of new policies. For example, Bambra and Marmot's (2023) expert report does not identify fewer health inequalities in Scotland or the relatively effective impact of Scottish Government policies. Further, UNCOVER's (2022a: 21-2) general assessment is that:

'There is little mention of inequalities in strategic guidance on emergency preparedness ... There was very little specific consideration of the potential impact of a pandemic on health and socioeconomic inequalities, nor of ethical issues, including balancing potentially conflicting needs and rights, in strategic guidance, risk assessments or lessons learned from emergency planning exercises ... Given what is already known about significant inequalities within Scottish society, it bears considering whether a more proactive approach to assessing and mitigating the risks to different groups, including disadvantaged and minoritised groups, could have been taken, as part of Scotland's approach to pandemic preparedness'.

115. The difference between the UK and Scottish Governments may be one of explicit aspiration (much like John Swinney's (Inquiry transcript 29.6.23: 115) M1 description of the NPF as 'aspirational'). Caroline Lamb's (Inquiry transcript 28.6.23: 111-3) Module 1 testimony suggests that an expected drop in health inequalities did not occur before 2020. If so, there is minimal evidence to suggest that Scottish Government aspirations translated into greater pandemic preparedness in relation to health inequalities. Further, in 2020, much of this NCD related health

improvement work was deprioritised in Scotland and internationally (Cairney et al, 2022a and Cairney et al 2022b). The COVID-19 pandemic prompted public health agencies – including Public Health Scotland – to shift resources from long-term work on the unequal spread of NCDs towards the emergency response (WHO, 2020).

EXPERT OPINION TOPIC 1: Preparedness for a novel pandemic by January 2020

116. Before 2020, the UK legislative and regulatory framework for civil contingencies provided the following (met or unmet) expectations for UK and Scottish Government responsibilities. First, UK government ministers would take overall responsibility for UK-wide emergencies, declared by the NSC and led by the Department for Health when addressing pandemic emergencies. Second, the UK Government Department for Health would take overall responsibility for UK-wide pandemic preparedness, such as when it coordinated a ‘four nations’ approach to pandemic influenza. These arrangements would be supported by regular cooperation between UK and devolved government civil servants in health departments, such as the network of Chief Medical Officers. Third, the UK government would take responsibility for developing and maintaining UK-wide arrangements to receive scientific advice, such as via SAGE and NERVTAG. Fourth, within that broad framework, Scottish Government ministers would take the lead responsibility for the coordination of Scottish policy responses in relation to devolved issues such as public health. For example, Scottish ministers would direct Scottish emergency services, oversee the devolved NHS in Scotland, and oversee Public Health Scotland (without the Scottish Government being subject to UK government oversight on devolved matters). Fifth, key leadership roles remained clear. While the First Minister had overall responsibility, the Deputy First Minister had operational responsibility to coordinate the fostering of ‘resilience’ across the Scottish Government, and to foster a wider public sector response and provide strategic direction to partners in the private and third sectors. While the Cabinet subcommittee SGoR exists, it was convened rarely, and the Scottish Government weekly Cabinet meetings were far more likely to host discussions of resilience. Long-term work was supported by the Scottish Resilience Division, such as to develop the *Preparing Scotland* guidance. Emergency responses would be supported via the SGoRR. SGoRR was at the heart of an infrastructure designed to oversee and respond to emergencies - including to support first and second responders – but its role in a health emergency was not clearly or sufficiently defined.
117. UK government guidance on emergency preparedness tends to be high-level and general. Civil contingencies legislation does not identify pandemic preparedness specifically, and most of the general guidance avoids describing the details of planning for specific kinds of pandemic. The language of the guidance suggests that it serves primarily to address natural disasters such as weather or environment related emergencies, major accidents, and terrorism offences, in which ministers would expect police and fire services to be the first to respond. More specific pandemic preparedness comes from largely-separate exercises, reflection on exercises, and guidance coordinated by health departments.
118. It is difficult to identify specific reference to the wide range of roles and responsibilities described in my letter of instruction for Topic 1. UK government and Scottish Government documents describe their civil contingencies and emergency preparation work generally, without reference to a long list of named roles. Further, general emergency preparedness operated on parallel tracks: (1) regulations and guidance for civil emergencies do not discuss specifics such as pandemics, and (2) specific preparations for pandemic flu do not connect clearly to civil emergencies regulations. UNCOVER (2022a) describes this issue as worth further examination,

to establish the extent to which there were unintended consequences. For example, not all responders would know to which guidance to refer. If people were not directly involved in previous exercises, many would not know who was in charge and which sources of guidance they should use.

119. UK and Scottish Government guidance for pandemic preparedness provides (1) a division of UK and devolved responsibilities, accompanied by expectations for Scottish ministerial responsibilities in relation to emergency planning, and (2) clear evidence of work devoted to preparing for an influenza pandemic in Scotland.
120. However, it is not clear who was accessing and understanding emergency preparedness documents, or how much knowledge was expected of potentially relevant responders. For example, it takes considerable time to understand how the Scottish Government 'hub and spokes' model fits together to produce a 'resilience system', to the extent that it is likely that very few people understand it at any one time. The designers or administrators of this system may be experts, but without knowing if their audience is well enough informed, at least in the absence of regular training and surveys to evaluate their impact. If the senior civil servant responsible for maintaining the hub and spokes model moves to another post, it is not clear how long it would take for their successor to achieve the same level of proficiency. Further, potentially key staff may only be involved in exercises once every 5-10 years, while the turnover in key staff will be much more frequent, which calls into question the preparedness capacity across the public sector (see Scottish Parliament Finance and Public Administration Committee, 2023: 26-8 on 'churn').
121. Module 1 probed the claim that ministers were preparing for the wrong epidemic, or having too-narrow horizons, when focusing on influenza. However, there are general aspects to UK and Scottish Government preparedness that would be applicable to Covid-19. Attempts to foster clear guidance on how ministers should direct public bodies, foster collaboration, and communicate well with the public were relevant to Covid-19 preparedness. In Scotland, new and unanticipated initiatives, such as to introduce mass testing and tracing, were administered through existing organisations such as health services.
122. In Module 1, multiple Scottish Government ministers and senior civil servants have accepted that their promised updated guidance on pandemic preparedness was not forthcoming from UK and Scottish Government departments. Further, Scottish ministers related the lack of preparation to the need to devote resources to Brexit preparation. However, these accounts do not provide a clear separation between three issues: (1) the need to divert planning resources to address Yellowhammer/ Brexit, (2) a more general competition between priorities, which led to the deprioritisation of flu preparation, or (3) the lack of imagination to deal with a different kind of pandemic. The counterfactual is: if Brexit planning was not necessary, would the Scottish Government have prepared well for Covid-19? Would it have continued to develop the same pandemic planning more quickly? Would extra time and space have allowed the Scottish Government to think bigger, like the Standing Committee on Pandemic Preparedness (2022) in relation to 'Disease X'? Scottish Government statements tend not to address such counterfactuals fully, although INQ000348720 (paras 22-3) notes that previous planning for Brexit informed the Scottish Government's Covid-19 response: the Resilience Division (containing SGoRR) 'was able to adapt a group hub co-ordination structure that had been developed to deal with a No Deal EU Exit ... This ensured good co-ordination of cross-cutting activity and liaison with stakeholders; streamlined briefing processes; and coherent interaction with the central SGoRR function'.

123. The Scottish Government has made a strong rhetorical commitment to reduce health inequalities, but without providing evidence of progress or a clear 'theory of change' (in other words, what is expected to cause the desired change, and how). First, its commitment could relate primarily to a belief that health inequalities (1) result from poor individual choices such as to smoke, drink, eat unhealthily, and not exercise, to be addressed by health communication, or (2) are structural or systemic, relating primarily to social and economic inequalities, and requiring high state intervention to redistribute income, wealth, and target public sector resources to provide safe and healthy housing and invest early in education and child support. Second, this commitment could relate primarily to the Scottish Government focus on joining-up services, such as by establishing PHS to coordinate efforts. Scottish Government testimony from Module 1, and witness statements for Module 2A, do not provide a clear narrative on these issues.

EXPERT OPINION TOPIC 1: Continuous learning and preparedness for a pandemic 'second wave' from mid-2020

124. Although Topic 1 relates pandemic preparedness largely to policies and procedures in place by January 2020, preparedness is a more continuous process. In particular, the UK and devolved governments were not well prepared to address the 'first wave' of the novel Covid-19 pandemic in Spring 2020. However, their ability to learn about Covid-19, *and the impact of their decisions*, allowed them to be better prepared to deal with the 'second wave' from Autumn 2020 onwards (albeit while addressing multiple, more transmissible, variants of Covid-19).

124.1. This comparison of different levels of preparedness is crucial to a full analysis of decision-making. The response to the first wave highlights profoundly high uncertainty about the likely impact of a novel virus and low preparation in relation to the policy instruments to be used (often described as 'non-pharmaceutical interventions', NPIs). The response to subsequent waves, and variants of Covid-19, took place in the context of lower uncertainty about Covid-19 and higher preparedness based on newly acquired knowledge of the NPIs to use. Both factors would suggest that UK and devolved governments should have been better able to make good decisions to address Covid-19 after their first 'lockdown' than during January-March 2020.

124.2. For example, Nicola Sturgeon (INQ000339033: 360) stated in an emergency Cabinet meeting that 'the single most important lesson since the initial outbreak in February 2020 had been that waiting for more data (and therefore delaying action) could have highly negative consequences. It was essential to act quickly, decisively, and preventatively'. Further, John Swinney (INQ000287771: 140) describes the Scottish Government learning from the first lockdown experience in March 2020 that the second lockdown in January 2021 was necessary, since 'measures short of lockdown would not be sufficiently effective to suppress the prevalence of the virus' (Swinney also notes that this lesson could have been actioned sooner).

125. This focus on (a) being better prepared over time to make effective decisions, based on a commitment to continuous policy learning, and (b) being increasingly better prepared for an unfolding pandemic, is a strong feature of Scottish Government oral testimony for Module 1 and written testimony for Module 2A, as follows. First, a general focus on the Scottish Government being a learning organisation is a key feature of the Scottish Government's 'Scottish approach' narrative on decision-making (paras 10-14, this report). Second, multiple witness statements describe continuous learning to respond to an emerging problem more effectively: preparedness

for future phases of Covid-19 would be improved because the Scottish Government had far more information about the nature and spread of the virus, and its ability to respond. Third, this preparedness would be bolstered by new arrangements, including (a) the establishment of a Scottish Government advisory system, based on the Scottish Government's realisation that it should be less reliant on UK science advice mechanisms (Topic 3), and (b) new specialist Directorates better able to respond to the immediate Covid-19 threat then prepare properly for another (Topic 4).

126. Yet, as Figures 1.2 and 1.3 show, most Covid-19 deaths were recorded *after* the first peak of infection and first lockdown, including more deaths during the second peak from late 2020. For example, deaths with COVID-19 on the death certificate by the end of August 2020 (first peak) were 4232 in Scotland. By the end of April 2021 (second peak), they rose by 5884 to 10,116 deaths, and over 7000 people have died since the end of the second peak. This evidence does not fit with the general expectation that the Scottish Government: (1) was underprepared in January 2020, but (2) would be far better prepared, and more able to make effective decisions, as it transitioned from high to lower reliance on UK government procedures and support. When measured according to mortality, Scottish Government decision-making did not lead to more successful outcomes by the end of 2020 (explored more fully in Topic 4). Rather, these figures help to make explicit or clarify a key theme of the Scottish Government written response to this Inquiry, namely that *it became better equipped than the UK Government* to prepare for subsequent waves of more transmissible and damaging variants of Covid-19. While that argument is relevant to Module 2 as a whole (in which UK and devolved comparisons are relevant), it should not distract from proper reflection on decisions relevant to Scotland in Module 2A. In other words, becoming *relatively well prepared* is not synonymous with becoming *well prepared*.

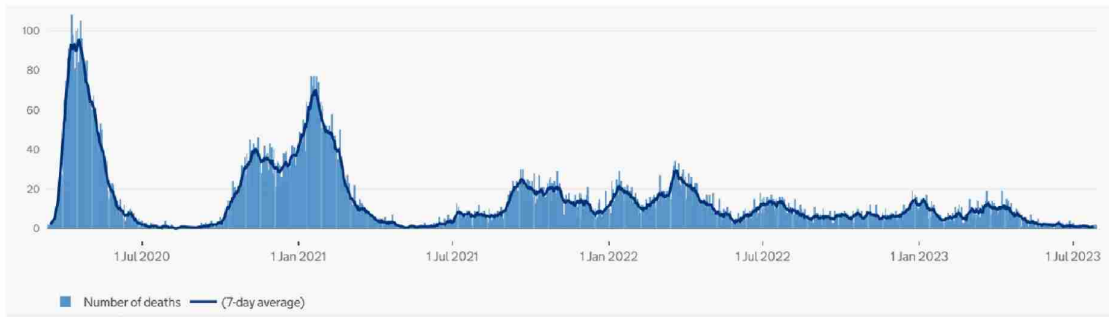


Figure 1.2 Number of Covid-19 deaths in Scotland, Jan 2020-Aug 2023 (source: gov.uk, 2023)

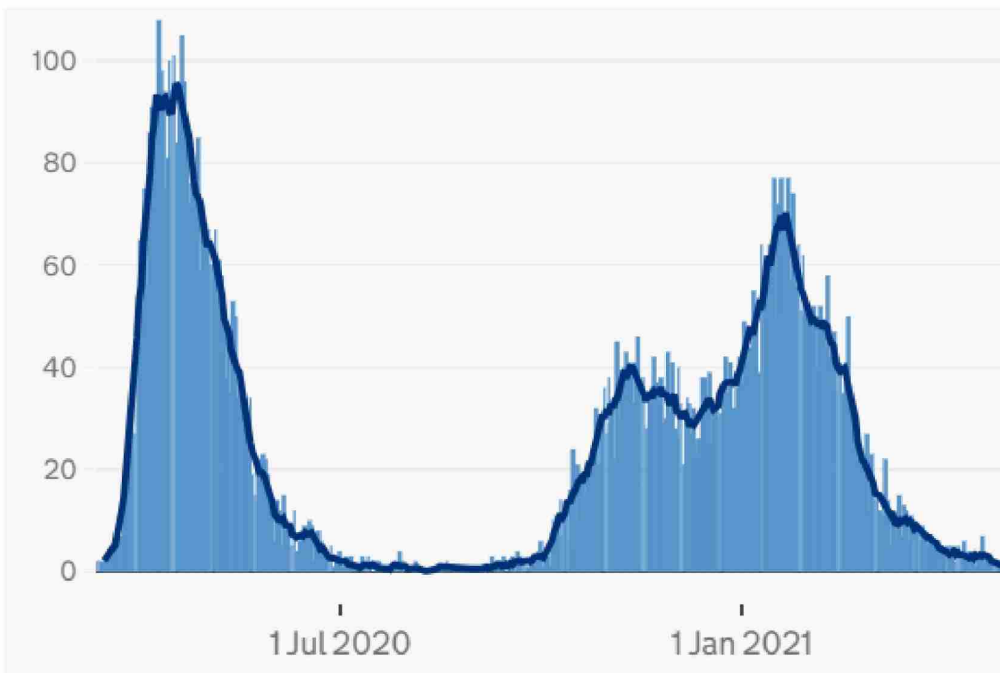


Figure 1.3 Covid-19 deaths in Scotland during first two peaks in 2020 and 2021 (Source: gov.uk, 2023)

Topic 2: Learning from previous experiences of emergency response

127. Paragraphs 102-8 describe a modest number of preparedness and learning exercises organised by the Scottish Government before 2020.
128. Further, it is difficult to identify any previous instance of emergency response, comparable in scale to the Covid-19 pandemic, from which the Scottish Government could have learned. It may be possible to identify relevant lessons learned from individual aspects of each response, such as responding effectively to: (1) annual peaks of pressure on the NHS each winter, (2) comparable disruptions to essential journeys, such as transport failings during severe winter weather, and (3) organisational crises, such as within Police Scotland when it identified routine failings in missing persons investigations.
129. However, no written submission from the Scottish Government to which I have had access describes preparedness in terms of learning lessons from previous emergencies. Most of its reference to learning relates to trial-and-error learning in response to unfolding Covid-19 emergencies, such as when former Cabinet Secretary for Health and Sport Jeane Freeman described the Scottish Government PPE response in Module 1.
130. There is more evidence of learning *in other countries or regions*. For example, Vietnam, Hong Kong, Taiwan, and Singapore have been described as good practice examples of using learning from experience, and a build-up of capacity in infection control, to respond quickly to Covid-19 (House of Commons Health and Social Care and Science and Technology Committees, 2021).
131. There is limited evidence of UK and devolved governments learning from such international experiences, and the search for lessons has come indirectly via House of Commons and other external reports. UK ministers have also expressed scepticism about learning from such places, particularly in relation to suppression measures in countries such as China (Cairney and Kippin, 2023a).
132. The collection of Scottish Government written testimony to inquiry module 2A (June 2023) contains minimal reference to learning from international experiences before and after 2020 (beyond epistemic learning, from academic research, via SAGE or Scottish Covid-19 Advisory Group). One specific exception is INQ000215488 (2023: para 370) which describes learning after 2020: 'Following the example of a number of other countries, Scotland introduced Covid19 vaccine certification on 1 October 2021', and states that 'international best practice' is not to engage with Covid-19 conspiracy theories when communicating with the public (2023: para 469).
- 132.1. That said, Nicola Sturgeon (INQ000339033: 252) states that she 'asked Scottish Government officials to pay particularly close attention to countries considered to be handling the pandemic well to ascertain what we might learn' (e.g. New Zealand). John Swinney (INQ000287771: 66; 76; 101) describes incorporating international perspectives into advice to Scottish ministers, such as via the UK Government's International Comparators Joint Unit (ICJU) (from June 2020, to compare responses of the UK and comparator countries) and the World Health Organization (e.g. relayed by the UK Government CMO via the four nations CMO network).

132.2. John Swinney (INQ000287771: 68) reflects on the limited ability to learn from 'countries such as New Zealand' when the UK held key responsibilities (in other words, New Zealand has a reputation for relative success, based partly on its decision to place severe restrictions on international travel). In relation to the countries studied by ICJU, Nicola Sturgeon (INQ000339033: 138; 252) states that 'The political and geographic character of the countries cited – Taiwan, Singapore, New Zealand – is different to that of Scotland', but also makes more general reference to 'international best practice' on good communication.

EXPERT OPINION TOPIC 2

133. Learning from previous experiences of emergency pandemic responses does not seem to be a strong feature of UK and Scottish Government preparation and action in relation to Covid-19. This type of learning was a more prominent feature of the responses by governments who had experience of responding to a comparable epidemic (see para 131 above, and the example of South Korea in Topic 8).
134. However, there is evidence – provided by Thomas' (2023) expert report for Module 2 – of longer term learning in the UK government with indirect relevance to Scottish decision-making. For example, the establishment and development of UK government science advice mechanisms arose partly from learning from previous mistakes regarding the gathering and use of evidence during crises (2023: 16-18).

Topic 3 The challenges caused by Covid-19

Covid-19 challenges: 1. Understanding and defining the policy problem

135. In general, Covid-19 exacerbated the three policymaking challenges, for all governments, described frequently in academic policy studies (Cairney, 2020). First, to produce a comprehensive understanding of a policy problem. Policymakers seek to understand the problem's size, severity, urgency, and cause. Generally speaking, policymakers produce a limited understanding because they face high *uncertainty*, or a lack of information on a problem, and *ambiguity*, or a lack of agreement on how to define it (Cairney, 2020). In the absence of crisis, they may have the ability and desire to address uncertainty and ambiguity by generating new information from a relatively wide range of sources and encouraging open and frank political debate on how best to understand and address the problem. During crisis, by necessity they rely on a far more limited range of trusted sources of information (often based on their existing arrangements) and existing understandings of policy problems.
136. Nicola Sturgeon (INQ000339033: 149-58; 174) describes examples of uncertainty in early 2020, such as regarding 'How Covid-19 was transmitted' (including asymptomatic spread), the likely 'community transmission', the 'severity of the consequences of infection', who was most vulnerable, and how Covid-19 compared to influenza or other viruses.
- 136.1. The Scottish Government Director General Strategy and External Affairs (INQ000215495: 77) describes the decision-making challenge in 2020 as: 'Given the complexities and uncertainties in assessing the pandemic's various harms, it was necessary for rational decision making to adopt ways to simplify and otherwise make sense of information'.
- 136.2. John Swinney (INQ000287771: 18-19) states that, during a brief key period in March 2020, 'decisions were often arrived at in a less formal environment given the necessity for urgent decision-making' (then recorded and reported to the Scottish Parliament), 'as we wrestled with a fast-changing situation in an atmosphere of significant public alarm'.
- 136.3. Nicola Sturgeon (INQ000339033: 13) states that this was the only period in which informal discussions between ministers (and the First Minister and Cabinet Secretary for Health and Sport, Jeane Freeman in particular) would be used to produce Scottish Government decisions. Nicola Sturgeon (INQ000339033: 22) states that 'due to the sheer pace of decision making that was required in the early phase of the pandemic and the limitations of the scientific evidence base at first, these structures were initially more ad hoc than would otherwise have been the case'. Relevant decisions, taken in this manner, include the decision to cancel gatherings of over 500 people (made 12 March 2020) and close schools (made 18 March, then reported by the DFM to the Scottish Parliament 19 March) (INQ000339033: 22).
137. The Director General Strategy and External Affairs (INQ000215495: 163-76) also relates Scottish Government decision-making to a distinctive strategic context based on the following challenges or opportunities in Scotland compared to England:
- the challenge of Scotland's older and sicker population which is more susceptible to Covid-19

- the opportunity afforded by a smaller geographical area with fewer local authorities, providing more ability to have a nuanced approach to regional restrictions (after the first national lockdown)
- the opportunity to produce distinctive ministerial judgements and a different 'risk appetite' during high uncertainty (which I interpret as describing a more cautious approach to the risk of Covid-19 transmission in the Scottish Government)
- these strategic decisions prompt the need for a series of different choices during the Covid-19 response. For example, the UK government preferred to signal the date at which it hoped to remove restrictions, while the Scottish Government described removing restrictions after meeting WHO criteria (e.g. on the current incidence or transmission of Covid-19)
- the effects of different UK and Scottish Government policies on Covid-19 transmission produce a different context in which to make decisions. For example, INQ000215495 states that Scotland had longer lockdowns and reduced transmission in 2021.

137.1. While INQ000215495: 163-76 suggests that such differences in context might help to explain subsequent differences in the impact of lowered restrictions at key times (such as during higher social mixing during Euro 2021, the men's football tournament held across Britain), it does not seek to provide a detailed comparison of casual factors (nor does this report).

Covid-19 challenges: 2. Coordinating policy and policymaking in Scotland

138. A second general challenge is to produce coherent policy via *joined-up*, *holistic*, or *integrated* policymaking. As this report (paras 21-5; 68-74) explains, while simple models of policymaking portray an orderly and centralised policy process, decision-making responsibility and action is actually spread across many 'centres', and policymaking fragmentation is inevitable. Therefore, low coordinative capacity at the centre of government is a profound challenge to decision-making. This general image of complexity (Figure 1.1) was accentuated by the 'spaghetti bowl' described in Module 1 in relation to 'Pandemic preparedness and response structures in the UK and England – August 19', but even that image only captures some aspects of decision-making networks.
139. Academic UK policy studies identify a general pattern of inconsistent UK government approaches to this decision-making coordination problem (before and during Covid-19). UK government approaches over several decades have involved a mix between (a) attempts to reassert central government control by reforming government structures or procedures, and (b) more pragmatic responses to reflect the inevitability or benefits of sharing policy responsibilities with other organisations (Cairney and Kippin, 2023a). Or, UK governments have attempted to separate strategic central government decision-making responsibilities, to establish aims and objectives, from the responsibility to deliver policy. For example, UK governments have often rejected policy delivery via local government in favour of greater reliance on non-governmental organisations or newly-established public bodies (Cairney and Kippin, 2023a).
140. Critical accounts of UK government connect this mix of government approaches to problems of governing during crises such as Covid-19. For example, the UK government established new organisations to make decisions – including the UK Health Security Agency (to replace Public

Health England) and NHS Test and Trace - rather than relying on established local government or public sector capacity, and complicated the public service delivery landscape even further (Diamond and Laffin, 2022; Richards et al, 2022).

141. This report (Background section, e.g. paras 10-14) highlights a general aspiration, described by the Scottish Government, that its approach to coordinated decision-making would be more effective than that of the UK Government, but also the need to examine how its decision-making worked in practice. There is relative certainty about its broad aspirations, such as to foster closer relations with stakeholders and rely on traditional ways to deliver policy via established public bodies such as local authorities. There is also a tangible impact of the 'Scottish model' on the Scottish Government policy agenda (exemplified by the NPF) and 'whole of government' reforms via the work of Directorates. However, the Scottish Government provides limited evidence that this system of decision-making was more effective during its response to Covid-19 (partly because the Inquiry did not ask it to do so explicitly). Rather, most of its relevant written evidence (to which I have had access) describes organisational changes rather than their effectiveness. As such, while the following section summarises key changes, I do not have enough evidence to assess their impact, such as in relation to the trade-off between (a) the benefits of reconsidering roles and responsibilities in relation to a novel problem, and (b) the costs of any reorganisation (such as relating to the 'churn' of staff which prompts the need to learn new briefs and form new relationships with colleagues and stakeholders).

The reorganisation of Directorates to coordinate a Scottish Government response to Covid-19.

142. Covid-19 prompted the Scottish Government to modify the role of multiple Directorates, as described in multiple Scottish Government written witness statements for Module 2A (July and October-December 2023), and supplementary evidence from the Scottish Government in response to the draft of this report (December 2023).

142.1. First, the Directorate General for Constitution and External Affairs (DGCEA) contained multiple Directorates to foster cooperation and coordination across government (INQ000348720: para 7). According to supplementary evidence (December 2023), the *Exit Strategy Directorate* coordinated policy advice across the Scottish Government from April 2020 to April 2022. This Directorate was run by a 'a small team of relatively senior-graded staff' reporting to the (Director General CEA and) First Minister and Deputy First Minister. Its staff were able to observe Scottish Cabinet meetings and 'provide information and advice' in "Covid-19 related SGORR meetings, 'Gold' meetings and Four Harms Group meetings" (see this report para 164 on the four harms approach). It was 'responsible for providing advice primarily on the use of non-pharmaceutical interventions (NPIs) in Scotland'. It led the development of key strategy documents, such as in relation to: the four harms approach to NPIs; the 'route map' describing how to exit lockdown measures; and, the design of a levels approach to vary restrictions in different parts of Scotland. Other Directorates included:

- a. *Cabinet and Constitution Directorate*, to organise Scottish Cabinet business, conduct four nations liaison on strategic issues (e.g. to contribute to the 'UK-wide Covid-19 Coordination Forum'), and coordinate work to inform Covid-19 legislation, regulations, and guidance (including travel restrictions), liaise with the Scottish Parliament, and prepare for national and local elections (INQ000348720: para 7; 52).
- b. *Organisational Readiness Directorate* (created March 2020, 'building upon a pre-existing EU Exit Readiness function within DGCEA'; becoming Performance,

Delivery and Resilience Directorate from February 2022), to coordinate policy in relation to the Coronavirus Act 2020, restrictions on gatherings, and (from November 2021) resilience, including the SGoRR secretariat and liaison work in relation to COBRA. More generally, its role was to support 'core decision-making processes', such as by providing 'support and challenge' to 'policy leads as they prepared advice for ministers' then supporting policy delivery (INQ000348720, para 40). Its team were 'supported by Military Planners and a Programme Management Office' (para 42).

- c. *External Affairs Directorate*, such as to liaise with the UK and devolved governments and manage international travel restrictions.
- d. *Outbreak Management Directorate*, to monitor local outbreak responses by public bodies and inform NPI design (INQ000348720: para 7). From May 2021, the renamed *Covid Coordination Directorate* took on multiple coordination roles from other Directorates (INQ000348720: para 4). Its roles included to: (a) prepare draft Cabinet Papers, based on meetings of the Four Harms Group, 'in the name of the Deputy First Minister' (INQ000215495: 133); (b) coordinate the Scottish Government's engagement with stakeholders to gather knowledge on the 'four harms' in relation to inequalities and protected characteristics (INQ000366267: 84); (c) coordinate advice to relevant ministers on Covid-19 Health Protection Regulations (INQ000366267: 31, describing the use of the 'made affirmative' procedure, explained in this report para 245). The responsibility for monitoring local outbreak responses (via the Incident Management Response Team) moved to the Directorate for Covid Public Health in the DG Health and Social Care (INQ000348720, para 79).
- e. In addition, Divisions or Hubs provided cross-cutting support for Directorates, including from 4 March 2020 the Covid-19 Modelling and Analysis Hub (C-19 MAH) (which became the Covid-19 Analysis Division in November 2021, then Central Analysis Division February 2022), which 'was able to provide a cross-office perspective, to triangulate a wide range of data and evidence, to provide briefing, analysis, challenge and advice and became a single source of truth for the Scottish Government' (INQ000348720, para 47).

142.2. Second, most other organisational changes took place in health and social care Directorates. For example, the Scottish Government Director General for Health and Social Care (INQ000215488: 119) describes 11 major Directorate changes from 2020-22. Four involve shifts of responsibilities between Directorates (largely to combine or separate responsibilities for mental health and social care). One is a Directorate for Population Health with a new Division (Shielding Division in July 2020, renamed Covid Highest Risk Division in June 2021). One is the *Directorate for Outbreak Management* (July 2020, which was part of the DGSEA 'but shared some staff and worked particularly closely on certain functions', INQ000215488: 150). Three are newly formed Directorates responsible for new responses: *Directorate for PPE* (April 2020); *Directorate for Testing and Protect* (April 2020); *Directorate for Vaccine Policy and Strategy* (February 2021). In addition, key Directorates – including the Community Health and Social Care Directorate - had a more continuous role before and during the pandemic (INQ000346089: 18-19).

143. The temporary formation of the Directorate for Covid Health Response (DCHR) exemplifies the Scottish Government's approach to personnel change and Directorate or Divisional reorganisations during this period (in other words, many different civil servant responsibilities

changed frequently in 2020). The DCHR was created on 16 March 2020 and initially had two joint directors to it to 'run as a single team with flexible resource, working seven days a week, on shift patterns' (INQ000215488: 122). An internal review in May 2020 signalled a forthcoming DCHR reorganisation to (1) reflect 'the need for greater clarity of relationship between DCHR functions, new functions that would be required (e.g., vaccinations) and existing functions in the Directorate for Population Health', (2) return to the normal model of one Director for each separate Directorate, and (3) rename the DCHR – as the Directorate for Covid Public Health (DCPH), 1 June 2020) – to reflect this new organisation (INQ000215488: 124). The DCPH also included the Vaccinations Division until the Scottish Government created the Directorate for Vaccine Policy and Strategy.

144. The Chief Medical Officer Directorate is 'part of the Health and Social Care family of Directorates', but the CMO role is distinctive: 'The CMO is the most senior adviser to the Scottish Government on health matters. As a senior civil servant with statutory responsibilities, the CMO reports to and is a director within the Health and Social Care directorates and also sits on the Health and Social Care Management Board. The CMO has a more independent status in government than most civil servants' (INQ000215470, 2023: 8; 6).
145. Third, some non-health Directorates informed the overarching work of Covid-19 Directorates without having a formal role in 'Covid-19 decision-making' narrowly defined. Rather, they sought the more general aim of mainstreaming some issues into all work. For example, the Equality, Inclusion and Human Rights Directorate (EIHRD) (including the Equality and Human Rights Division) sought to ensure that the Scottish Government Covid-19 response 'addressed equality and human rights considerations, including: regular stakeholder engagement, enabling intelligence gathering and analysis of key impacts for equality groups' and informing policy delivery in other Directorates (INQ000215482: 20; INQ000340113: 25-42 lists examples of stakeholder engagement; see also Topic 6 on emergency legislation and Topic 8 on care homes).
 - 145.1. This role would include to ensure that Scottish Government decision-making (1) met its commitments to the European Convention on Human Rights, enshrined in the *Human Rights Act 1998* and *Scotland Act 1998* (2) met its Public Sector Equality Duty enshrined in the *Equality Act 2010*, which lists in Section 4 the following 'protected characteristics: 'age, disability, sex, gender reassignment, pregnancy and maternity, race, religion or belief and sexual orientation', and (3) used the Scottish Government Equality Impact Assessment (EQIA) process systematically to demonstrate policy impact in relation to protected characteristics. For example, Director General Communities (INQ000215482) notes that:
 - The DG would attend the Communities and Public Services Ministerial Group (CPSMG) twice weekly from 2.4.20, then weekly by July, and fortnightly by October. This group was led by the DFM and focused partly on the unequal impact of the pandemic and pandemic response (para 35).
 - Inequalities 'featured' in weekly briefings to ministers in relation to the '4 harms approach' (para 37).
 - This work had a strong focus on older and vulnerable people (para 41).

- The EIHRD assessed the Coronavirus (Scotland) Act in relation to protected characteristics. For example, it included 'special provision' for 'Gypsy/Travellers' in relation to online learning, health, financial assistance, counselling, and sanitation (para 25).
- The Expert Reference Group on Covid-19 and Ethnicity first met on 10.6.20 'in response to the growing evidence of the disproportionate impact of the Covid-19 pandemic on minority ethnic people' (para 29). The Scottish Government set up an Anti-Racism Observatory for Scotland in 2023 (para 75).
- There was a greater than expected focus on the lack of opportunity to worship during lockdowns, and realisation that the Scottish Government should have opened places of worship before hospitality (para 48; 69-72)
- There was a general exhortation for Directorates to comply with the public sector equality duty, but policy change was often too quick to be subject to substantive equality impact assessments (paras 55-60).
- Director General Education and Justice (INQ000215491: 72) also notes the importance of the 'human rights principles of lawfulness, necessity and proportionality' when discussing Police Scotland enforcement of stay at home orders.

146. Fourth, some non-health Directorates dealt with the knock-on effects of Covid-19 policies in other sectors. For example, INQ000215480 (2023: 33; 138-43) describes the Learning Directorate and Directorate for Early Learning and Childcare 'working in close partnership with colleagues in Public Health Scotland' to produce advice on school closures and their impact and provide guidance for schools and childcare providers.

Covid-19 challenges: 3. Coordinating policy and policymaking in a devolved UK system

147. A third challenge for the Scottish Government is to produce coherent policy and integrated policymaking when key responsibilities are held by the UK government. As Henderson (2023) and this report (paras 53-67) describe, although the devolved governments have responsibility for Covid-19 when addressed via public health policy, the UK government still plays an overarching or influential role (summarised by Cairney and Kippin, 2023a as follows). First, to lead a 'four nations' approach. Examples include to coordinate the timing of key policies such as lockdowns, and gather and share evidence. Second, to make policy for the UK as a whole or pass legislation giving powers to devolved government ministers equivalent to those of UK ministers. For example, the UK government has primary responsibility for taxation and assigning the Scottish Government budget, and initial Scottish ministerial lockdown powers came from the Coronavirus (2020) Act (see para 59 this report). Third, the UK government's public health decisions for England have spillover effects on Scotland, such as when its removal of lockdown measures had implications for Scottish Government finance and public health communication (Topics 5 and 7).

Topic 4 Phases of Scottish Government decision-making

Responses to Topic 3 Challenge 1: Using scientific advice to understand the policy problem

148. Scottish Government witness statements describe two main phases of using science advice, which I paraphrase as (1) a pragmatic decision to place high reliance on UK government science advice mechanisms, then (2) a decision to establish Scottish Government mechanisms to supplement UK sources when it became clear that they did not provide fully tailored evidence and advice to inform a distinctive Scottish Government approach.
- 148.1. The first Scottish Government decision was to continue its high reliance on UK government sources of scientific information and advice (outlined in Topic 1; INQ000343900: para 4). This reliance reflects the higher UK government capacity to gather and process scientific information, and a pragmatic Scottish Government decision to draw on this well-established science advice machinery rather than try to replicate it, even though Scottish Government ministers were not central to the design of this science advice mechanism (John Swinney Module 1 testimony, 29.6.23: 87, 7-10). Multiple Scottish Government written submissions describe the ability of key officials to attend SAGE and related meetings routinely if required (albeit without playing as important a role as their UK counterparts). There is also frequent Scottish Government reference to the well-functioning network of chief medical officers and their teams, which met and shared information frequently during the Covid-19 crisis.
149. When UK government ministers describe their use of science advice mechanisms, it is clear that they rely on a small number of key individual people/ roles (Cairney, 2021a). Their main interactions were with senior civil servants in specialist positions, including the Government Chief Science Adviser (GCSA) Patrick Vallance and Chief Medical Officer (CMO) Chris Whitty. Both positions involved leading civil service teams and networks of expertise, including SAGE, which is described further in Henderson's (2023) expert report. The GCSA and CMO relayed information and advice from SAGE to UK Government ministers directly, as part of a relationship not enjoyed by Scottish Government ministers.
150. This science advice mechanism was restricted to issues such as epidemiology rather than the full use of all relevant academic disciplines. The UK government's (2020: 1) SAGE explainer describes drawing on 'expertise from across the scientific spectrum' but also (1) prioritising a sub-set 'including epidemiologists, clinicians, therapeutics and vaccine expertise, public health experts, virologists, environmental scientists, data scientists, mathematical modellers and statisticians, genomic experts', and (2) maintaining key specialist groups such as SPI-B on behavioural science. While its work could inform Scottish Government assessments of Covid-19 transmission and the impact of NPIs, it could only be one of many sources relevant to the wider '4 harms' approach adopted by the Scottish Government from April 2020 (paras 162-4 this report, and INQ000302505).
151. When explaining UK government ministers conferring status on science advisors, Cairney (2021a: 5-6) describes the GCSA and CMO roles as 'core insider', and SAGE members as 'specialist insider', while most other potential sources of scientific information were either peripheral to, or (in the case of 'Independent SAGE) outside of UK policy processes (2021: 5-6). 'Core insider' describes status in government and expected behaviour. For example, as civil servants, the GCSA and CMO are expected to follow the formal and informal rules of UK

government, including to respect the right of UK government ministers to make policy (although each clearly has some latitude to express views in public in relation to their role and expertise, and to provide an appropriate challenge to ministers in private). They are expected to provide regular information and advice on request, tailor their advice to ministerial agendas, maintain confidentiality when required, and avoid criticising government policy in public. These rules often appear to contradict the ‘principles of science advice’ favoured by professional organisations, such as to protect the independence of scientists and foster transparency and accountability to protect the credibility of the profession (2021a: 6) (this report para 161). As such, science advice to the UK government involves a balancing act between competing rules, to provide often-challenging advice to ministers but in the context of supporting their right to define and address policy problems. Most other SAGE members would be less subject to UK government rules if employed by Universities rather than directly by government (e.g. not subject to the Civil Service Code, and not socialised in the civil service system), but would also be aware of the trade-offs between following insider rules to inform policy or having to criticise policy largely from the outside (2021a: 6).

152. As described (para 151), this science advice mechanism reflects the UK government hierarchy in which civil servants and advisory groups feed up evidence and advice to UK ministers in a way that is tailored to their policy agendas and expectations. While Scottish Government ministers would have access to much of that evidence (via documents or meetings), they would not have the same influence over the research questions or policy agenda served by science advice, and their officials could only attend as observers (e.g. INQ000340112: 23 states that ‘Officials are of the opinion that it would have been beneficial for them to also be able to contribute to SAGE discussions and be able to provide the Scottish Government’s perspective on the issues raised’). The continuous need for rapid, high quality, and relevant evidence to respond to Covid-19 accentuated this limitation.
153. This limitation helps to explain why the Scottish Government established its own advisory mechanisms to supplement this reliance on UK government networks. Nicola Sturgeon (INQ000339033: 22; 46) describes SAGE advice as high quality but ‘not sufficiently specific to Scottish circumstances’, and ‘I did not have the opportunity to engage directly with and ask questions of its members’. John Swinney (INQ000287771: 52-3) describes the added value of tailored data and additional discussion with scientific experts. Scottish Government witness statements describe limitations regarding (1) the inability of UK sources of information to tailor their activities to Scottish policy, such as in relation to a distinctive schooling system (INQ000215480, para 159), and (2) the inability of Scottish Government ministers to have the same direct line to science advice as their UK counterparts (INQ000215470, para 22). In that context, the Scottish Government Covid-19 Advisory Group (C19AG) would provide a more direct link to SAGE-like science advice and be able to establish (seven) sub-groups relevant to Scottish Government needs. Multiple Scottish Government written statements express satisfaction with that additional system (e.g. INQ000215480, para 14).
154. The Minister for Public Health, Women’s Health and Sport (Maree Todd) described the Scottish Covid-19 advisory system in general terms to Scottish Parliament COVID-19 Recovery Committee (2022d, 30 June):

“we established the Covid-19 advisory group and subgroups, which have brought together experts from a range of disciplines and organisations, including universities, Public Health Scotland, National Services Scotland and Scottish Government advisers. The chief medical officer and the chief scientific adviser for Scotland also led a new network of our

science and evidence-related chief advisers to share information across their specialisms. That has delivered a holistic approach to commissioning and co-ordination of scientific evidence” (2022d: 3-4).

155. The C19AG witness statement (INQ000215468: para 1-14) describes it as an advisory body akin in role to SAGE but with fewer resources and a less established presence in government (to reflect its novelty and the relative inexperience of its members). As with most SAGE members, most of its members were employed externally, such as in Universities, and the positions were unpaid. It provided regular advice largely via (a) its Scottish Government secretariat, which coordinated a written document for officials and ministers, and (b) key members who were relatively well connected in more important forums, such as the Chief Medical Officer who attended C19AG and gave advice directly to ministers. It met twice-weekly from March to May 2020, then weekly until January 2021, fortnightly until June 2021, and monthly (plus 3 meetings in December 2021 on Omicron) until its last meeting on 3 February 2022 (INQ000215468: para 8; John Swinney INQ000287771: 49 states ‘It was decided in February 2022 that it was unlikely there would be a continuing need for regular external advice on the science of COVID-19 from the Group’). The only formal and direct contact with ministers was via participation in infrequent ‘deep dive’ presentations on broad topics such as the future of Covid-19. C19AG relied on two main sources for its information: (1) its meetings generally followed those of SAGE, to discuss the implications for Scotland, and (2) it received Scotland-specific information from the Scottish Government Covid-19 Corporate Analytical Hub, headed by Chief Social Researcher who was also a member of C19AG and attended C19AG meetings (INQ000215468: para 26).

Like SAGE, C19AG performed a specialist scientific role focusing largely on epidemiological and related issues. It was not given the primary responsibility to provide overarching analysis or advice in relation to, for example, connecting Covid-19 transmission to wider social and economic issues, although its flexible structure allowed many sub-groups to consider that wider context (e.g. INQ000340112: 19-21 describes the role of the Advisory Sub-Group on Education and Children’s Issues in informing the Scottish Government 21 May 2020 *Strategic Framework for Reopening Schools and Early Learning and Childcare Provision*). That wider task was the focus of the ‘four harms’ approach described in the next subsection. Nor was C19AG tasked with providing wider ethical advice in relation to policies such as balancing harms or fulfilling ministerial duties on equalities (John Swinney INQ000287771: 56 describes such matters as ministerial responsibilities).

156. The GCSA and CMO are both civil servants in senior roles in the UK science advice system. In the Scottish Government, the CMO enjoyed the same status but the Chief Scientific Adviser for Scotland did not. The latter is a seconded position to: ‘provide independent science advice and challenge to Ministers and officials’, be a member of some Covid-19 advisory bodies in the Scottish Government, and attend SAGE if appropriate, but with no specific role in relation to Covid-19 or public health (INQ000215478: 18).
157. Multiple Scottish Government submissions describe the importance of the CMO in relation to (a) direct and frequent advice to ministers and senior officials, (b) being at the heart of a wider advisory team including deputy CMOs, and (c) the importance of the CMO network to ‘four nations’ activity (INQ000215488: para 44-52; 72-8; 182-7; 285). INQ000215470 (para 6) states: ‘The CMO is the most senior adviser to the Scottish Government on health matters. As a senior civil servant with statutory responsibilities, the CMO reports to and is a director within the Health

and Social Care directorates and also sits on the Health and Social Care Management Board. The CMO has a more independent status in government than most civil servants’.

158. During Scottish Cabinet meetings, the CMO would be the main translator of scientific information and debate, and ministers would routinely ask the CMO for advice on policy options (INQ000215470: para 36-42). The CMO would seek to present a consensus view when possible or a ‘centre ground’ position when there were differing views among colleagues. It was deemed not helpful ‘to present a wide range of different, often conflicting, medical or scientific views to Ministers’ (INQ000215470: para 40). Ministers were generally aware of a ‘diversity of opinion’, and could question or challenge the advice and seek additional perspectives (e.g. to avoid ‘groupthink’), but too much attention to divergent perspectives would make it ‘challenging for Ministers to identify an appropriate set of decisions to take’ (John Swinney INQ000287771: 56-8).

158.1. To explain such discussions, I distinguish between the means to communicate evidence well to reduce uncertainty (in other words to make sure that ministers understand the technical evidence presented to them) and the acknowledgement of ambiguity (in other words, relating this evidence to different ways to interpret and address the policy problem). For example, when describing uncertainty, Nicola Sturgeon INQ000339033: 47; 106 notes her extensive experience ‘in processing large quantities of information and making judgments about what sources were of most utility and importance’, as well as the essential CMO role in aiding her understanding of Covid-19, while John Swinney INQ000287771: 62 describes processes to make sure that Ministers would understand the data presented. When describing ambiguity, both would emphasise that ministers were responsible for interpreting and addressing policy problems, with scientific evidence there to inform but not replace ministerial judgement (e.g. Nicola Sturgeon INQ000339033: 114, and para 194 on the example of cancelling mass gatherings to reflect not only scientific advice but also public service capacity and government messaging). In other words, the phrase ‘following the science’ could be a useful shorthand but also a misleading representation of who makes – and should make - decisions (Nicola Sturgeon INQ000339033: 133).

158.2. Like the UK GCSA and CMO, the Scottish CMO was a regular attendee at media briefings led by ministers (including First Minister briefings), and gave frequent media interviews. Catherine Calderwood resigned as Scottish CMO on 5 April 2020. Former DCMO Gregor Smith became interim CMO, then was confirmed as CMO on 23 December 2020. Scottish Government (2020d) and INQ000215470: para 18-20 describe Smith replacing Calderwood as CMO.

159. Other advisory roles listed as essential to decision-making in health include the Chief Nursing Officer (CNO) and Chief Scientific Officer Health (CSO) (INQ000215488: 44). In addition, the Scottish Government’s National Clinical Director Jason Leitch took on an increasingly important role in public health communication, and there was no direct UK equivalent to this role (INQ000215470: 52-74). This arrangement arose partly as a response to the events leading up to the resignation of Calderwood as CMO in April 2020, when it emerged that Calderwood had broken Scottish Government lockdown rules. Initially, the CMO and NCD had prominent roles in health communication, but the NCD took on a more prominent role when (a) Calderwood’s position was becoming untenable, producing a gap in relation to the need for credible professional advice to the public, and (b) Leitch proved to be a health communicator respected

in the Scottish Government (these developments are described to some extent by Director General for Health and Social Care, INQ000215470).

160. Overall, these UK and Scottish experiences highlight a distinctive role for science advice in Scottish Government decision-making, beginning with high reliance on UK mechanisms (without being central to their operations), then more reliance on new Scottish mechanisms (at a smaller scale, with fewer resources). In each case, the CMO had a more prominent role, initially as a key connection to a four nations CMO network, then increasingly as a key connection between Scottish Government science advice and ministers (Director General Strategy and External Affairs, INQ000215495; 44, 50). This role included regular CMO attendance at Scottish Cabinet to provide direct updates, with the CMO translating advice and presenting conclusions rather than dwelling on scientific debates (Director General for Health and Social Care, INQ000215470: 3-24; 36-40). In each case, governmental sources describe the benefits of scientific pragmatism when communicating technical information to ministers and senior officials during an emergency (e.g. INQ000215470: 40; this report para 158). It is not entirely clear why this role would effectively be shared by two senior civil servants in the UK government and one in the Scottish Government (and it is difficult to comment on the relative benefits of either arrangement).
161. Critical accounts of the UK government-led experience identify the need for reforms to maintain adherence to science advice principles. Michie et al (2022: 1) argue that: '(1) Government scientific advisors and advisory bodies should be more independent of political influence and interference; (2) Government scientific advisors should be empowered to challenge misrepresentation and misuse by decision-makers of the scientific evidence, and undermining of public-health policies; and (3) Government scientific advice should be more transparent and advisors should engage more proactively with the public. Acting on these lessons will be important for ongoing handling of the current crisis, for the current UK Covid-19 Public Inquiry, and for the UK's preparedness for future crises'.

161.1. Cairney and Toth (2023) suggest that such recommendations would be rejected – in practice, if not in rhetoric – by the UK government. UK ministers place higher value in their advisers following the UK's informal rules, which includes keeping discussions behind closed doors. Further, the Scottish Government largely established a science advice system that resembles that of the UK government. It maintains high reliance on a relatively trusted adviser (the CMO) whose role became primarily to (1) provide advice pragmatically rather than (2) challenge Ministers or foster wider scientific debate as a matter of course (although the CMO has the ability to perform such roles).

Responses to Topic 3 Challenge 1: developing a four harms approach to the policy problem

162. The Scottish Government developed – from April 2020 – a 'four harms' framework to make an explicit comparison of the trade-offs to policy, in relation to (1) the direct harm of COVID-19, (2) other health harm caused by the pandemic, such as the impact on NHS services, (3) the societal harms associated with lockdown measures, such as social isolation and the impact of school closure on learning, and (4) the economic harms of Covid-19 and lockdown policies, such as unemployment and business collapse (Director General Strategy and External Affairs, INQ000215495: 73-5; Scottish Government, 2020g). This work was published after the first lockdown, to prepare for its partial then full release (Scottish Government, 2020f).

- 162.1. The four harms approach provided a way to articulate the need to identify potential trade-offs in relation to: (a) key principles, such as to balance state intervention to protect public health and state respect for individual freedom; (b) the unequal impact of Covid-19 and policy, including when policy instruments harm or benefit some more than others or some groups are relatively harmed from action or inaction ('equalities were integral to the four harms' rather than considered a fifth harm, INQ000339039: 10; INQ000340113: 7). Further, INQ000339039 (para 10) describes a more 'purposeful' use by the Scottish Government of the four harms approach when compared to the UK Government (in the context of a more general preference for state intervention in the Scottish Government, e.g. INQ000287771: 39).
163. While this framework was useful to help plan the release of lockdown measures, there was still high uncertainty about the policy problem (the likely spread and impact of Covid-19) and likely impact of policy instruments (to address Covid-19), which 'justified a role for the application of judgement in decision-making, taking all factors into consideration, including those that were difficult to quantify with much accuracy or confidence. This uncertainty also provided justification for adopting a cautious approach, particularly at stages during the pandemic when the risk to public health was potentially extreme' (INQ000215495: 77). For example, the four harms approach was not a strong feature of the emergency decision-making associated with lockdowns in March 2020 (it was produced by April 2020) or January 2021, and routine assessments of the impact of non-pharmaceutical interventions (NPIs) often involved too much uncertainty to make a proper four harms assessment (INQ000215495: 115-6).
- 163.1. My interpretation of such evidence is twofold. First, that - in key respects - the four harms approach is much like the NPF (this report para 31, 115): it provided an important reference point to general principles, rather than detailed guide to decisions-making in an emergency. Second, the approach was used to narrate key shifts of 'strategic intent' in the Scottish Government Strategic Framework, from prioritising virus suppression in October 2020 towards describing a strategy 'overly focused on suppression' as 'disproportionate' by February 2022 (INQ000339039: para 25).
164. The four harms framework featured – as an agreed reference point - in Scottish Cabinet discussions, civil service weekly meetings, formal procedures such as impact assessments, procedures for funding (INQ000215486: 14), working groups on issues such as education recovery (INQ000215480: 30), and communication with the public (INQ000340111: 4-5).
- 164.1. The Scottish Government also established a separate advisory 'Four harms group', consisting of 'senior officials and advisers who between them could speak to the full range of harms, along with relevant policy leads, analysts, and representatives of Public Health Scotland and COSLA' (INQ000215495: 128). This group would collaborate to inform a detailed Cabinet paper containing key information and/or advice, which the First Minister would help to draft (e.g. to 'help frame the options that Cabinet would consider' – Nicola Sturgeon INQ000339033: 8) and the DFM would present to Cabinet (confirmed by John Swinney, INQ000287771: 19). The Cabinet paper would include evidence, modelling, advice on specific measures, legal and parliamentary issues (INQ000215495: 126).

Responses to Topic 3 Challenge 2: achieving effective policy coordination in the Scottish Government

165. The difference between UK and Scottish Government policymaking is a central theme in Scottish Government oral and written witness statements to the Inquiry. They draw heavily on the aspirational story of a Scottish policy style (described in this report *Background*, which suggests that any such story of decision-making should be accompanied by evidence of its operation and success in practice). The general *aspiration* can be paraphrased as follows, accompanied by evidence when provided by Scottish Government witness statements:

- a. The Scottish Government is better placed than the UK government to join-up its policy response because (a) its policymaking directorates are designed to ensure routine cross-cutting work, and (b) there is relative flexibility to change the focus of key Directorates to respond to new problems.
- b. Senior ministers can make better use of a smaller and therefore more coherent Cabinet system, with the First Minister enjoying meaningful Cabinet delegation and a Deputy First Minister providing administrative oversight of resilience policies (Nicola Sturgeon INQ000339033: 8; 11). The FM can make timely decisions based on agreement in principle in Cabinet (e.g. 'the final lifting of face covering requirements' was agreed in principle on 29 March 2022 then implemented on 18 April 2022, INQ000339039: para 33; John Swinney INQ000287771: 84-5 describes this 'level of discretion' as 'marginal or peripheral given that Cabinet had approved the strategic direction'). The DFM provides the political weight essential to coordinate policy choices across the Scottish Government and public sector, then inform Cabinet choices and delegated First Ministerial choices. This frequent and meaningful cooperation at Scottish Cabinet level, supplemented by ministerial and official meetings in other fora, ensured that ministers were routinely 'updated on key developments' (John Swinney, INQ000287771: 28). The scale of UK government means that 'the UK government does not operate as cohesively' as the devolved governments (Nicola Sturgeon INQ000339033: 55)
- c. Scottish Government Directors General and Directors have frequent meetings to oversee the meaningful coordination of Cabinet policy agendas. These meetings are weekly during non-crisis times, and became more frequent in response to Covid-19.
- d. The frequency of contact between senior officials and ministers rose markedly during crisis periods, and not only in direct relation to health policy. For example, the Transport Scotland senior team met the Cabinet Secretary for Transport, Infrastructure and Connectivity and Energy minister fortnightly from March to June 2020, then weekly, then fortnightly until May 2021. The work was fast paced, with a quick turnaround for information, and key points followed up after meetings (including via WhatsApp - INQ000215497: 55-8).
- e. Ministerial and official meetings are informed by a wide range of advisory groups and supported by many cross-cutting working groups. The long list of advisory groups and subgroups is a feature of Scottish Government witness statements.
- f. There are clear lines of authority within the Scottish Government. The Scottish Cabinet makes all of the key decisions, or delegates them to the First Minister. The civil service informs and supports ministerial decisions, and advisory bodies feed into well-established processes to provide advice to ministers. Therefore, while it would be possible to produce

a confusing diagram of Scottish Government decision-making – akin to the ‘spaghetti’ image of UK government in Module 1 – it would be misleading. There is a single central hub of activity, surrounded by many other bodies whose role is clear in relation to the centre.

- g. There exist relatively productive central-local relations and Scotland has a more manageable landscape of 32 unitary local authorities.
- h. The Scottish Government oversees a network of effective working groups that bring together representatives of the Scottish Government, local government and other public bodies, and stakeholders from the public, private, and third sector (with key aims including to gather and share information, stress-test policy, and foster stakeholder ownership of policy).

Responses to Topic 3 Challenge 3: Coordinating policy and policymaking in a devolved UK system

166. Paras 59 and 259-62 in this report describe the Scottish Government’s reliance on UK legislation and funding. The Scottish Government was unable to legally enforce orders for people to stay at home, and businesses to close, until the passage of UK legislation (the Coronavirus Act 2020). The Scottish Government was highly dependent on the UK government Treasury to (a) fund its Covid-19 responses, and (b) support its policy aims, such as to maintain the UK-wide employment furlough scheme to maintain lockdown measures such as stay at home orders and business closures (Topic 7).

166.1. In some cases, particularly before March 2020, Scottish Government witness statements describe a reliance on the UK government as a useful or pragmatic step. The Scottish Government would also engage in four nations cooperation via, for example, the network of CMOs. In other words, this reliance on UK-wide mechanisms is not always described as a drawback to be addressed with alternative mechanisms. Rather, since the Scottish Government is much smaller and has less capacity than its UK government counterpart, it can make sense to rely on UK government research for policy relevant information. For example, as described by Scottish Government oral evidence in relation to pandemic flu preparation in Module 1, it adapted UK government knowledge or responses to a Scottish context. It also made sense for the UK government to lead the procurement of PPE and vaccines, then for the Scottish Government to manage PPE and vaccine delivery in Scotland.

167. The Scottish Government’s description of decision-making before the first lockdown in March 2020 emphasises being part of a UK-wide approach to Covid-19, summarised in relation to multiple venues for cooperation, or ‘A well established ecosystem of formal and informal arrangements for liaison and, if the governments agreed, joint action’ (INQ000215495: 44-55). Ministerial interactions took place via Scottish Government minister attendance at UK government meetings, including (1) COBR meetings attended initially by the Cabinet Secretary for Health and Sport then the First Minister, and (2) three of four Ministerial Implementation Groups (MIGs). For example, the General Public Sector (GPS) MIG was chaired by the Chancellor of the Duchy of Lancaster (CDL), with participation by the DFM or another Scottish Government minister. It held 35 meetings (every weekday) from 23 March to 21 May 2020, and focused on public service continuity. Scottish Government ministers also attended MIGs for Health, and Economy and Business. In each case, there were equivalent opportunities for

Scottish Government Permanent Secretary, Director General or Director attendance at UK Government convened meetings. John Swinney (INQ000287771: 25) described MIGs as 'helpful', but also relates the general impression that discussions with the CDL were not 'translated into practical reality' (Nicola Sturgeon INQ000339033: 44; 46 uses the same argument and phrase 'practical reality').

- 167.1. The fourth MIG - International - was treated rather narrowly by the UK government as a reserved issue, despite some issues effectively having devolved elements and presenting unintended consequences. For example, the UK Government determined immigration policies and international border control, and the Scottish Government determined testing and quarantine requirements for international travellers crossing the UK border via Scotland. Further, the Scottish Government could not stop international travellers arriving in England then travelling to Scotland to avoid more restrictive Scottish Government measures (Cabinet Secretary for Transport, Infrastructure and Connectivity, 2021; INQ000339039: para 35; 94-5).
168. Examples of joint work include, 'liaison on the establishment of the mass testing programme', cooperation to connect the UK and Scottish systems on PPE and medicine supply, 'liaison and decision-making on vaccine development, supply, policy and rollout and Covid status certification', relating Scotland's 'Test and Protect' system and restrictions and quarantine arrangements for international travel to equivalent schemes across the UK, financial transfers arranged by Scottish finance directorates and the Treasury, and the issue of further and higher education student movement (INQ000215495: 44).
169. Further, specific departments describe equivalent sectoral discussions. For example, cross border transport issues included the need to communicate differences in requirements to the public when face mask rules differed in England and Scotland, and four-nations information sharing on issues including rail recovery, freight, and PPE (INQ000215497: 50-1; 53-4; 67).
170. Examples of the increased frequency of intergovernmental relations were relatively concentrated in – but not exclusive to - the initial phases of Covid-19 policy, including:
- Four-nations meetings between Chief Medical Officers began in January 2020 and continued throughout the pandemic (INQ000215495: 50).
 - Health Secretary then First Ministerial attendance at COBRA meetings. The Cabinet Secretary for Health and Sport (Freeman) attended the first COBRA (24.1.20) then 29.1.20, 5.2.20, 18.2.20, and 26.2.20. The First Minister took over COBRA attendance 'throughout March 2020'. Both participated in the Prime Minister-led COBRA meeting (2.3.20) 'to discuss and clear the Four Nations Coronavirus (Covid-19) Action Plan' (INQ000215495: 49).
 - Ministerial Implementation Groups: (1) General Public Sector (GPS) involved 35 meetings (every weekday) from 23.3.20 and 21.5.20; (2) Health involved 5 meetings 23.3.23 to 26.5.20; (3) Economy and Business 6 meetings 31.3.20 to 14.5.20 (INQ000215495: 51-2).
 - Weekly calls between the Chancellor of the Duchy of Lancaster and heads of devolved government from May 2020 'through the pandemic' ((INQ000215495: 53).

- Nine four-nations Ministerial meetings on transport from April 2020 to May 2021, and fortnightly four-nations officials meetings from Summer 2020 to Autumn 2021 (INQ000215497: 50-1; 53-4; 67).
 - Scottish Government Permanent Secretary attendance (online or call) at Cabinet Secretary chaired meetings or Permanent Secretaries from April 2020. These discussions included 'stock-takes of developments in the pandemic' and 'deep dives' in particular issues. From June 2020 Directors General could attend. From January 2021, Scottish Government officials could attend (INQ000215495: 54).
171. From June 2020, four-nations meetings reduced and the structure of meetings was reconstituted, although First Ministerial attendance at COBRA meetings continued. The UK MIGs were replaced by Covid-S (Covid-19 Strategy Committee), chaired by the Prime Minister, and C-19 Operations chaired by the CDL, without routine Scottish ministerial involvement, except to discuss international travel restrictions. This shift in IGR reflected an increase in the operational separation between UK and Scottish Government responses after the initial emergency and March lockdown (there were fewer meetings to coordinate joint activity). There were still frequent calls by the CDL to the First Minister, and four-nations meetings at ministerial and CMO level, to discuss relevant issues from the end of the first UK-wide lockdown in May 2020 to the imposition of the second in January 2021.
172. From February 2022, four-nations meetings 'moved to a slower rhythm' to reflect the UK and devolved government choices to lift restrictions in light of the successful vaccination programme (INQ000215495: 56-66).

Counterfactual approaches to a timeline of Covid-19 decision-making in Scotland

173. These three policy and policymaking challenges - uncertainty, incoherence, and limited multi-level cooperation - combine to make it very difficult to provide a detailed timeline of policy and decision-making in Scotland. It is not straightforward to describe, explain, and evaluate Scottish Government decisions when they result from a combination of (1) making choices despite high uncertainty and limited access to evidence, (2) major challenges of coordinating policy across Scottish Government and the wider public sector, and (3) choices that are not fully in Scottish Government control.
174. In other words, there is considerable room for interpretation of the extent to which the Scottish Government *could*, *would*, and *should* have made different key decisions from early 2020. Systematic analysis of this issue requires us to differentiate between the following ways to explore decision-making:
- *Questions to seek clarity on reserved and devolved powers.* To what extent could the Scottish Government have acted differently from the UK government, given the powers that it had?
 - *Counterfactual analysis to identify the limits to devolved powers.* If the Scottish Government had full autonomy, what could and/ or would it have done differently?
 - *Counterfactual analysis to identify more general limits to policy and policymaking.* If the Scottish Government had better evidence and understanding of the problem, what would it have done differently?

- *Counterfactual analysis to identify success and failure.* If it could go back in time, what would it do the same or differently? How does the answer inform future strategies?
175. For example, these distinctions are essential to help address a series of questions raised by UNCOVER (which produced preliminary reports to inform the agenda of the Scottish Government commissioned Inquiry, 'Scottish Covid-19 Inquiry'). UNCOVER (2022b) describes a fine-detailed timeline on Scottish Government decisions/ choices. This section paraphrases UNCOVER's (2022b) points as follows then explains them in more depth. *Could, would, and/or should* the Scottish Government have done things differently in relation to: (1) policies preceding the first lockdown in January-March 2020; (2) the release of lockdown from April 2020; (3) the impact of countervailing pressures from 2021, when vaccination was becoming successful but new variants were emerging; and, (4) the impact of lockdown and other measures on children and young people?
176. Doing things differently in January-March 2020 could include:
- Adopting 'more aggressive suppression strategies in early March', such as to move more quickly to an obligatory test, trace, and isolate scheme.
 - Sticking with the strategy of 'containment' rather than moving to 'delay' from 14 March 2020.
 - Enforcing an earlier lockdown in March 2020.
177. Taking a different approach to the release of lockdown from April 2020 could include:
- Pursuing a 'zero COVID' strategy via high state intervention, including longer stay at home orders or more interventionist test, trace, isolate mandates.
 - Pursuing the opposite strategy, associated with the 'Great Barrington Declaration' and 'grave concerns about the damaging physical and mental health impacts of lockdown policies'.
 - Giving more autonomy to local authorities or regional public bodies to deliver interventions more tailored to local areas, rather than prioritising uniform national approaches.
 - Enforcing stricter travel restrictions within Scotland and border controls between Scotland and (a) the rest of the UK, and (b) other countries.
 - Introducing the second lockdown far more quickly, and with no special arrangements for social mixing during Christmas 2020 (e.g. John Swinney INQ000287771: 84-5 confirms the absence of scientific evidence to justify a Christmas Day relaxation).
178. Making different choices following the impact of vaccination and new variants from 2021 could include:
- Keeping and communicating the benefits of restrictions until the impact of vaccines and new variants was better known.
 - Maintaining stricter travel and border controls until more information on new variants was available.
179. Doing things differently for children and young people could include:

- Gathering more information on the likely and actual ‘educational and social developmental harms’ of lockdown measures and school closures (e.g. discussed in INQ000340112: 71-88).
- Giving greater priority to school openings compared to other measures, such as reopening other public places (this was more of a feature of Scottish Government policies in 2021 – e.g. INQ000339039: para 123).
- Consulting more widely with a broader range of experts, as well as stakeholders, parents and young people, to inform school policies.

Scottish Government Covid-19 strategy documents

180. A series of Scottish Government strategy documents (updated regularly from 2020-22) help to describe and explain its key decisions. I provide a short summary of each in this paragraph, then use these documents – and UNCOVER and other commentaries - to reflect on key aspects of Scottish Government decision-making.

Coronavirus (COVID-19): Scotland's Strategic Framework (published in October 2020, then updated on February, June, and November 2021 and February 2022).

180.1. First, it describes ‘our approach’ as ‘Suppress the virus through compliance with physical distancing and hygiene measures, ensuring that the reproduction number remains below 1 and that our NHS remains within capacity; Care for those who need it, whether infected by the virus or not; Support people, business and organisations affected by the crisis; Recover to a new normal, carefully easing restrictions when safe to do so while maintaining necessary measures and ensuring that transmission remains controlled, supported by developments in medicine and technology; Protect against this and future pandemics, including through effective testing, contact tracing and isolation; Renew our country, building a fairer and more sustainable economy and society’ (2020f: 4).

180.2. Second, it describes decision-making principles in relation to: ‘Safe’, to reduce transmission and protect health and social care capacity, ‘Lawful’, to ensure that restrictions are ‘justified, necessary and proportionate’, ‘Evidence-based’, ‘Fair & Ethical’, ‘Clear’, to facilitate public understanding and compliance, ‘Realistic’, and ‘Collective’, to work with stakeholders including UK and devolved governments (2020f: 4). This approach and these principles were to inform the Scottish Government’s pursuit of a transition from lockdown to less restrictive measures when it was safe to do so, based on levels of transmission and harm as well as public compliance with restrictions, and with a review of the lockdown regulations ‘at least once every 3 weeks’ (2020f: 24).

180.3. *Coronavirus (COVID-19): Scotland's route map through and out of the crisis* (published in May 2020, followed by announcements to move from Phase 1 (from 28 May 2020) to Phase 2 (from 18 June 2020) and Phase 3 (from 9th July, but subject to review and the reintroduction of restrictions in October 2020).

180.4. A series of evidence-informed updates and regular reviews focused on the ‘route map’ which ‘gives an indication of the order in which we will carefully and gradually seek to change current restrictions’ (Scottish Government, 2020h).

180.5. This transition was to be based on the World Health Organisation's 'Six key criteria for easing restrictions', reproduced as follows: '1. Evidence shows that Covid-19 transmission is controlled. 2. Sufficient public health and health system capacities are in place to identify, isolate, test and treat all cases, and to trace and quarantine contacts. 3. Outbreak risks are minimized in high vulnerability settings, such as long-term care facilities (i.e. nursing homes, rehabilitative and mental health centres) and congregate settings. 4. Preventive measures are established in workplaces, with physical distancing, handwashing facilities and respiratory etiquette in place, and potentially thermal monitoring. 5. Manage the risk of exporting and importing cases from communities with high-risks of transmission. 6. Communities have a voice, are informed, engaged and participatory in the transition'.

180.6. Each phase would require physical distancing measures and advice to use face masks in public places. Phase 1 would allow more outdoor activity, including meeting outdoors with another household (up to 8 people in total), but a very limited reopening of businesses and schools for essential purposes. Phase 2 would increase the size of outdoor group meetings and some indoor meetings if subject to physical distancing, and allow for the limited reopening of some shopping and leisure activities. Under phase 3 (when the virus is suppressed), allowable indoor meetings would increase to more than one household, public transport would return to capacity, schools would have phased reopenings, and pubs, restaurants, and leisure activities could resume (subject to physical distancing and hygiene measures). Phase 4 (the virus is not a 'significant threat to public health') would allow limited restrictions on such behaviours, subject to physical restriction measures and a recommendation to use face masks.

Coronavirus (COVID-19): Scotland's Strategic Framework (published in October 2020, then updated on February, June, and November 2021 and February 2022).

180.7. First, it describes the 'strategic approach' as 'We will work determinedly, energetically, and collaboratively to suppress the virus to the lowest possible level and keep it there, while we strive to return to a more normal life for as many people as possible'.

180.8. Second, it relates this approach to the 'four harms' approach, such as to: describe new 'protection levels', testing capacity, support for care homes; maintain health and social care capacity; mitigate the impact of Covid-19 and lockdown measures on mental health, education, and low incomes; and, support business.

180.9. Third, it outlines a levels-based approach to lockdown measures, to allow the Scottish Government to shift between (1) a national approach during a nationwide pandemic (without reference to these levels) and (2) a more localised approach to measures such as stay-at-home orders depending on rates of infection in each area. Levels 0 and 1 are akin to the 'the closest we can get to normality, without a vaccine', Levels 2 and 3 would involve more restrictions 'focusing on key areas of risk – broadly, indoor settings where household mixing takes place', and Level 4 would involve 'measures close to a return to full lockdown' to prevent overwhelming NHS capacity (Scottish Government, 2020i).

181. In addition, the Scottish Government identifies examples in which its decisions were part of a UK-led four nations strategy, albeit particularly during the initial period of high uncertainty leading up to the first lockdown and less over time. In some cases, witness statements describe the benefits of a four nations approach, such as when introducing lockdown mandates in unison

to address the same problem and avoid legal loopholes. In others, they describe a high reliance on UK government decisions in relation to the high risk of going it alone, such as to procure PPE and vaccination supplies during an intense period of global competition. For example, John Swinney's Module 1 testimony (Inquiry transcript 29.6.23: 87, 7-10) describes, in relation to issues like PPE, 'there would be other dialogue on a four nations basis where there really was no particular value in us undertaking a different and distinctive process' (Inquiry transcript 29.6.23: 87, 13-15).

182. These strategy documents and witness statements inform several types of counterfactual analysis (this report para 174). Scottish Government statements relating to autonomy suggests that, in theory, it could have:

- introduced its first lockdown more quickly
- lengthened its first and second lockdowns (March 2020 and January 2021) while maintaining the employment furlough and other economic support measures for a longer period (to reach and maintain a point of minimal Covid-19 transmission)
- delayed the 'living with Covid-19' phase described by the UK government in early 2022, and
- used some reserves (or other budget allocations) to fund these policies (although Topic 7 describes the limits to its borrowing powers and reliance on UK government allocations).

183. Multiple witness statements suggest that the lack of policy change often related to the lack of certainty or availability of key facts. For example, high uncertainty of the number of Covid-19 cases and rate of transmission in March 2020 contributed to high uncertainty about the benefits of lockdown (to prevent major illness and death) in relation to the costs, relating to restricting personal freedoms and economic and social activity (albeit at a time when other countries, including Italy, had taken more restrictive measures). However, there is less witness statement engagement with analysis of the lead up to the second lockdown in 2021, in which governments still faced uncertainty, such as regarding the transmissibility of new variants, but had more data and policy experience on which to draw (see expert opinion Topic 1, para 124-6).

184. This combination of empirical and counterfactual answers helps to identify areas of partial clarity in relation to the questions raised by UNCOVER (2022b), as follows.

185. *Key decisions in January-March 2020.*

185.1. INQ000339039 (para 59) confirms that Scottish Government ministers were in charge of Scottish Government strategy 'throughout the entire pandemic'. Scottish Government witness statements generally describe a decision to support a strategy akin to that of the UK government, in which the main initial focus was on gathering evidence on a new virus via UK science advice mechanisms, using existing public health capacity to contain then delay the spread of Covid-19, and focusing primarily on public guidance and support rather than direct state intervention to oblige behavioural change, then moving rapidly to lockdown.

185.2. John Swinney (INQ000287771: 84-9) also confirms the Scottish Government's initial uncertainty about public compliance with major restrictions on behaviour (until people understood the scale of the problem) then its use of a similar language – such as 'flattening the curve' – to describe the need to protect NHS capacity by avoiding too-high

peaks of population infection (while shielding vulnerable people) (see also Nicola Sturgeon INQ000339033: 8; see Cairney, 2021b on the UK government's 'flattening the curve' framing). John Swinney (INQ000287771: 89; 116) relates this four nations approach to the need for clear and coherent UK-wide communication 'to persuade the public to comply with extraordinary measures that had to be implemented in unprecedented times', and describes the pragmatism of introducing the first lockdown at the same time across the UK. Nicola Sturgeon (INQ000339033: 203) expresses a similar regret – as UK government ministers – about not introducing lockdown measures earlier (albeit while describing the need for UK government financial support to make it happen).

185.3. During this period, there is little discussion of alternatives such as using test/trace/isolate measures to delay or contain for longer, and the Scottish Government's initial lack of legally enforceable lockdown powers do not feature strongly in Scottish Government accounts in July 2023. Subsequently, Scottish Government correspondence on this report - and INQ000339039 (para 59) - confirms that the Scottish Parliament could have passed its own legislation rather than initially use the Coronavirus Act 2020).

185.4. The language of Scottish Government witness statements (July 2023) is often general, *describing a UK-led plan rather than specific decisions by named roles* (e.g. INQ000215495: 68-19). Examples of activity during this period include:

- INQ000215495 (para 68) summarises the UK Government led Coronavirus Action Plan of 3 March 2020, describing the aim to contain then delay Covid-19 transmission, fund research on treatment and vaccines, and mitigate the impact of illness on NHS capacity while seeking to 'minimise the overall impact of the disease on society, public services and on the economy'. As Topic 1 notes, this description traces back to four nations preparation for pandemic influenza, on the assumption that state intervention would be to mitigate its impact rather than lockdown to halt or radically slow its spread.
- INQ000215495 (para 69) notes that the shift from contain to delay took place on 12 March after the first confirmed case in Scotland, followed in late March by a shift to an "unprecedented set of NPIs, culminating in 'lockdown', as more traditional 'precision' public health measures such as isolation became insufficient and population-level interventions were deemed necessary".
- In relation to 'super-spreader events', INQ000215497 (para 63) describes cooperation with Scotrail to provide 'health messages' and guidance to people travelling to the Scotland v France rugby Murrayfield 8 March 2020. Then, 'events of more than 500 people were cancelled across the UK' on 16 March, followed by the closure of schools and nurseries in Scotland on 19 March, the closure of 'hospitality and other social venues' on 20 March, "'Stay at Home' requirements came into effect" on 23 March, and the Coronavirus (Act) 2020 allowed lockdown powers to be enforced from 26 March (INQ000215495: 70).

186. *Key decisions to prepare release from lockdown from April 2020.* The Scottish Government presents an overall narrative of lockdown similar to that of the UK government: "The lockdown position was not sustainable in the medium term, however, as notwithstanding the various types of support made available including the UK Government's 'furlough' scheme, the disruption to everyday life and impact on the economy were both extreme" (INQ000215495: 70). Further,

John Swinney (INQ000287771: 134) notes that ‘people were clearly frustrated by restrictions and anxious to return to more familiar patterns of living and working’.

187. Within that context, the Scottish Government presents a more explicit preference for restrictive measures to minimise Covid-19 or caution about removing the ones in place, without pursuing ‘zero Covid’ since it was unlikely to be feasible, especially if not also pursued in England (INQ000215495: 153; the ideal of zero-covid was a ‘stretch aim ... an overall objective to continually work towards, even if there was a very low possibility of it being fully achieved’, INQ000339039: para 27; see also Nicola Sturgeon INQ000339033: 289). For example, the Scottish Government maintained a stricter version of UK policies restricting foreign travel, but relevant people could fly to England then drive to Scotland (and the Scottish Government suggests that it could not control the Scotland/ England border) (INQ000215495: 158). There were also times – explained in Topic 7 - when the Scottish Government wanted longer lockdowns but would be unable to secure additional financial support (INQ000215495: 161-2). More generally, Nicola Sturgeon (INQ000339033: 49) lists examples of a more cautious approach in relation to ‘the nature and timing of NPIs, media messaging, funding and budget flexibilities and furlough’, international travel, and community testing.
188. The Scottish Government’s ‘strategic priority in 2020 and the first half of 2021 was on suppressing prevalence, even at the expense of considerable broader harms’, and the Scottish Government sought to ‘suppress the virus to the lowest possible level and keep it there, while we strive to return to a more normal life for as many people as possible’ (INQ000215495: 91). As this report para 181 summarises, it refined continuously its approaches to the release of lockdown measures. First, its strategic framework established a broad approach and general principles. Second, its ‘route map’ out of lockdown connected to six WHO criteria, to help move between phases of restrictions in relation to the scale of the pandemic (INQ000215495: 96-9). Third, its ‘strategic approach’ introduced a more localised approach to lockdown restrictions, in which there would be more or less restrictions on behaviour in relation to Covid-19 transmission and harm (INQ000215495: 102).
189. The resurgence of Covid-19 in Autumn 2020 (and emergence of new variants by the end of 2020) prompted the Scottish Government to slow or cease the easing of restrictions (INQ000215495: 100-1). The emergence of a likely new wave of infection also prompted a four nations agreement to scale back the planned ‘special arrangements’ for Christmas 2020 (INQ000215495: 104).
190. From April 2020, the ‘four harms’ approach was the Scottish Government’s general reference point when decision-makers sought to balance Covid-19 health harms with the harm of restrictions on social and economic behaviour (this report, paras 162-4), albeit not until it had more evidence on the impact of restrictions, such as via impact assessments that were difficult to produce during an emergency (INQ000215495: 73-5; 85). This focus on harm connected to routine analysis to confirm that the Scottish Government’s ‘approach remained lawful’; there were checks at least every three weeks to make a formal assessment ‘on the necessity and proportionality of all the legal measures (the INQ000215495: 82 text uses the passive tense without identifying who checked what). This included both existing legal measures (for continuation) and potential changes in measures (introduction and removal). The test applied was whether a measure was “necessary to prevent, protect against, control or provide a public health response to the incidence or spread of infection in Scotland with coronavirus” (INQ000215495: 82). In every case, the Scottish Cabinet decided which legal measures ‘would need to be removed’ (INQ000215495: 83). Indeed, it is stated that *every major decision*

revolved around Cabinet meetings on Tuesdays, informed by 'four harms group' meetings on Fridays, and 'Gold' meetings on weekends or Monday when ministers would give a direct steer in relation to a four harms group paper (confirmed by Nicola Sturgeon INQ000339033: 8). This medal-based language relates Gold to strategic decisions made by senior policymakers, Silver as tactical and Bronze as operational (INQ000215495: 83). INQ000348720 (para 114) describes 'Gold meeting' as 'colloquial' ('there was no "Gold committee"').

191. *Key decisions following the impact of vaccination and new variants from 2021.* The Scottish Government resumed its more localised and levels-based approach from February 2021, in which local areas could enjoy reduced levels of restrictions if Covid-19 prevalence declined, subject to the tightening of restrictions to reflect the impact of new and more transmissible variants such as Alpha (INQ000215495: 105). While the Levels-based approach applied to localities, and there were general ambitions to include local authority and community voices, *the approach to local variations was centralised at the national level, with key decisions made by the Cabinet.* The Scottish Government described a national approach to levels as sensible because (1) too much focus on local variation 'would reduce clarity and hence public understanding of the measures, which was considered important for maintaining adherence', (2) a 'sense of national solidarity' was important as long as the government could avoid the perception of unfairness in low transmission areas, (3) there were issues of local unfairness in relation to people living near boundaries, and (4) key periods required a rapid national response (INQ000215495: 122-4).
192. From June 2021, the Scottish Government signalled the potential for transition out of Levels-based restrictions if a key 'gateway condition' - 'all adults over 40 had been offered 2 doses of the vaccine' - was met (INQ000215495: 107). If so, there would be a shift to 'Baseline Measures', including mask use, testing and tracing, adaptations to reduce transmission, capacity limits on venues or activities, and vaccination certification (INQ000215495: 107). This transition came into effect from August 2021. In that sense, vaccination was a game changer to Scottish Government strategy (INQ000215495: 120).
193. In December 2021, the impact of Omicron prompted the 're-introduction of international travel measures and stricter guidance on isolation, on social interaction and for particular settings. Various regulatory requirements were reintroduced for hospitality settings', night clubs were closed, and large events restricted (with some financial compensation by the Scottish Government). These measures were lifted from January 2022 (INQ000215495: 114). Scottish Government correspondence on this report describes such measures as significantly different from UK government policies (e.g. closing nightclubs was a decision by the three devolved but not UK government). By March 2022, the Scottish Government strategy was to 'manage Covid-19 effectively, primarily through adaptations and health measures that strengthen our resilience and recovery, as we rebuild for a better future'; after two years of restrictions followed by high population vaccination, 'a strategy overly focused on suppression would be disproportionate' (INQ000215495: 92-5). This language is comparable to the 'living with Covid-19' approach articulated by (then) Prime Minister Boris Johnson, albeit in a context where the Scottish Government would have preferred a longer transition.

EXPERT OPINION TOPICS 3 and 4

194. *Addressing uncertainty in the evidence.* The Scottish Government describes the need to make decisions with profound consequences despite high uncertainty about the policy problem (e.g. the spread and impact of Covid-19) and the consequences of its responses (e.g. NPIs). This

uncertainty related to a sequence of decisions, such as to lockdown to respond to a pandemic, then seek alternative ways to deliver public services. Examples such as education highlight how a sequence of choices multiplied uncertainty and the likelihood of unintended policy consequences: lockdown prompted the need for alternative ways to foster student learning and assessment, producing an acute crisis in relation to exams, and exacerbating the longer term crisis of education inequality, in ways that the Scottish Government did not anticipate (even though reducing educational inequalities was a high priority before 2020 - Kippin and Cairney, 2022; 2023b). Topic 8 explores such examples in more depth.

195. The Scottish Government made substantive attempts to anticipate such unintended consequences, but it has not yet demonstrated the benefits of its decision-making approach. It developed a 'four harms' approach to engage with trade-offs between Covid-19 harm and the costs of lockdown restrictions, but does not yet describe an overall assessment or reflection on its choices during these periods (often preferring to use the two Covid-19 inquiries as a way to learn lessons). This absence prompted UNCOVER (2022b: 7) to ask: 'What plans does the government have for a systematic audit of lockdown-associated harms and their enduring impacts, across the population and for different population groups (e.g., including minority populations, different age groups and those with a range of health conditions)? Balancing benefits and harms across different groups is a key area for ethical analysis'. Correspondence from the Scottish Government (in response to a draft of this report) suggests that examples of 'learning and reflection' activity include:
- a. *Coronavirus (COVID-19) Learning and Evaluation Oversight Group* (2022-24). It is chaired by Professor Linda Bauld (Scottish Government Chief Social Policy Adviser) and consists of relevant Scottish Government Directors, University Professors, and chairs or chief executives of groups representing local government, professions, and third sector organisations. Its remit is to 'provide active and effective direction, support and guidance in order to support the Scottish Government and partners to: prioritise and agree a small number of key Covid-19 learning and evaluation questions which will be critical in supporting future policy decisions; deliver and oversee a coherent and pragmatic programme of evaluation and learning to address key Covid-19 evaluation questions; utilise evaluation and learning outputs to ensure learning is applied to maximum effect and impact' (Scottish Government, 2022b).
 - b. *Social Renewal Advisory Board* (2020-21). It was chaired initially by Cabinet Secretaries, and members represented SOLACE and COSLA, provided academic expertise, or were senior staff of third sector (and other relevant) organisation recruited 'in recognition of the individual contribution they could make' (Social Renewal Advisory Board, 2021: Annex). Its main report produced a list of 'calls to action' based on three principles, summarised as: everyone should 'have a basic level of income from employment and social security', and 'see their rights realised and have access to a range of basic rights, goods and services', and 'we need to give more power to people and communities and empower frontline teams' (2021; 4-9; see also para 32 of this report). Annex D also lists five other 'advisory groups on renewal', including the Expert Reference Group on Covid-19 and Ethnicity 2020.
 - c. *Standing Committee on Pandemics* (from 2022), a scientific advisory group to inform preparedness for 'future pandemics' (see this report para 112).
 - d. The strategy document *Covid Recovery Strategy: for a fairer future* which 'Sets out our vision for recovery and the actions we will take to address systemic inequalities made

worse by Covid, make progress towards a wellbeing economy, and accelerate inclusive person-centred public services' (Scottish Government, 2021f). The report Annex A lists the 'Public engagement and stakeholder events' used to gather information to inform this work.

195.1. These initiatives often involve a welcome, substantive commitment to learning from decisions, although it is not yet clear how they will feed into decision-making. Academic studies of learning from policy evaluation provide three cautionary tales that should inform further reflection about the Scottish Government's 'architecture' for learning.

- a. First, governments use evaluation evidence in a range of ways, from (a) vague and selective engagement with evidence to defend their policies and decisions (e.g. using general phrases like *we used the best available evidence*), to (b) an 'enlightenment' function to challenge 'old ideas' and provide 'new perspectives' (Weiss, 1999). Therefore, the set-up of multiple forums for substantive learning does not guarantee an impact on policy agendas or decision-making. Indeed, the setting up of such forums to project a commitment to policy learning can actually be used as its substitute.
- b. Second, 'policy learning' takes many forms, including 'epistemic' learning from a small number of experts and more participatory 'reflexive' learning, between many citizens and stakeholders, to share knowledge, experiences, and perspectives (Dunlop and Radaelli, 2013). Therefore, the primary reliance on Scottish Government working groups or committees – consisting largely of civil servants and select experts – may present the idea that learning can be a technocratic search for technical solutions, at the expense of an opportunity for wider and more open reflection on political decisions. There is evidence of more participatory practices to gather wider insights, but also a general gap between aspiration and reality (this report para 32).
- c. Third, the set-up of Inquiries should not be seen by governments as a substitute for their own participatory and deliberative forms of policy learning, especially when they invest in those Inquires a 'legal-judicial logic' without the remit or resources to foster more participatory forms of learning (Stark, 2018: 12).

196. *Making, coordinating, or influencing policy.* 'Scottish Covid-19 policy' is produced or influenced by a range of different political actors, including the UK and Scottish Governments. Scottish Government policymaking is multi-faceted, relating to its:

- contribution to a 'four nations' approach across the UK (particularly in early 2020)
- requests to the UK government to increase its budget (with mixed success), and
- devolved powers, such as to direct public health policy. The latter includes emergency work in health protection and longer term work on health improvement, and to oversee the delivery of public services, including the NHS, policing, local government, transport, and education.

197. In that context, the Scottish Government witness statements identify general descriptions of decision-making procedures or approaches:

- parallel processes to support a four nations approach, in which there would be regular interactions between UK and devolved government ministers (albeit subject to the general limitations, such as the asymmetry of power between UK and devolved governments, described in this report paras 62-7), supported by often more frequent interactions between departmental officials and strong networks of professionals such as via four nations CMO meetings or attendance at SAGE meetings
 - the use of some of these arrangements (or direct bilateral exchanges) to make regular requests to UK ministers or departments for more powers, resources, or autonomy (explained in Topic 7), and
 - the modification of Scottish Government directorates to support ministers (this report paras 142-6)
 - the establishment of advisory groups to inform officials and ministers
 - the establishment of working groups to remain in regular contact with public bodies and other stakeholders
 - the reform of funding and other processes to facilitate far quicker decision-making during emergency (Topic 7).
198. When describing its own approach, the overarching Scottish Government story combines elements of the Westminster story of strong central control with elements of a more collaborative and coordinated Scottish policy style (this report, *Background*). Witness statements describe all major policy choices taking place collectively, in weekly meetings of ministers of the Scottish Cabinet, or delegated to the First Minister or other senior ministers (this report, *Background*). The role of almost all other organisations was to (a) inform the choices of ministers, such as via advisory bodies, and (b) support the choices of ministers, such as via Scottish Government directorates and public bodies. If so, this simple image presented by the Scottish Government is in marked contrast to the 'spaghetti bowl' described in Module 1. While there were a large number and wide range of organisations involved in informing and supporting policy, Scottish Government witness statements state that, by far, the most important role was performed by the heart of Scottish Government.
199. This collective statement *asserts* that decision-making for the Scottish Government response to the Covid-19 virus was organised primarily in relation to collective and individual ministerial action (this report, *Background*). However, it does not help to map and track the details or processes associated with each key choice. One consequence of this story could be the lack of proper analysis of the roles of many relevant posts and organisations, summarised as follows:
- Many working groups and advisory bodies matter, but they are described as part of a long list of organisations feeding advice to Directors General, CMO, or other organisations.
 - There is much description of activity, but little detail on the inner workings or relationships relevant to decision-making, largely because the distinction between (1) giving scientific advice and (2) making political choices removes the need to describe the details of information and advice gathering (in other words, the main story is that scientists give information and ministers make choices).
 - There is little reflection on key events, such as when providing only a procedural account of the resignation of Calderwood as CMO.
 - Written statements provide largely uninformative accounts of the use of Whatsapp and other messaging services, other than to note that: they were essential during fast paced

work; the Scottish Government has provided its guidance on message use, and the CMO did not advise ministers via Whatsapp (INQ000215474: 62-6; INQ000215470: 42). This lack of attention to describing the informal rules and practices (including Whatsapp use) has a knock-on effect for media, public, and parliamentary trust in Scottish Government decision-making.

200. Further, stakeholders such as Scottish local authorities may provide a less positive narrative of wider collaboration, emphasising a tendency towards central government interference in local autonomy via statutory duties and control of the budget, insufficient funding, limited resources to cooperate with other public bodies, and unresolved issues such as plans to integrate health and social care and encourage a national service for social care (described in this report, *Background*; Scottish Parliament Finance and Public Administration Committee, 2023).
201. The Scottish Government describes an often-pragmatic approach to its position in the UK policymaking system, including meaningful and often successful examples of joint working under the umbrella term ‘four nations’. This shift in the frequency and intensity of contact took place in the context of poor intergovernmental relations, particularly in relation to Brexit and its aftermath (described more fully by Henderson, 2023 and this report, *Background*). Generally speaking, successive Scottish Governments describe being one of three junior partners in four nations approaches. The Scottish Government and UK governments may seek or describe relatively good working relationships between officials, but face relatively tense relationships between ministers, especially when the Scottish and UK governments are led by a different party, and when there are unusually strong disagreements on constitutional issues such as Scottish independence and Brexit. Scottish Government witness statements describe a tendency for UK governments to make decisions for England, affecting the rest of the UK, without sufficient partnership or consultation, and without transparency about the implications to the Scottish Government budget of changes to UK government spending on England (Topic 7). In other words, witnesses may be describing a *relatively* high and productive level of cooperation to address Covid-19 on a four nations basis, but sandwiched between periods of worryingly low contact, including: (1) several years of tense relations between the UK and Scottish Governments, and (2) ongoing tense relations relating to the UK government’s approach to a post-Brexit UK, centred on the effect of the UK Internal Market Act and described by Morgan and Wyn Jones (2023) as ‘the death of devolution’.
202. Scottish Government witness statements assert that the Scottish Government could have made different decisions if it had more autonomy and resources (and Module 1 oral testimony by Nicola Sturgeon and John Swinney state that the UK government response to Brexit undermined the ability of the Scottish Government to anticipate and respond to Covid-19). However, based on the current evidence available (via witness statements and associated documents), it is difficult to pinpoint exactly what those decisions would have been.

Topic 5: Scottish Government communication

Communications within and across governments

203. Topic 4 describes a general rise in the frequency of meetings between (1) officials, (2) officials and ministers, and (3) ministers. This frequency was at its peak in the lead up to the first lockdown in March 2020, with a general pattern of daily meetings during crisis periods, reducing to weekly, fortnightly, then monthly meetings by 2021. Scottish Government statements tend to list the working groups and advisory bodies rather than show how they all fit together.
204. Topics 3 and 4 describe regular communication between the Scottish Government and UK government via largely online meetings between ministers and equivalent meetings between senior officials, as well as four-nations meetings on a departmental basis, most notably led by the UK government's health department. These meetings were particularly frequent from March to June 2020, then (1) diminishing somewhat after the first lockdown was relaxed, and the UK and devolved governments began to produce moderately distinctive approaches to lockdown release and (2) diminishing greatly from February 2022 when the UK and devolved governments declared the success of their vaccination programmes. In other words, regular communication largely related to (1) initially formulating a four-nations strategy, and (2) discussing issues of policy instrument implementation, which meant that communication frequency fell in line with the fall in government restrictions. A common theme in Scottish Government witness statements is that the UK and devolved government communications relationship was unequal. The Scottish Government would generally describe the need to remind UK counterparts of their existence and relevance.
205. Topics 3 and 4 describe the Scottish Government's general account of effective and frequent contact with public, private, and third sector stakeholders via the maintenance of working groups. This generally positive picture is difficult to assess in the absence of accounts by stakeholders.

Comparisons of UK and Scottish Government public communications strategies

206. The Scottish Government's public communications strategy was distinctive, but also part of a UK-led four-nations approach to communications until May 2020. As such, it is common to relate Scottish action to the wider UK context. For example, Garland and Lilleker (2021: 19) relate the communications strategies of the UK and Scottish Governments to an alleged 'crisis in public communication' that has prompted leaders of elected governments to 'personalise' their power and engage in 'permanent campaigning' to influence or control media messaging. This form of campaigning combines with the temporarily high concentration of power in central governments to address Covid-19, to produce 'a more presidential style' of policymaking and communication (2021: 19). The primary aim of such communication may be to maintain the popularity of (or at least trust in) elected leaders. It may facilitate the effective communication of information during a crisis, but the UK and devolved governments also recognised that citizens may be more likely to trust scientific evidence if it came from scientists.
207. To be effective during a crisis, leaders need to 'create the perception they are trustworthy, competent, decisive, empathic and courageous' (2021: 19). Further, 'A health pandemic requires a shared sense of national identity', in which powerful leaders convince the public that they are 'representing us' by harnessing the 'values of a nation, built around inclusivity, strength

in the face of threats, with a history of working together' (note the well-used phrase 'rally around the flag' – 2021: 21; see also Kettell and Kerr, 2022). Garland and Lilleker (2021: 22) identify 'four key public communication norms' to be found in the communications literature:

- "coherent, factual and unified messaging for all citizens,
- transparency and accountability in public communication,
- a commitment to serving the public interest,
- maintaining the dividing line between partisan and impartial communications".

208. In that context, Garland and Lilleker (2021: 18) describe the 'commitment to UK-wide public communication' as 'unprecedented and substantial', with frequent media briefings (92 of 60-90 minute briefings 16.3-23.6.20) led by the Prime Minister or Cabinet ministers, flanked by the Government Chief Science Advisor and Chief Medical Officer or other senior experts. They compare the messages and briefings of the UK and Scottish Governments, identifying the following elements.

209. First, the UK and Scottish Government campaign messages were similar until 10.5.20, albeit presented in different ways. During that time, the UK government campaign *Stay at Home, Protect the NHS, Save Lives* was highly successful, prompting 'awareness levels of 92%' (2021: 21). UK daily briefings ran from 16.3-23.6.20, while Scottish briefings ran throughout 2020 (2021: 19). UK and Scottish briefings relied heavily on presentations by medical and scientific experts, with 'with scant representation for nursing, social work, social care, general practice or public health' or behavioural science (2021: 23). First Minister Nicola Sturgeon chaired 98% 'of the 107 briefings to the end of August', while Prime Minister Boris Johnson chaired 17% of briefings up to June (although the Prime Minister's hospitalisation and recovery from Covid-19 affects the comparability of these figures) (2021: 19). Nicola Sturgeon's distinctive role, and gender-balanced Cabinet, largely explains the Scottish Government's avoidance of the UK government's male dominance in public appearances (2021: 23).

210. Second, UK and Scottish Government communications began to diverge significantly from 10.5.20:

- a. The UK government message for England changed to *Stay Alert, Control the Virus, Save Lives*, partly to signal a desire to relax some lockdown restrictions (it was not used by the devolved governments, and Nicola Sturgeon INQ000339033: 63-5 states that it was 'not discussed in advance with the Scottish Government').
- b. Scottish Government messaging was often more 'cautious' (partly to reflect relative caution about lockdown release). It contained subtle differences in terminology, such as to describe a 'route map' rather than 'road map' out of lockdown. Its introduction of Test and Protect rather than NHS Test and Trace (in other words, separate test, trace, and isolate systems based on separate public health systems) also required the communication of different decisions and arrangements in Scotland (described by Nicola Sturgeon, INQ000339033: 227-30).
- c. It was often unclear – from UK briefings – if communications regarding 'Britain' only referred to England (2021: 24; 26). In that context, the Scottish Government would often express concern about the speed of UK policy change, while noting that the Scottish

Government was not forewarned, and/or insist that the UK government clarify when its plans referred only to England (2021: 28).

- d. In other words, there are different categories of concern. One describes the political impact, and spillover effects, of UK government decisions for England (e.g. people in Scotland may not know about or appreciate the differences). Another describes ineffective IGR in which the UK government did not fulfil a longstanding commitment for the UK and devolved governments to avoid surprising each other with policy decisions.
211. Third, both governments faced major challenges in relation to key staff breaking lockdown rules and resigning after receiving initial PM or FM support: (1) Dominic Cummings (Johnson's special advisor), (2) Dr Catherine Calderwood (Scottish CMO) (2021: 24-5). The Cummings affair had an appreciably larger impact (e.g. on trust in government), largely because he stayed in post much longer, and sought to explain his decisions rather than apologise and resign, and the Prime Minister allowed Cummings to stay in post (see below).
 212. Fourth, Garland and Lilleker's (2021: 25) comparison of Johnson and Sturgeon is favourable to Sturgeon, who was 'on top of her brief, precise in her language, in command of the machinery of government, and as protector of the health and welfare of the Scottish people, often positioning herself in opposition to the UK government'. They also argue that 'her strategy to differentiate Scotland from the UK served a nationalist purpose' (2021: 27). Gergi-Horgos (2022) identifies similar SNP Facebook communications using (1) the blame on Johnson for the poor handling of Covid-19 to (2) push for Scottish independence (in other words, using the argument that an independent Scotland would contain more autonomous and competent government). In contrast (and in response to similar criticisms by UK government ministers), Nicola Sturgeon (INQ000339033: 62) states that the Scottish Government's primary aim was to provide information and advice to the Scottish public as quickly as possible (which meant that Scottish Government announcements came before the UK government announcements).

Higher trust in Scottish Government leadership, policy, and communication

213. Garland and Lilleker (2021: 19) suggest that Scottish Government communication contributed to higher levels of public trust or approval, such as when: 'Sturgeon was significantly ahead of Johnson in public approval for her handling of the coronavirus pandemic'. The next section ('Scottish Government polling and assessment of trust') summarises extensive evidence from the Scottish Government that most people found its communications to be clear. This section describes selected additional evidence to substantiate the general claim that Scottish Government communication was relatively effective.
214. Abrams et al (2021a: 2) conducted a UK-wide survey (May to June 2021) on 'whether over 9000 respondents from across the UK found communication about COVID-19 honest and credible, empathic, clear, accessible. They found that 'local and Scottish/Welsh government communication were rated as superior to UK government communication on all indicators' (2021a: 2), while:

"Respondents from Scotland were especially negative towards the UK government communication, with a majority finding it to lack honesty, empathy, and not corresponding to the community's needs. On the other hand, respondents from Scotland were more positive towards their local government communication, especially in terms of showing honesty and credibility. They were also very positive towards the Scottish Government communication. On

most measures, they rated this as the best form of communication, although differences between the local and Scottish Government were much smaller than between the local and UK government. Most strikingly, Scottish respondents evaluated the Scottish Government communication as being especially clear (only 12% found it lacked clarity) and empathetic (only 19% found it lacked empathy)” (Abrams et al, 2021b: 2).

215. The Scottish Election Study commissioned YouGov to survey ‘1259 Scottish residents’ in December 2021. When asked about ‘how good or bad a job both governments were doing of communicating their decisions to the public’, 66.2%/27.2% of respondents think that the Scottish Government/ UK government ‘is doing a good job’ (MacMillan et al, 2021). However, it is difficult to establish the extent to which ‘these perceptions are driven by first-hand experience of policy differences ... versus pre-existing political preferences’ (or indeed, knowledge of the veracity of each government’s statements). While ‘perceptions of pandemic performance are not exclusively driven by pre-existing political preferences’, ‘Yes’ voters are far more likely to reward Scottish Government action, while among No voters ‘there was little difference in evaluations of each administration’ (MacMillan et al, 2021; See also Henderson’s, 2023 expert report to the Inquiry).

Scottish Government polling and assessment of trust in Scottish and UK government

216. Scottish Government testimony describes the routine commissioning and use of such polling data to assess (a) public trust in government and government policy, (b) the ‘reach’ of government messaging and public understanding of guidance, and (b) actual or likely compliance with Scottish Government guidance or enforced measures (INQ000215474: 46). In other words, they used such data as useful proxies of social attitudes and behaviour to inform decision-making and routine reflection on its impact. For example, INQ000340111 (paras 13-28; 56-9) provides multiple examples of the high levels of general public reach for each campaign, concerted attempts to reach marginalised groups, and evaluations of communication effectiveness. Further, INQ000339039 (paras 38-9; 53) notes a decline from 2020 to 2022 in trust in the Scottish Government (while remaining over 50%, and much higher than trust in the UK Government) and high-but-declining compliance with Scottish Government NPIs (‘behavioural fatigue’ was ‘not an issue’, although Nicola Sturgeon INQ000339033: 244 notes some concern about ‘lockdown fatigue’).
217. INQ000215474 (para 40) notes that the Director General Corporate Strategy and Insight Team commissioned regular online opinion polling, including weekly polls from March 2020 to June 2021, then fortnightly until April 2022, then monthly. It describes the Scottish Government as much more trusted than the UK government throughout the crisis. This general finding tends to be confirmed by independent surveys not commissioned by the Scottish Government.
218. INQ000215495 (para 168) states that ‘the Scottish Government retained more public trust in its approach to managing the pandemic than the UK Government ... This matters to the extent that it enabled Scotland to maintain higher adherence to NPIs and hence higher NPI effectiveness and reduced overall harm ... This may have been a factor in the Scottish Government continuing to deploy certain NPIs in Scotland after the UKG had withdrawn them in England due to differences in the relative effectiveness of those NPIs’.
219. INQ000215474 (para 50) cites Fancourt et al (2020) to describe the ‘Cummings effect’ on public trust in the UK government. Dominic Cummings was Prime Minister Boris Johnson’s special adviser. He broke UK government Covid-19 lockdown rules, initially refused to resign, and

received Prime Minister support. The initial act, subsequent defensive position, then lack of Prime Minister decisiveness, contributed to widespread media and public condemnation, with a substantive impact on public trust in the UK government (Fancourt et al, 2020). In other words, Scottish Government testimony warns against the impact of such poor judgements on trust in government.

220. Relevant Scottish Government testimony on the Scottish Government's handling of an equivalent experience does not use the same argument to reflect on its own decision-making in relation to Calderwood (e.g. INQ000215470). Instead, there are brief references to, for example, the impact of Calderwood's rule-breaking and resignation on 'Scottish Government marketing' (e.g. INQ000340111: 55). Nicola Sturgeon (INQ000339033: 43) also lauds Calderwood's decision to resign without stating (for example) what decision-making processes were available to deal with rule-breaking and non-resignation. This lack of reflection on the structures or processes of decision-making represents a missed opportunity to state key differences clearly, in relation to (1) ministerial judgement on the possibility of a CMO staying in post after such rule breaking (initially the FM provided backing to the CMO before the CMO resigned), and (2) the presence or absence of decision-making rules to systematise such decisions during crisis (in other words, to plan for such events rather than respond quickly during heightened anxiety).

Principles and practice of good health communication to the public

221. The Scottish Parliament COVID-19 Recovery Committee conducted an Inquiry 'COVID-19: communication of public health information' in 2022. Its 'informal fact-finding event' with the Royal Society of Edinburgh (Scottish Parliament COVID-19 Recovery Committee, 2022a: 1-4) highlighted themes regarding scientific communication to policymakers, including:
- The need to understand how people consume news and information, to aid communications strategies.
 - The need for independent fact-checking services to counter disinformation and misinformation quickly (there is lower fact-checking organisation capacity in Scotland than the UK – the Ferret, 2017).
 - Marked variations in the successful communication of risk: "For example, there wasn't a good understanding of risk in different settings (e.g. care homes and schools)".
222. The Scottish Parliament COVID-19 Recovery Committee (2022d, 30 June) took oral evidence from Maree Todd (Minister for Public Health, Women's Health and Sport), and Professor Linda Bauld (chief social policy adviser), Professor Jason Leitch (national clinical director), and Dr Audrey MacDougall (chief social researcher) of the Scottish Government. Todd emphasised the aim of providing 'cost effective' and 'accessible' information, the complexity and changing nature of the problem, and the centrality of 'behavioural science' and Scottish Government commissioned research to 'all pandemic-related communications activity' (2022d: 3-4; more generally, the use of 'behavioural science' 'fed in indirectly to policy' such as via advisory groups, INQ000339039: para 47)
223. Most of the oral and written evidence to the 'COVID-19: communication of public health information' inquiry focused on defining and addressing the problems of:
- *low information*, which some witnesses described as the primary problem among an uncertain public seeking authoritative guidance)

- *disinformation* and *misinformation*, distinguishing between (a) the deliberate provision of misleading information and (b) the vulnerability to paying attention to misleading information and therefore misunderstanding an issue.

224. The Scottish Government (2022a) reports its “total marketing spend on covid public information campaigns’ as £3.1m 2019-20, £20.6m 2020-21 and £9.3m up to 31.1.22 (and additional transparency reports provide detailed breakdowns).

225. Some responses to the inquiry also identified examples of good Welsh and Scottish Government practice, such as to counter misinformation about vaccines, and make it straightforward to access a vaccine appointment, including:

“COVID-19 vaccination campaigns where people were given date/time/location in personal vaccine invitation letter, with expected timelines previewed in the media. This reduced barriers to access and adhered to the behavioural science literature on the benefits of ‘defaults’ and action-relevant knowledge” (SciBeh, 2022; in other words, default to providing a booking rather than asking someone to book, and oblige behaviour rather than rely on voluntary compliance).

226. The Scottish Parliament COVID-19 Recovery Committee (2022b: 1-5) identified two unresolved issues regarding Scottish Government health communication. In both cases, the committee notes the existence of bespoke Scottish Government communications (also described in Scottish Government written evidence to this Inquiry) but also its insufficient impact. First, communications had a markedly unequal impact in relation to marginalised groups, necessitating further work to tailor messages to ‘some communities in Scotland, including Polish and Gypsy/Traveller people’, and build on work to increase uptake and reduce distrust among ‘minority groups’ (based on oral and written evidence by BEMIS and Ethnic Minority National Resilience Network, 2022). Second, some communication did not keep up with changes to policy, such as in relation to shielding and arrangements for individuals classified as at high risk. It reports confusion among people who were initially on the ‘Highest Risk List’ then asked to take responsibility for their own risk assessment, left confused about their prioritisation on vaccination and treatment lists, and ‘have complained of a complete lack of public health communication’ (based on oral and written evidence by Health and Social Care Alliance Scotland/ the ALLIANCE, 2022 and Witcher, 2022; see also Scottish Government, 2021b: 15). Its overall assessment of communications was:

“Many individuals at highest risk in Scotland felt let down by the Scottish Government’s COVID-19 public health communications, confused and unsure about where to find reliable information. It was deeply concerning to hear that many of those who were at the highest clinical risk, as well as unpaid carers, viewed public health messaging as mixed or unclear and felt that their concerns were not being addressed. The Scottish Government must continue to learn from the lived experience of individuals and communities during the earlier stages of the pandemic and adapt public health messaging during the recovery phase to make sure that no one is left behind” (Scottish Parliament COVID-19 Recovery Committee, 2022c; see also SPICe, 2022a summary of written evidence).

226.1. On behalf of the Scottish Government, Minister for Public Health, Women’s Health and Sport Maree Todd (2022: 6) describes (1) working with third sector groups and support workers to communicate with marginalised groups (‘Examples of inclusion activity as planned by Health Boards include working with specialist statutory and third sector

organisations to ensure they reach certain underserved groups, such as those experiencing homelessness, substance misuse and people from Gypsy/Traveller communities'), and (2) engaging in routine research on the experiences of people deemed of highest risk, and 'We communicated directly with this group through multiple channels, including regular letters from the Chief Medical Officer, through a text messaging service, through social media, through dedicated pages on Scottish Government's websites, through First Minister's briefings and through media coverage' (2022: 4).

227. There are few published academic studies on this problem but, for example, Adekola et al's (2022: 896-7) qualitative study, based on 26 'semistructured interviews with expert and nonexpert members from Scotland's minority ethnic communities', states that 'All the participants suggest that fake news and conspiracy theories influenced the perception of coronavirus and COVID-19 vaccines within minority ethnic communities', particularly 'where there is an alignment of conspiracy theories with existing religious and social narratives'.

228. Public Health Scotland (2021) conducted a survey of 'Frontline health and social care workers' views and experiences of the COVID-19 vaccination programme in Scotland' ('7,000 staff members – 75% healthcare staff and 25% social care staff'). It reports:

- General praise for national and local communication, including the consistency of messaging on who to prioritise, 'official programme information' which 'helped to dispel misinformation from other media sources', and local communication on vaccine scheduling.
- Some glitches in communications on vaccination appointment, a lack of sufficient investment in national messaging to counter misinformation, and some confusion 'due to changes in guidance for specific groups such as pregnant or breastfeeding women, as well as for those with allergies or those with concerns about contraindications' (2021: 50-51; Bauld's oral evidence – Scottish Parliament COVID-19 Recovery Committee (2022d: 17) relates the confusion to pregnant women not being included in trials).

Evidence for the success of public communication

229. There is a categorical difference between (1) *public satisfaction with government communication*, and (2) *the ability of the public to understand the information conveyed by governments*. The latter is much more difficult to gauge, there is limited evidence available, and some of it is unpublished (the latter is confirmed in Scottish Government December 2023 correspondence to the Inquiry).

230. For example, MacMillan et al (2021, for the Scottish Election Study survey) examined the extent to which the Scottish public understood the Scottish Government's distinctive approach to convey Covid-19 advice. The UK government preferred the message 'hands, face, space' (wash hands, wear a mask, social distance). On 19 June 2020, the Scottish Government adopted the acronym **FACTS** to describe (1) **F**ace coverings (to be worn in indoor public places), (2) **A**void crowded places, (3) **C**lean your hands regularly, (4) **T**wo metre distance (to describe social distancing), and (5) **S**elf isolate and book a test if you have (Covid-19) symptoms (Figure 2 below). The Scottish Government (2020c) confirmed via FOI that (1) it received scientific and policy official advice on five key behaviours, and (2) an 'independent research agency recommended FACTS' over the alternative acronym SAFER. MacMillan et al (2021) suggest that the acronym contained too much ambiguity regarding the meaning of each letter, and a

mixture of old and new obligations and guidance. Their survey identified public knowledge of the meaning of each FACTS letter, finding high recall of **F**ace coverings (60%), but low recall of the rest: **A**void crowded places (9%), **C**lean your hands (12%), (4) **T**wo metre distance (5%; more people guessed 'test'), and (5) **S**elf isolate (6%). 1% of respondents could recall all five elements, while 38% recalled none, and 42% recalled one. MacMillan et al (2021) conclude that 'there is room for improvement in future pandemic messaging ... FACTS was, perhaps, a clever acronym in search of a coherent message'.



Figure 2: FACTS Covid-19 message (Source: Scottish Government, 2020)

231. During the Scottish Parliament COVID-19 Recovery Committee (2022d, 30 June) oral evidence, the committee probed the efficacy of the acronym FACTS. Maree Todd was given committee applause when able to recall all five elements, but stated that the main purpose was to ensure 'people would know that it meant that they had to do something' (2022d: 6). Jason Leitch describes an evaluation of FACTS in which '83 per cent of people said that FACTS changed their behaviour. Leitch also relays the judgement, based on advice from 'Marketing people', that removing the FACTS campaign 'would make things worse' even though it took place at the same time as the UK-wide 'hands, face, space' campaign. The judgement was that these 'messages all pushed the population in the same direction' (2022d: 6-7). More generally, Scottish Government oral interviewees were complimentary about the Scottish Government officials engaged in communication on behalf of the Scottish Government (2022d: 18; 24).

Additional issues with public understanding

232. In general, Scottish Government witness statements relate public confusion to the existence of two – UK and Scottish Government – sources of policy and communication. The relative lack of trust in UK government also exacerbated the ability of the Scottish Government to communicate clearly and authoritatively, although this impact varied markedly.
233. In addition, rapid changes to Scottish Government policy and guidance contributed to some public uncertainty. For example, Police Scotland reported some public confusion regarding the combination of changes to policy in Scotland and their differences from policy in the rest of the UK. There was also potential confusion regarding different rules during the regional approach to Levels (INQ000215491: 106-9). Such ‘practical issues’ were ‘having an effect on compliance’, but ‘did not have a significant impact on enforcement and were for the most part resolved through the 4Es approach’ (INQ000215491: 83-4).

EXPERT OPINION TOPIC 5

234. Most of the witness statements describe the frequency and duration of communications across government (in other words, communication to help coordinate decision-making). There is little discussion or evidence of the quality or effect of this communication across government (compared to published data on the impact of communications to the public).
235. The evidence of the success of Scottish Government public communication is patchy and unclear. When Scottish Government ministers and officials describe success, it relates largely to (1) the volume of engagement, such as when some spokespeople engaged in heroic levels of interviews, and (2) general references to principles of good communication practice. There is insufficient evaluation of the actual impact of government communication on public understanding. The available information suggests that key campaigns – such as FACTS – were not memorable in the way intended. They may have prompted positive behaviour in a general sense, but FACTS was designed to help people understand five specific behaviours. That said, the main focus of this report is on decision-making, and there is clear evidence from Scottish Government statements to the Inquiry (including further information on the draft of this report) that decision-makers were reflecting on the limitations to the data and responding by gathering more.
236. Other evidence relates to – albeit very important – proxies of success, such as that levels of trust in the Scottish Government were far higher than the UK.
237. The Scottish Government uses the experience of Dominic Cummings to describe the need to maintain high trust: policymakers should be seen to follow the rules and signal low tolerance for rule-breaking in government. It does not relate these lessons directly to the process to replace Calderwood as CMO. In this case, Calderwood broke Scottish Government lockdown rules, received initial support from the First Minister, then resigned her position as CMO. There is no reflection on the extent to which the First Minister would and should have continued to support Calderwood while in post. It would be valuable for the Scottish Government to reflect more systematically on the extent to which UK and Scottish Government experiences are similar or different, and to provide overall lessons from both experiences rather than focus primarily on Cummings. These reflections are essential given that the Scottish Government described the high status and importance of the CMO.

Topic 6 Parliamentary procedures and mechanisms

Westminster and Holyrood legislative processes in the absence of emergency

238. The Westminster and Holyrood legislative processes take place in a wider political context, in which there are expectations for the Scottish Parliament not only to take responsibility, but also use that responsibility differently (see this report, *Background*). Significant 'hopes for a new type of politics in Scotland were invested in the structure of the Scottish Parliament' (Cairney and McGarvey, 2013: 86). Political engagement would be less adversarial and more participatory and deliberative, fostered by the Scottish Parliament which would be more powerful than its House of Commons counterpart. The Scottish Parliament would be unicameral and its committees would combine two functions: select committees monitoring government departments or the units under Cabinet Secretary responsibility, and standing committees scrutinising draft legislation. The legislative process would also be committee-centred, with committees responsible for Stage 1 gathering evidence on the principles of the bill, and Stage 2 managing amendments to the draft bill, before plenary proceedings to complete the Stage 3 final amendments followed by a vote to approve the bill (in the House of Commons, the bill's principles are approved in plenary then a standing committee is appointed). The overall idea was for committees to publicise the policy change and encourage general debate among key stakeholders, and citizens if possible. Stage 1 debate would be about policy tone and substance. Stage 2 would subject draft legislation to meaningful scrutiny, prompt changes if necessary, and conduct this process in a relatively businesslike way, to reduce the partisanship and posturing associated with debate in plenary (2013: 83-96; Arter, 2002; 2004; St.Denny, 2020).
239. These hopes for Scottish devolution and the Scottish Parliament were tempered by several political realities (Cairney and McGarvey, 2013: 95-105; 208-10). First, the 'remote' Westminster would still legislate routinely on the many reserved UK matters that impacted on Scotland. Second, if legislation involved reserved and devolved elements, Westminster could legislate on behalf of the Scottish Parliament, but not vice versa. In such cases, it would also seek Scottish Parliament permission to legislate in devolved areas – via the 'Sewel motion' – on the general expectation, and growing sense of convention, that such requests would be infrequent and respectful of the Scottish Parliament's responsibility for devolved matters. Third, the Scottish Parliament was, in key respects, a smaller version of Westminster. It had limited opportunities to initiative legislation. There was an expectation that the Scottish Government would produce most legislation and that Parliament would perform a traditional scrutiny role. Committees had limited resources to take evidence and scrutinise policy and amend legislation. Further, at times, MSPs would complain of an insufficient ministerial respect for committees when they presented amendments too late to receive sufficient committee scrutiny, or introduced new and last minute amendments at Stage 3 (Cairney, 2006: 188-92; McHarg, 2017).
240. Studies of the Scottish Parliament scrutiny and amendment process (Shephard and Cairney, 2005; MacGregor, 2021) have found that the Scottish Government is generally respectful of parliamentary procedures. Opposition parties have non-trivial opportunities to influence government legislation before and after it is introduced: 'the legislative process in Scotland is largely defined by the sort of consensus politics which its proponents wished to see' (MacGregor, 2021: 5). Further, the most recent inquiry on parliamentary reform proposed modest changes to boost efficiency with current resources, rather than declaring failure and the need for a major overhaul (St.Denny, 2020: 494-5).

241. There are comparable, and often as positive, studies of Westminster. For example, Russell et al (2015) and Russell and Cowley (2016) argue that: people assume rather than demonstrate government dominance of the legislative process; legislative procedures to amend legislation exaggerate the low impact of Parliament, which actually influences considerable changes to legislation from draft to Royal Assent; ministers and civil servants try to anticipate Parliament's reaction to draft legislation and avoid needless opposition; and, the House of Lords provides a routine means to enhance scrutiny and often put a brake on the pace of legislative change. Further, high profile examples such as Brexit demonstrate the inability of the UK government to proceed without House of Commons consent (UK in a Changing Europe, 2021).

Reduced scrutiny during emergencies, and low scrutiny of subordinate legislation

242. In general, it is more difficult to identify the same levels of meaningful cooperation and parliamentary influence in relation to two key aspects. First, *when legislation is passed in non-routine ways*. The Scottish Parliament standing order 9.21 *Emergency Bills* allows for a government minister to propose to the Scottish Parliament – via the Parliamentary Bureau – to treat new legislation on an emergency basis. If agreed by the Bureau, Parliament combines Stages 1-3 on the same day (in the Bureau, each party representative votes on behalf of its bloc of MSPs; for example, in 2020 the SNP would need support from another party). The bill is referred immediately to Parliament. The lead committee is not required to agree to the 'Bill's general principles, the Financial Memorandum or the Policy Memorandum' or 'provisions conferring powers to make subordinate legislation, or conferring powers on the Scottish Ministers to issue any directions, guidance or code of practice' (Scottish Parliament, 2023: 112-13). For example, this emergency procedure was used for the Coronavirus (Scotland) Bill, introduced on 31 March and becoming an Act on 1 April (but then the Coronavirus (Scotland) (No.2) Bill became an Act on 26 May 2020, 15 days after it was introduced, including a one week gap between Stages 1-3). There is no directly equivalent process in Westminster, partly because legislation requires the approval of two chambers, but it is still possible to pass legislation in one day under exceptional circumstances (Priddy, 2023; Marshall, 2019).

243. Second, *in relation to subordinate (or secondary) legislation*. For example, the substantive impact of Scottish Parliament committees when scrutinising secondary legislation is relatively unclear, but certainly less notable than for primary legislation. This relative lack of impact relates largely to practical problems with resources, such as the time and space to scrutinise legislation, which rise in line with the volume of secondary activity. There is a dedicated committee – now called the Delegated Powers and Law Reform Committee – that can refer matters to other committees for their consideration. Then, committees consider the secondary legislation, but without a high capacity to understand the implications. There are similar issues in Westminster, although the House of Lords provides additional capacity to scrutinise secondary legislation or, at least, criticise the government if it appears to be avoiding sufficient scrutiny. In both cases, there is a risk that governments could (1) pass legislation of profound importance too quickly to receive sufficient parliamentary scrutiny, and (2) produce secondary legislation or regulations that are subject to far less scrutiny than primary legislation (see also INQ000340112: 4 on Educational Continuity Directions, ECDs, which were 'legally binding' on schools but 'not Scottish Statutory Instruments (SSIs) and were therefore not subject to parliamentary procedure'). This outcome is understandable to some extent during a crisis, but also a problem on which governments and parliaments should reflect (and address, such as with clear rules or a code of conduct to deal with novel emergencies).

Emergency procedures for Covid-19 legislation

244. The use of emergency procedures, to pass Covid-19 legislation in the Scottish Parliament and Houses of Commons and Lords, has received some (often critical) academic and parliamentary scrutiny.
245. *UK legislative procedures*. Taylor's (2022) summary of House of Lords reports identifies the following concerns about UK government Covid-19 legislation and policymaking:
- The UK government used emergency procedures extensively to introduce a 'large volume of new legislation, much of it transforming everyday life and introducing unprecedented restrictions on ordinary activities' (quoting the Constitution Committee). For example, the Coronavirus Act 2020's stages were completed over three days, including one day in the Commons.
 - The UK government relied heavily on secondary legislation (statutory instruments) that received no scrutiny before coming into effect. It used two procedures, either via the (1) *made negative procedure*, in which an instrument is laid after it is signed by a minister to become law, or (2) *made affirmative procedure*, in which an instrument is made law after being signed by the minister, then requiring parliamentary approval within a certain number of (usually 28 or 40) sitting days. The overall number of regulations introduced was 582 by 3rd March 2022.
 - The UK government relied selectively on existing legislation – most notably the Public Health (Control of Disease) Act 1984 – to minimise the need for scrutiny of most of its lockdown measures. It avoided using the Civil Contingencies Act 2004 which 'would have required greater parliamentary scrutiny' (here, Taylor is summarising House of Lords Select Committee on the Constitution, 2021: para 27 'This approach was not the only legal route available to the Government. Witnesses suggested two alternative legislative approaches which they said could have resulted in greater parliamentary scrutiny and legal clarity: (a) Use of the Civil Contingencies Act 2004 – or alternative legislation with equivalent scrutiny safeguards – as the basis for the most significant and far-reaching regulations;¹⁷ and (b) Greater parliamentary scrutiny of the Coronavirus Act 2020 and incorporating a Covid-specific lockdown power in that Act').
 - The consequences include (1) limited checks on executive power, (2) a potential reduction in the quality of the law, and (3) a lack of clarity, among the public and delivery bodies such as local authorities and the police force, about what the law is, and how enforceable it may be.
 - The 'Coronavirus Act itself was subject to a review and a vote every six months in the House of Commons, and had a two-year sunset clause' (in other words, it would cease to be law without renewal), but the Constitution Committee recommended three-month sunset clauses.
246. Smith (2021) and Ewing (2020) outline similar criticisms of the remarkable speed to process lengthy and complex legislation with profound social consequences, and legislation to grant ministerial powers on unprecedented spending. Lock et al (2021: 699) describe the six-monthly review process (by the House of Commons only) as ostensibly a democratic 'safeguard' but actually a 'a broken promise on the part of the current government to Parliament'. The UK government: (1) allowed very little time for scrutiny, (2) presented the choice to continue as 'all

or nothing' (in other words, it brooked no compromise), (3) bounced the Commons with information, and (4) did not respond to legitimate concerns, such as regarding human rights (2021: 699).

247. *Scottish legislative procedures*. Scott (2020: 421) notes that the use of civil contingencies legislation would have signalled that the emergency response was primarily a reserved area (as Topic 1 discusses, under those circumstances, the UK government would have led the response and delegated executive functions to Scottish Government ministers). Rather, 'the pandemic was treated – correctly – as a public health issue, a framing which afforded devolved institutions a much greater role' (2020: 422). However, as described in Topic 1, the Scottish Government was initially unable to emulate the UK government's use of existing public health legislation to enforce early lockdown measures:

"The result was that while an early reliance on voluntary cooperation in England appears to have been part of a deliberate strategy, in Scotland that strategy was the only one available to the government: as a number of its early communications made clear, when it was asking organisers to cancel events, it had no power to require them to do so".

248. Then, the Scottish Parliament consented to three separate pieces of legislation. First, it consented – via Legislative Consent Motion S5M-21322 24.3.20 – to the passage of the *Coronavirus Act 2020* which contained provisions for the UK as a whole and empowered Scottish ministers to act in accordance with the Act, such as to restrict individual behaviour and close public places (and issue fines for non-compliance with stay at home orders). Second, it passed the *Coronavirus (Scotland) Act 2020* – using emergency bill procedures – to give Scottish ministers additional powers, including to prevent home evictions, reform court, tribunal, and parole board proceedings, modify the amount of 'fiscal fines' that could be issued by the Procurator Fiscal, extend the amount of time to complete 'Community Payback Orders', and allow the early release of prisoners. Third, it passed the *Coronavirus (Scotland) (No.2) Act 2020* using emergency bill procedures (but with a 15 day gap between bill introduction and Royal Assent).
249. The relative absence of Scottish Parliament scrutiny was double-sided: (1) it could only assent to – and not scrutinise in any meaningful way – Westminster Covid-19 legislation, which contained the most important measures, *and* (2) it passed Scottish legislation unusually quickly with minimal scrutiny (Grez Hidalgo et al, 2022a). Understandably, it is difficult to demonstrate that there was a proper balance between speed and scrutiny under such circumstances. That said, there were examples of some pre-legislative consultation. For example, Scott (2020: 423-4) notes that Scottish Parliament legislation only passed so quickly because the Scottish Government agreed to withdraw plans to 'to permit criminal trials on indictment to take place without juries' following opposition by the Faculty of Advocates and Scottish Criminal Bar Association.
250. Some legal academic journal articles express concern regarding the Scottish Government's use of secondary legislation, including the rapid rise in the use of the *made affirmative* procedure (this report, para 246), or the tendency to give the Scottish Parliament one or a few days to consider a Scottish Statutory Instrument before coming into force (in each case, usually accompanied by no or minimal debate) (Grez Hidalgo, 2022b). De Londras et al (2022: 582) argue that this behaviour undermines the Scottish Government's commitment to human rights approaches and otherwise 'admirable levels of rights-based scrutiny of COVID-19 related primary legislation'. Further, Scott (2020: 425) describes the overall effect:

“rules imposing massive – even if ultimately proportionate – interferences with the rights of the Scottish people were not subject to prior scrutiny and though ultimately affirmed by the Parliament, could only have been (as is always the case) accepted or rejected in full. A large number of the coronavirus-related Scottish statutory instruments were not subject even to that level of oversight ... In many cases that absence will have been justifiable by reason of their relatively slight effects, but the pandemic should alert us to the extent of the reliance on secondary legislation, and in particular to the loose manner in which urgency is understood” (Scott, 2020: 425).

251. Scottish Government written witness statements in July 2023, additional information provided as feedback to a draft of this report in December 2023, and subsequent Scottish Government statements (e.g. INQ000366267, paras 3-68; 96-100) outline in considerable detail the lengths to which the government went to signal respect for Scottish Parliamentary procedures, make senior ministers available for committee scrutiny, oblige public bodies to report frequently to Parliament (e.g. The Coronavirus (Scotland) (No.2) Act 2020 required the Care Inspectorate to report ‘every two weeks during the emergency period’ on its care home inspections, INQ000346089: 24), and publicise new Covid-19 measures to the public (including ECDs - INQ000340112: 8). These statements also assert the difference between (relatively negative) academic commentary and parliamentary assessments of the Covid-19 legislative process.

251.1. In that context, key aspects of the UK and Scottish Government approach are indeed acknowledged as reasonable under the circumstances. For example, the (at that time) Convener of the Delegated Powers and Law Reform Committee noted on 24th March 2020 – in relation to the legislative consent motion for the Coronavirus Act 2020 – that ‘The committee is also reassured that the affirmative procedure, or the made affirmative procedure in urgent cases, will apply. We think that that strikes the right balance between allowing the Government to act quickly and allowing the Parliament to scrutinise those actions’ (then Conservative MSP Bill Bowman, Scottish Parliament Official Report 24th March 2020: p58). Second, the Delegated Powers and Law Reform Committee (2022: para 17) notes in its inquiry report on the made affirmative procedure that it ‘has regularly acknowledged the requirement for made affirmative instruments during the pandemic so as to allow the Scottish Government to respond quickly to the many challenges presented by coronavirus’.

251.2. That said, the main emphasis in the committee report is the need for the Scottish Government to: foster higher clarity and accessibility of secondary legislation, produce clearer criteria for determining its ‘test of urgency’, and contribute to a government-parliament protocol to guide this process. It also notes the limited opportunities for MSPs and committees to express immediate concerns (2022: paras 1-9). Scottish Government statements (including feedback on this report) tend to identify the relative absence of expressed concerns without noting this lack of opportunity (with the exception of John Swinney, INQ000287771: 203).

251.3. In addition, INQ000366267 (para 7) notes that the Scottish Parliament approved the designation of three bills as Emergency Bills (unanimously in two of three cases), while INQ000215493 (18-28) and INQ000366267 (paras 50-55) describe six further Acts to modify Covid-19 policy while allowing for greater scrutiny. The Scottish General Election (Coronavirus) Act 2021 expanded provisions for the Scottish Parliament election to be via postal ballot. The Coronavirus (Extension and Expiry) (Scotland) Acts 2021 removed expired/ unnecessary provisions from the emergency bills. The Carer’s Allowance

Supplement (Scotland) Act 2021 provides more flexible arrangements for further payments. The Coronavirus (Discretionary Compensation for Self-Isolation) Act 2022 gave Health Boards 'a power, rather than being under a duty, to provide compensation to anyone asked to self-isolate'. The Non-Domestic Rates (Coronavirus) Scotland Act 2022 ensured that Covid-19 did not impact unfairly on the rateable value of properties. The Coronavirus (Recovery and Reform) (Scotland) Act 2022 provided updates to Scottish ministerial powers (a series of measures designed to boost emergency preparedness and therefore address the next pandemic more effectively). The overview to this Act (2022 asp 8 Explanatory Notes, The Act: Overview paras 3-4) suggests that the 2022 Act provided the opportunity for the kinds of meaningful consultation not afforded to the Scottish Government (or Parliament) in 2020:

- a. 'To help manage the coronavirus pandemic, the Scottish Parliament passed the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No.2) Act 2020. The Coronavirus (Extension and Expiry) (Scotland) Act 2021 amended these Acts to extend much of their operation initially until 31 March 2022, with the potential for further extension by secondary legislation to September 2022 (which was confirmed with the approval of the Parliament). The Extension and Expiry Act also expired certain provisions within the Scottish Acts which were no longer necessary or appropriate.
- b. The Scottish Government's Programme for Government 2021 committed to consulting on what further legislation would be needed to support recovery from the pandemic and to bring forward a Coronavirus Recovery Bill in the first year of Parliament to deliver on aspects of that. This Act delivers on that commitment: its overall policy intention is to embed reforms in Scotland's public services and justice system that, though necessitated by the pandemic, have delivered improvements to service users and efficiencies, and to help build resilience against future public health threats. This Act will also continue certain temporary provisions on a longer extension basis as a response to the impact of coronavirus on Scotland's justice system'.

EXPERT OPINION TOPIC 6

252. Emergency procedures to pass Covid-19 legislation, in Westminster and Holyrood, had a profound impact on the ability of the Scottish Parliament to scrutinise Scottish Government policy. Westminster legislation gave Scottish ministers unusually strong lockdown powers, Holyrood legislation accentuated those powers, and subordinate legislation amounted to a radical change to public policy in Scotland in the absence of a level of meaningful scrutiny associated with the design of the Scottish Parliament (this report, *Background*).
253. Scottish Government testimony to the Scottish Parliament, and written submissions to this Inquiry, provide a rationale to adopt this approach to policy change during emergency. They also describe a series of appropriate safeguards to ensure the routine scrutiny of legislation after it is in operation.
254. It is difficult to identify a well-articulated and complete alternative to the way that the UK and Scottish Governments changed policy during the crisis. However, the UK government decision to not use civil contingencies powers provoked suspicion about its attempts to bypass parliamentary scrutiny. Further, the vesting of so many powers in Scottish ministers, largely in the absence of intensive Scottish Parliament scrutiny, should prompt greater reflection on democratic accountability in Scotland. The initial use of UK legislation for expediency came at

the expense of a Scottish Parliament's usual role. The legislative process, regarding Covid-19 in Scotland, did not live up to 'new politics' expectations for Scottish decision-making (this report, Background). Further, the Scottish Government provides regular reports to Parliament, and to this Covid-19 inquiry, but without combining their insights to provide overall reflections on policy and practice.

Topic 7 Funding Covid-19 policy

The general funding position since devolution in 1999

255. The UK government's Treasury is traditionally the most important player in relation to Scottish revenue and the allocation of the budget in Scotland (INQ000215476: 9-14). This influence has the following elements:

- To largely determine the size of the Scottish Government budget, in a Block Grant process that – until the further devolution of fiscal powers from 2016 – was akin to allocating the budget of a UK government department. By 2020, the mix of UK/devolved contributions to the Scottish budget became difficult to pinpoint exactly. For example, the Scottish Fiscal Commission's (2021: 7, Table 1) estimate of the Scottish budget suggests that (1) for 'resource' spending, the UK 'block grant' is £16,578m after removing £12,9991m to take into account Scottish Government determined taxation (a split of 56% to 44%), while (2) the UK still largely determines 'capital' spending (£5,817m).
- To spend money for Scotland directly in reserved areas, such as via funding allocated for UK defence and social security (the latter to a diminishing extent). It also directed how money allocated by the EU would be spent.
- To oversee ad hoc spending, such as the new Covid-19 related schemes described below.
- To limit the ability of the Scottish Government to borrow or save ('The overall limit of resource borrowing is £1.75 billion and the total annual limit is £600 million', Scottish Government 2021d: para 9.8).

256. The Treasury's process to determine and allocate the Scottish Government budget is opaque and has been one of the greatest sources of contention before and after devolution in 1999. This contention re-emerged during Covid-19 funding decisions. Most general debate hinges on the meaning of the phrase 'Barnett formula' which is

- generally used as a shorthand to describe the Treasury process to allocate budgets to devolved administrations, or
- used more accurately to describe how the Treasury will modify the annual amount by routine, largely via 'Barnett consequentials'. The latter involves increased spending on relevant services in England – such as healthcare – which prompts increased allocations to devolved budgets. The consequentials are calculated according to (a) Scotland's share of the UK population, and (b) the comparability of spending. For example, most health-related spending is 100% comparable, while transport spending involves reserved and devolved elements.

256.1. A lack of transparency has contributed to high disagreement on what the Barnett formula was designed to do. Possible explanations include to:

- Reduce the process to a simple principle, to allocate last year's budget plus a marginal increment, to avoid annual political contest. The UK Government does not want an annual debate to fuel demands in Scotland for devolution or independence.

- Reduce per capita spending in Scotland, which is significantly higher than in England. This may occur over the long term by allocating marginal increments in relation to population size, not in relation to historic budget decisions.
- Prevent further rises in per capita spending in Scotland (Cairney and McGarvey, 2013: 224).

256.2. This debate was never really resolved, partly because the Barnett formula is not the only means used to spend in Scotland (‘formula bypass’ – when the Treasury allocated funds to Scotland on an ad hoc basis – was a routine occurrence). Further, per capita spending in Scotland varies from sector to sector partly because the Scottish Government has spending autonomy. For example, reduced per capita spending on education could relate to Barnett or the identification of higher priorities elsewhere. Regardless, ‘Barnett formula’ remains a catch-all term to describe the centrality of the Treasury to devolved government finance.

257. The Treasury now oversees a relatively new process prompted by the Scotland Act 2016. The Scottish Government sets its own levels of income tax, but not the non-taxable personal allowance or National Insurance which is an income-related tax. VAT income in Scotland is also estimated and allocated to – rather than set by – the Scottish Government. The Scottish Government also (1) raises some taxation directly via Revenue Scotland (Land and Buildings Transaction Tax, and Landfill Tax), (2) sets the Non-Domestic Rates collected by local authorities, and (3) influences heavily the rate of Council Tax raised by local authorities, largely by reducing grants to local authorities if they raise additional revenue through the Council Tax.

The general spending position in Scotland

258. While the Treasury influences heavily the size of the Scottish Government budget, it does not control how the Scottish Government spends its budget. The most high profile examples of funding divergence have included (1) funding ‘free’ personal care for older people (a per person payment for care), and (2) abolishing tuition fees for further and higher education in Scotland for those who qualify, largely by residence before study. In practice, a tendency to inherit spending commitments from the past – such as to finance compulsory education, the NHS, police, and fire services – limits the scope for major innovation. Further, Treasury rules on borrowing undermine divergence on, for example, allowing local authorities to borrow to fund council housing. The Scottish Government also allocates the vast majority of the local authority budget (this report, *Background*).

The funding of the Scottish Government pandemic response

259. Almost all of the major economic changes, in response to Covid-19, were initiated by the UK government, as the more powerful government with the means to borrow and spend at this scale in an emergency. This paragraph summarises key areas of funding, and subsequent paragraphs and the next section explore their operation in depth:

- the ‘coronavirus job retention scheme’ in which the government paid 80% of the salary of ‘furloughed’ staff during lockdowns
- equivalent schemes for the self-employed
- tax reliefs, grants, and loans to businesses

- additional spending for public services, the third sector, and local authorities
- additional social security payments
- deferred VAT and self-assessed income tax
- supporting these funding increases via UK government borrowing (Cairney and Kippin, 2023a: 116-7).

260. This additional UK government Covid-19 spending in Scotland has two general elements. First, the Treasury provides an additional allocation of funding to the Scottish Government, largely by using the Barnett formula to estimate Barnett consequentials. In other words, changes to relevant spending on public services, such as to boost NHS spending in England to address higher demand for healthcare, prompts Barnett consequentials in Scotland. Second, new funding schemes, such as the furlough scheme, are provided directly in Scotland by the UK government.

261. This UK government control of the economic response to Covid-19 had two major implications for Scottish Government policy. *First*, the Scottish Government budget – available to deal with Covid-19 – was largely influenced by spending on comparable services in England, with some delays built into the process and issues of comparability. For example, INQ000340114 (para 7) describes “daily situation reports (‘sit-reps’)” in March-April 2020 that stated (a) the likely need for the Scottish Government to spend an additional £700-800m on emergency Covid-19 responses, which (b) ‘exceeded the £410 million of confirmed consequentials arising from the UK Chancellor’s £5 billion initial response fund’.

261.1. Subsequently, the Treasury addressed these shortfalls by providing ‘Barnett Guarantees’ from July 2020 until then end of the 2020-2021 financial year, but then did not meet agree to ‘an extension being requested by the devolved administrations’ (such as in letters and statements by Scottish Government ministers, INQ000340114: 9; 13-15). INQ000340114 (17; 19-20) also lists examples in which reductions in comparable spending limited the Scottish Government’s ability to fund its preferred policies (when, as Nicola Sturgeon INQ000339033: 70-82 notes, the rest of the Scottish Government budget had already been allocated). The UK government’s ceasing of funded testing in 2022 meant that the Scottish Government would either need to cease most Test and Protect activity or find the money from elsewhere (it chose to phase out testing more gradually). The Scottish Government’s preference for more restrictions to deal with the ‘Omicron variant’ in late 2021 also required more funding ‘to compensate individuals and businesses’ than provided by the Treasury (para 20). John Swinney INQ000287771: 150 states that in December 2021, ‘There was clinical support for a “circuit breaker” or further lockdown but Ministers believed, in the absence of financial support measures, such an approach could not be taken’.

261.2. Scottish Government submissions also highlight some frustrations with UK calculations of comparability. For example, ‘inter-Island Ferry and lifeline air services where Scotland was exposed to a loss of revenue that would have been far higher proportionally than any equivalent loss in the other nations’ (INQ000215497: 71-2). Further, differences in school terms produced differences in demand for Covid-19 testing in 2020-21 (INQ000340114: 16-17).

261.3. *Second*, some new schemes could only really operate in Scotland if they operated in England. For example, the employment furlough scheme would relate largely to 'lockdown' measures such as stay-at-home or business closures in England, and initiated by the UK government. The Scottish Government would not receive Treasury funding – to fund furlough measures – if it decided to pursue longer or more stringent lockdown measures. In theory, it could introduce its own scheme, but by using money from its existing budget. For example, INQ000340114 (para 21) describes the absence of additional furlough funding (or the ability to tailor that funding) to address a relatively high infection rate, and more restrictive measures, in Scotland in October 2020. This funding was only provided when 'the UK Government announced a second national lockdown on 5 November 2020' in 'response to a further rise in cases in England' (para 22). It then ceased at the end of September 2021 'despite representations made in an emergency four nations call ... for the furlough scheme to be extended' (para 23).

261.4. *Third*, the Scottish Government could not use major reserves (which it did not possess) or borrow independently to fund Covid-19 schemes. It could raise additional revenue by increasing income tax, but not at the scale required (the UK response involves repaying loans over the long term).

262. INQ000215476 (46-54) describes general Scottish Government awareness of how the Treasury and Barnett formula operate, but also confusion regarding how to request additional budgets in relation to Covid-19 (I interpret this to mean that key aspects of this general funding arrangement are informal and ad hoc, or not described in sufficient detail in formal mechanisms): 'Scottish Ministers made representations for funding to UK counterparts through various channels (during COBR meetings, written correspondence, statements in the Scottish Parliament), but there was and is not standardised mechanism for Scottish Ministers to bid for funding from the UK Government' (INQ000215476: 46). This confusion reflects a wider system in which there is 'no formal requirement of the UK Government to consult with the Devolved Administration and all decisions on the level and timing of grant funding for the Scottish Government remain the prerogative of the UK Government' (INQ000215476: 55). Over time, there was increasing UK recognition of the need for greater devolved government certainty on budget rises, but with the Scottish Government having to fit in with UK government decisions and processes which, at times, stopped it pursuing its preferred public health response (which I interpret to mean a desire to fund the employment furlough scheme in Scotland for longer) (INQ000215476: 58-63).

Audit Scotland and Scottish Covid-19 Inquiry Research on funding in Scotland

263. It is difficult to know exactly how the UK and devolved governments allocated funding in relation to Covid-19. This problem, combined with a lack of clarity over UK and Scottish responsibilities for raising additional funding (described above) make it almost impossible for a typical citizen to understand who was responsible for Covid-19 revenue raising and spending in Scotland.

264. Audit Scotland is an authoritative source – and communicator – on these matters, although it is only able to audit Scottish public bodies (the National Audit Office audits UK public bodies). It operates under the direction of the Auditor General and Accounts Commission. The Auditor General is appointed by the Crown, on the recommendation of the Scottish Parliament. The independent post was created under the Scotland Act 1998 to help ensure that public money is spent properly, efficiently and effectively' (Audit Scotland, 2023a). The Accounts Commission 'holds councils and other local government bodies in Scotland to account and helps them

improve by reporting to the public on their performance', and it operates 'impartially and independently of councils and of the Scottish Government' (Audit Scotland, 2023b).

265. Audit Scotland (August, 2020e: 5-6; 12) described Covid-19 as 'the biggest fiscal and policy challenge facing the Scottish Government over the past two decades of devolution', involving high uncertainty about the size of its budget and likely demands for spending, limited borrowing powers, and a limited 'reserve', which makes it remarkably difficult to meet its 'balanced budget' obligation.
266. In that context, Audit Scotland (May, 2020a: 2; June, 2020b) recognised that Covid-19 justified key changes to accounting measures to reflect an emergency response: 'Public bodies are under exceptional pressure as they manage the impact of the pandemic. Guidance and deadlines for financial reporting have been amended to reflect this. It will be some time before we fully understand the impact on public services'. Changes included extensions to accounting deadlines, less information required in 'performance and accountability reports', and a pause of 'performance audit work' (2020a: 2). More generally, responding to crisis required (1) flexibility, to strike 'the right balance between supporting public bodies and ensuring effective scrutiny', and (2) a shift in focus, such as to assess the extent to which public service changes should endure beyond the pandemic period (Audit Scotland, November, 2020f: 2-3; 2021c).
267. Factors such as the increase in ministerial emergency powers, the redirection of public services towards emergency support, a rapid rise in online services, and the allocation of a huge rise in spending suggests that 'Sound financial management and effective governance are more important than ever' (Audit Scotland, 2020a: 2).
268. Audit Scotland describes UK government influence in the following ways. First, to retain control of the overall system to tax, borrow, maintain reserves, and spend, even though key aspects are increasingly devolved. One small reminder related to a Scottish Government decision to make a 'a £500 payment to all health and social care staff in Scotland in the 2020/21 financial year', followed by its unsuccessful request to the Treasury to exempt the payment from tax (the scheme cost £180m, with subsequent tax estimated at £48m) (Audit Scotland, 2021b: 8). On the other hand, the Treasury resolved a 'longstanding dispute' regarding the spillover effect of UK income tax personal allowance changes, giving £375m to the Scottish Government in 2022-23 (INQ000215476: 66-7). Second, to control increases to the Scottish Government budget. The Treasury amended temporarily its routine (non-emergency) practice of confirming Barnett consequentials near the end of the financial year (when it would know how much budget was allocated to comparable spending in England). In 2020, it agreed to hasten its guarantee of resource spending to the Scottish Government based partly on estimates of likely spending for England: 'This is the first time the UK Government has provided guarantees of block grant levels in advance of spending commitments being made, and it is unclear how this guarantee will align with eventual Barnett consequentials' (Audit Scotland, 2020e: 10). Third, to spend directly in Scotland as part of UK-wide schemes, which minimises the Scottish Government role and ability of Audit Scotland to subject similarly high levels of spending to the same accounting procedures (the National Audit Office, NAO, performs that role). Audit Scotland (2020e: 13) lists UK schemes as:
 - 'Four separate loan schemes for businesses to support small- and medium-sized businesses, large businesses, and innovative companies.
 - Statutory Sick Pay Rebate Scheme.
 - Covid-19 Corporate Financing Facility (Bank of England purchasing short-term debt from large companies).

- The Coronavirus Job Retention (including the job retention bonus) and Self-Employment Income Support Schemes.
- The Kickstart Scheme which creates work placements for those aged 16-24 who are receiving Universal Credit.
- Schemes to support work search, skills and apprenticeships.
- Reduced VAT for hospitality, accommodation and attractions until January 2021 and the Eat Out to Help Out scheme for August 2020' (Nicola Sturgeon INQ000339033: 320-22 and John Swinney INQ000287771: 32 state that the Scottish Government did not consent to the Eat Out to Help Out scheme).

268.1. The UK government also leads 'four nations' funding decisions, such as to buy PPE (Audit Scotland, June 2021f) and Covid-19 vaccines (Audit Scotland, September 2021g). Indeed, the UK government used the Barnett formula (or, at least, its estimate of population share) to calculate the devolved government allocation of PPE and vaccines (2021g: 6).

269. Audit Scotland (February, 2021b: 4) notes that the 'complexity and scale' of UK and devolved funding 'makes following the public pound difficult'. For example, first, the Scottish Government committed to spending all additional revenue from the UK Treasury on Covid-19 policies, but without being able to demonstrate a fulfilment of that commitment. Initially, the Scottish Government worked with estimates of its likely budget, and its directorates 'exercised judgement over the classification of Covid-19 spending within portfolios in real time', but the actual audited figure for 2020/21 was not available until much later (Audit Scotland, 2021d: 7; 2022a: 15). Subsequently, it became 'harder to identify what is, and what isn't, Covid spending, as spending links more widely with economic development issues, and other government goals', and 'it is more difficult to demonstrate how each measure has been chosen and how overall spending is being managed' (2021b: 12; 21). Second, guaranteeing Barnett consequentials before making the decisions to generate them 'provides challenges in following how Scottish Government and UK Government spending decisions relate' (2021b: 4). For example, when the UK announced additional business support in January 2021, (a) the Scottish Government expected Barnett consequentials, but the UK government described them as part of £400m of consequentials already guaranteed (Audit Scotland, 2021b: 7). Audit Scotland (2021b: 7) describes the practical difficulty of a Scottish Government policy, to pass on any 'health-related consequentials' to NHS Scotland, when the overall consequentials are guaranteed but the health spending is not confirmed. INQ000215497 (71-2) describes similar problems of uncertainty in transport funding. On the other hand, the Scottish Parliament Finance and Public Administration Committee (2021: 11) argued that the *lack* of a guarantee of consequentials, during 2021-22, undermined proper budget planning. In other words, the Scottish Government would be making spending commitments without full knowledge of its likely income (and without much ability to borrow to make up any shortfall).

270. A remarkable rise in spending took place – in many stages – throughout the financial year 2020/21. Initially, the rise in 'devolved public spending' was estimated to be 15% (£5.3bn) during 2020/21, but estimates were 'subject to unprecedented uncertainty, volatility and complexity' (Audit Scotland, 2020e: 5). By the end of July 2020, the Scottish Government had 'announced over 90 spending and tax measures', including business and individual support and increases for NHS and other public services, expected to 'total £5.3 billion' (2020e: 6). By February 2021, this total had risen to £9.7 billion (an overall 42% rise) and 'Over 170 Covid-19 related spending announcements' by the Scottish Government (Audit Scotland, 2021b: 4-6). By June 2022, 'Covid-19 Barnett consequentials' totalled £14.4bn, and the Scottish Government had made

over 300 'spending announcements' and allocated £15.5bn in financial years 2020/21 and 2021/22, including '£1.1 billion funded through reprioritisations and the Scotland Reserve' (Audit Scotland, 2022a: 3). Audit Scotland (2020e; 2021b) notes that the additional funding was confirmed in seven stages: £3.1bn estimate in 7 May, £1.5bn in 8 July, £1.9bn and 'guarantee of block grant levels' on 24 July, additions to the guarantee of £0.7bn on 9 October, £1bn on 5 November, and £0.4bn on 24 December, then £1.1bn added to the block grant as part of the 'UK supplementary estimate' in February 2021 (total additional £9.7bn – 2021b: 6; Figure 7.1). The Scottish Government spent £8.6bn in 2020/21 and carried over £1.5bn to 2021/22 (Audit Scotland, 2021d: 4; see Audit Scotland, 2023c for regular updates). INQ000215476 (Figure 7.2) provides a similar timeline.

Timeline for additions to the Scottish block grant in response to Covid-19

The Scottish Government resource budget for 2020/21 has increased by £9.7 billion as a result of additional Barnett consequentialials

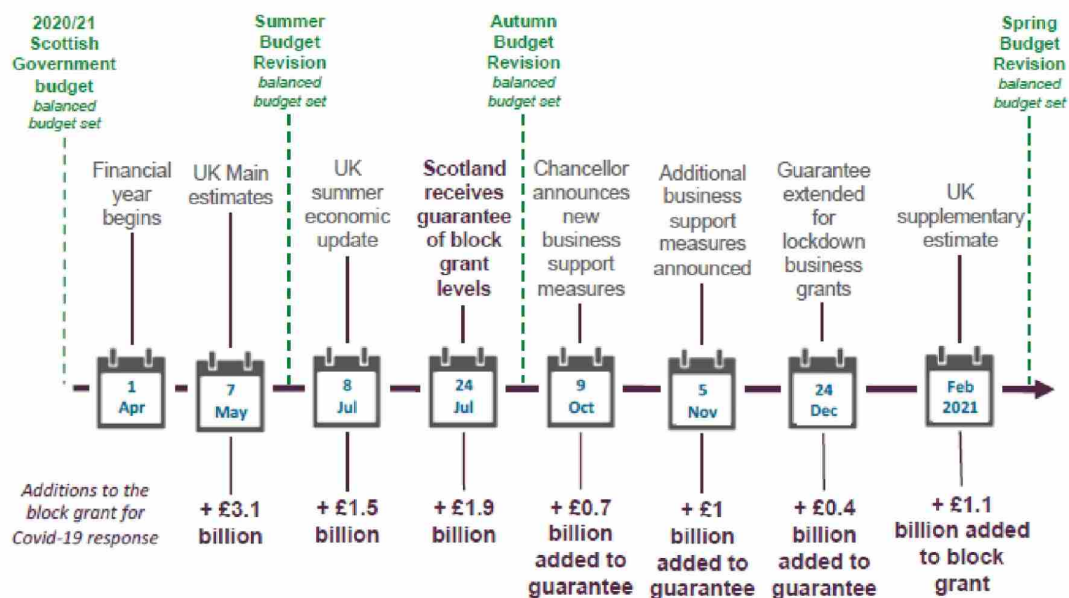


Figure 7.1 Audit Scotland timeline of Scottish budget 2020-21 (Source: Audit Scotland, 2021b: 6)

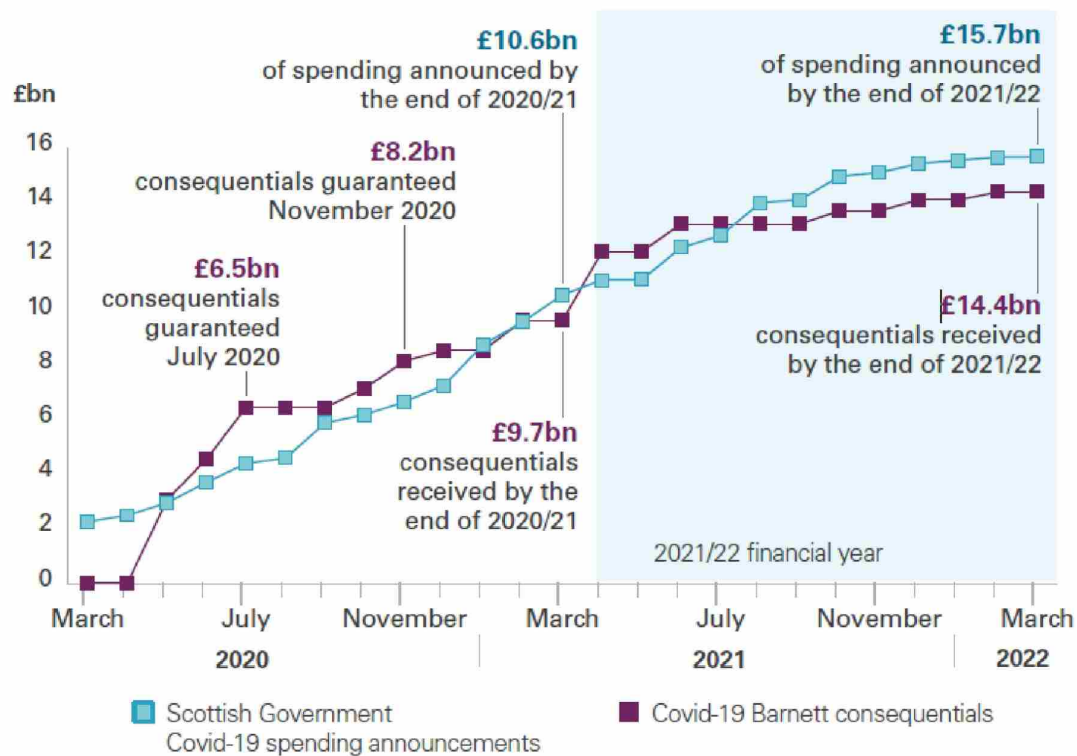


Figure 7.2 Scottish Government Covid-19 spending and Barnett consequentials 2020-22 (Source: Audit Scotland, 2022a: 22)

271. Most Scottish Government schemes were ‘funded by Barnett consequentials’, and Scottish Government allocations ‘broadly reflect those made by the UK Government’, such as to prioritise business support in Spring and Summer 2020 and health and social care in Autumn 2020 (Audit Scotland, 2020e: 10; 2021b: 12). In 2020/21, the Scottish Government spent £3.8bn on ‘business support’ including grants and rates relief, £2.9bn on health and social care including £448m on PPE and £130m on Test and Protect, and £2.5bn on ‘other public services’ including £1.2bn on local government and £874m on transport (£421m on rail) (Audit Scotland, 2021d: 6; 2022a: 12).

272. Some differences in detail include the Scottish Government’s use of Barnett consequentials to:

- provide an additional £185m for SMEs (small and medium-sized enterprises), ‘creative, tourism and micro hospitality companies as well as newly self-employed people’
- provide tailored economic support for areas with more restrictive lockdowns
- provide greater ‘support for the fishing industry’
- select a smaller ‘zero-rate threshold for Land and Buildings Transaction Tax’ (akin to stamp duty) (2020e: 11)
- make a decision not to fund separate specialist centres to treat long Covid (2021b: 8)
- allow more local government discretion to allocate hardship and other funds (2022a: 14; see also Audit Scotland, 2021e on challenges to the local authority administration of benefit schemes).

273. The Scottish Government was also able to change some of its own funding plans, such as to repurpose passenger subsidies to compensate for lost transport revenue, move funding for energy efficiency schemes to support housebuilders and landlords, and redeploy planned disability benefits to fund carers (2020e: 11). INQ000215476 (58) also describes delivering 'some funding streams slightly differently to UK Government, as well as developing some bespoke spending budgets to meet local needs'.
274. Audit Scotland (2022a: 14) describes the extent of direct UK schemes in Scotland (administered directly by the UK government):
- 'the Coronavirus Job Retention Scheme (furlough) which ran between March 2020 and September 2021 and supported 911,900 Scottish jobs, affecting 26 in 100 working age people in Scotland
 - the Self-Employment Income Support Scheme which provided 175,000 self-employed people in Scotland with grants totalling £1.7 billion
 - the Coronavirus Business Interruption Loan Scheme and the Bounce Back Loan Scheme which provided £4.1 billion of loans to 99,792 businesses in Scotland. The Future Fund also provided 23 loans valued at £8.3 million to businesses in Scotland
 - the Eat Out to Help Out scheme which helped support 4,775 hospitality businesses in Scotland throughout August 2020, with the value of discount claimed totalling £42.9 million'.
275. This distinction between UK government funded schemes (a) via the Scottish Government, and (b) provided directly by the UK Government, helps to identify subtly different arguments regarding the impact of UK government funding choices on Scottish Government policy. In some cases, such as funding for community testing and contact tracing, the phase out of UK funding for England in 2022 reduced the Barnett consequential and prompted the Scottish Government to follow the same phase-out or fund a continuation from its own budget. In some cases, such as employment furlough, the cessation of the UK government scheme applied UK-wide, prompting the Scottish Government to adapt or introduce and fund its own scheme. In both categories, the Scottish Government described profound limits to its ability to make different choices.

New concerns, including the increased risk of fraud

276. Audit Scotland (July, 2020c: 2-5) categorised the increased risk of fraud associated with the Scottish Government's emergency response and stretched capacity, characterised by 'weakened governance arrangements', understaffing, staff overload, and the redeployment of staff to unfamiliar roles:
- a. 'Covid-19 funding' risks relate to 'lower level of scrutiny and due diligence' and the inability to prevent fraudulent claims when supporting people and businesses quickly.
 - b. 'Payroll/recruitment risk' relates to insufficient checks on the qualifications of new staff, or claims for expenses and overtime.
 - c. 'Procurement risk' relates to the relaxation of controls and checks on new suppliers, bank details, duplicate payments, and the risk of organised fraud to supply counterfeit goods or harmful services.

- d. It also relates 'IT/cyber crime risk' to 'Health and wellbeing risk', such as when rapid rises in remote working puts pressure on authentication procedures and long working hours 'lead to errors or fraud due to lapses in concentration' (2020c: 2-5; see also Audit Scotland, August, 2020d on ways to probe experiences with these risks).
 - e. Audit Scotland (2021b: 19) notes similar problems with UK schemes, including the Bounce Back Loan Scheme described by the NAO as involving 'a "very high" level of fraud risk'.
277. Scottish Government witness statements describe recognising and addressing this increased risk of fraud. INQ000215486 (83-90; 133) provides a general description of the difficult balance between the need for speed and avoidance of fraud, and modestly different rules for business support grants to reduce the risk of fraud (compared with the UK scheme). In that context, Audit Scotland (2022b: 9) notes that a 'number of funds' administered by Scottish local governments required business to already have been registered on the non-domestic rates system, which ensured that 'eligibility was determined using a well-established, robust, existing data set and limited to businesses that were already known and identifiable'. It also notes that the Scottish Government made importance governance reforms to improve business support delivery, including to establish a Covid Business Resilience and Support Directorate, clarify business fund strategy, require 'administering authorities to regularly submit management information returns', and (in 2021) introduce 'two business support funding oversight groups' (2022b: 13).
278. However, Audit Scotland (2022b: 2) also identifies issues with the overall lack of 'good quality data' (or marked variations in 'quality and completeness') to inform funding decisions. This data gap requires considerable retrospective assessment 'to detect fraudulent claims', as well as to assess how funding 'addressed equalities and supported specific demographic groups'. The Scottish Parliament Economy, Energy and Fair Work Committee (2020: 72) expressed similar concerns. The Scottish Government review (in 2021) of 11 schemes found that 'two schemes were high risk, seven medium risk and two low risk' (Audit Scotland, 2022b: 11). The high risk schemes – Business Support Fund Grants, and Strategic Framework Business Fund – represented £2bn (87%) of £2.3bn distributed by councils, with a 'not unreasonable' estimate of a 'fraud and error' rate of 1-2% (2022b: 11). The next step was a 'large data cleansing exercise', essential to 'inform longer-term planning and enable evidence-based policy making, including wider equalities considerations' (2022b: 14).
279. Audit Scotland (2020f: 3) identified a range of additional concerns that emerged during 2020 regarding: (1) the 'financial sustainability of some sectors, including social care'; (2) 'backlogs where public services have been disrupted, for example the NHS, courts and maintenance of social housing'; (3) unequal impacts of Covid-19 and Covid-19 policies, including 'the black, Asian and minority ethnic community and more deprived communities have experienced more acute effects in areas such as health and education' and 'inequalities of access to digital technology and connectivity with regard to geography and deprivation' (see also Broadfoot et al, 2022); (4) staff shortages and burnout; and (5) 'adjustments to governance systems to enable rapid decision-making' that may have empowered 'local staff and communities', but also 'reduced scrutiny and oversight by non-executives and councillors'.

Support for business

280. Arshed and Knox (2022) provide a broadly positive assessment of Scottish Government financial support for SMEs. The main aim of funding was to preserve 'the SME base, keeping businesses solvent and people in jobs', which included targeting 'the sectors hardest hit by the pandemic – cultural, hospitality, personal services, and travel and tourism'. This aim accounted for £3.6bn, or 93% of relevant funding, compared to £0.26bn (7%) on 'recovery' (2022: 11). The

funding produced 'a strong overall approval rate' among SMEs in terms of staying in business, and having access to non-financial support facilitated by a 'joined-up approach between networks of public agencies, local authorities and third sector organisations' (2022: 4; 49). Greene (2022: 35-6) situates this outcome in a wider context of unprecedented UK state support, funded largely by the UK government:

'The number of business closures, redundancies and people experiencing unemployment is very modest given the magnitude of the GDP shock experienced during the pandemic. One main reason for these muted patterns is the massive state intervention to support firms through wage subsidies (furlough scheme) and financial support'.

281. However, Arshed and Knox (2022: 4) also identify the highly unequal effect of funding across the business sector, and four categories of experience: (1) 'typically ineligible for any funding' ('struggling'); (2) 'able to access some COVID-19 funding to keep them solvent' ('surviving'); (3) 'unable to access funds but were able to access support from wider organisations' ('adapting'); (4) 'easy and quick access to COVID-19 funding' ('thriving'). This problem was exacerbated by a 'narrow focus on specific sectors', SME confusion about who (e.g. which government) was eligible for what scheme, and the burden on small businesses of providing sufficient information to funders (2022: 23-4). Greene's (2022: 42) summary of wider business concerns includes that the funding available was: 'insufficient', 'poorly targeted', and difficult to understand and access. Businesses faced a 'cluttered economic development landscape' in which the biggest spend was by the UK government (directly to business) and the Scottish Government did not have enough financial autonomy 'to respond effectively to the heterogeneous needs of Scotland's business population' (2022: 42-3).
282. Greene (2022: 5) identifies similar concerns, of uncertainty, among the wider business sector seeking temporary financial support. Greene (2022: 18) relates this issue to wider economic problems intersecting with the use of policy instruments to support and regulate business during the pandemic. While the UK and Scottish Government provided financial support to address Covid-19 related uncertainty, they also issued a large number of regulations that had a mixed impact and were not always communicated well. For example, the Scottish Government's 'clear route map out of the first lockdown ... gave businesses time to prepare', but 'the speed of regulatory changes thereafter gave little notice to business closures' (2022: 20).
283. Greene (2022: 20) describes a 'general pattern' in relation to hospitality businesses: (a) 'after the Scottish Cabinet meeting on a Tuesday, there was potentially an announcement that would have either immediate implications for businesses or give them a few days notice of changes', and (b) the overall policy rationale was not sufficiently clear to allow businesses to anticipate these changes.

A mixed assessment of funding and governance in Scotland

284. Audit Scotland identifies multiple examples of good practice, including:
- 'The Scottish Government's publication of a Summer Budget Revision was a positive step in maintaining transparency in spending during the pandemic' (Audit Scotland, 2020e: 20). This Revision on 15 May explained to the Scottish Parliament (and Audit Scotland) how an additional £4bn Covid-19 budget would be spent.
 - the Finance Accountability Framework ('a new expenditure assessment and approval process' introduced by the Scottish Government for Accountable Officers in mid-March) was largely effective in approving any new Scottish Government spending choice above £1m (i.e. not already in the budget) (2022a: 19-20).

285. However, Audit Scotland (2022a: 4-5) identifies a range of unresolved concerns about Covid-19 governance, in which (1) it took too long to establish the oversight and accountability procedures appropriate to manage rapid expenditure choices (2022a: 16), and (2) a lack of clarity still stymies accountability when there is a lack of transparency about how money was spent:

“The Scottish Government streamlined governance arrangements to direct funds quickly, but it is hard to see how some financial decisions were reached. Records of decision-making are not collated centrally, and we could not always see how data and other intelligence was used to inform funding allocations. It is also unclear how spending announcements link to budgets and subsequent spending ... It is vital for transparency and financial planning that the Scottish Government and other public bodies are clear about how one-off Covid-19 funding has been spent, including where spending commitments may last for several years ... More work is needed by the Scottish Government to show how the wide range of Covid-19 spending measures have worked together to address the harms caused by the pandemic”.

286. Audit Scotland (2022a: 6-7) recommends that the Scottish Government work with public bodies to (a) publish ‘comprehensive Covid-19 financial reporting information which clearly links budgets, funding announcements and spending levels’, (b) review ‘financial decision-making processes’ to identify what worked and what needs to be reformed, (c) evaluate ‘whether Covid-19 spending delivered the desired outcomes’, and (d) develop more ‘robust processes which will improve the public sector response to future crises’. While the rapid, temporary reduction of internal audit made sense in a crisis, it stored up uncertainty, necessitating internal audit to ‘consider how it will retrospectively consider Covid-19 spending in its future plans’ (2022a: 15).

287. Similarly, the Scottish Parliament Finance and Public Administration Committee (2021: 11) ‘asks the Scottish Government to commit to providing transparent and timely information on all Covid-19 allocations to allow proper scrutiny of where, and how effectively, the money has been spent, so that any lessons can be learned for the future’. It is too late for this process to be timely, but there is still good reason to fulfil the demand for transparency.

EXPERT OPINION TOPIC 7

288. Topic 7 is an exemplar of the work that may only be possible to conduct in this Inquiry, rather than the Scottish Government commissioned Covid-19 inquiry, because it involves a complex and often unclear relationship between reserved and devolved policies. The UK government maintained UK-wide schemes that involved spending directly in Scotland (e.g. employment furlough scheme) *and* used the Barnett formula to determine the additional size of the Scottish Government budget (then the Scottish Government decided how to spend it). These UK budgetary and spending decisions, for the UK as a whole or for England, had a profound impact on Scottish Government decisions. This UK-led process could enjoy the advantage of flexibility to respond rapidly to new funding demands in Scotland. However, in some cases (direct spending) it made decisions for Scotland without fully involving the Scottish Government. In other cases, its informal and ad hoc approach to new funding could only work effectively in Scotland if backed by good IGR (yet, para 67 of this report describes poor IGR by 2020). This lack of Scottish Government certainty about funding, coupled with its inability to borrow to fund Covid-19 spending directly, created a level of uncertainty that is not conducive to good decision-making during an emergency.

289. Further investigation is essential because there is a considerable lack of clarity regarding how much money was spent in the name of Covid-19, where it was spent, and who benefited from the spending. This problem is twofold, since neither direct UK nor Scottish Government spending was fully explained, and there was no established mechanism for them to cooperate together with the National Audit Office and Audit Scotland.

Topic 8 Learning from successes and failings

290. This Topic identifies (1) general assessments of Scottish Government decision-making, and (2) a large number of specific lessons, from success and failure, that should inform reflections on the adequacy of decision-making during an emergency. The connection between (1) and (2) is that the Scottish Government portrays itself as a learning organisation, able to engage in trial-and-error and reflection to improve decision-making continuously. Such learning requires concerted attention to a large number of examples of issues that were addressed more or less effectively in Scotland since 2020. To facilitate such learning, in this topic, I have drawn upon published research and commentary by others which were of assistance to me in understanding the measures taken to address Covid-19 in Scotland (and the following discussion is my interpretation of their findings).

General assessments of Scottish Government decision-making

291. The most recent and relevant Scottish Parliament inquiry into Scottish Government decision-making took place after the pandemic, but with a wider remit than Covid-19. The Scottish Parliament Finance and Public Administration Committee (2023) described the background to this inquiry as: ‘Public Administration is a key part of the Committee’s remit and is best described as how the functions and systems of the Scottish Government work. The former First Minister explained that “For a sensible Government... transparency, good record-keeping and the ability to demonstrate the basis on which decisions are taken are as much in the interests of the Government as they are in the interests of those who are holding the Government to account’.

292. The following general remarks on Scottish Government decision-making – based on my special advisor report to the inquiry (Cairney, 2023) – are relevant to learning lessons from Covid-19 policymaking:

- a. Like most governments, the Scottish Government has not articulated a clear, concise, and coherent definition of effective decision-making (which makes it difficult to know how to judge how effective that government is). Rather, at different times, it emphasises different principles such as to foster systematic processes as well as ‘accountable, preventive, co-produced, coherent, evidence-informed, and equitable policymaking’ (Cairney, 2023: 3; see also paras 21-5, this report). As a result, it may seek to learn from success and failure, but without relating lessons clearly to an overall vision for effective government decision-making.
- b. It is not clear how a typical citizen could understand the Scottish Government’s account of its decision-making, during ‘normal’ times or emergencies. As paras 10-23 in this Inquiry report show, the Scottish Government relates its decision-making processes to multiple reference points, including aspirational models, ideal-types (such as the policy cycle, Figure 1), and an overly simplified Westminster-style narrative in which the First Minister is in charge and ministers are responsible for all decisions made in their name. If committees or inquiries find it difficult to piece together what the Scottish Government does, it would not be reasonable to conclude that citizens understand how decisions are made in their name.

- c. The Scottish Government tells a romanticised story of its own processes, usually with reference to less impressive UK central government policymaking. Stories of a ‘Scottish model’ or ‘Scottish approach to policymaking’ encourage unrealistic expectations about the government’s performance limitations, and undermines processes of learning from failures. Ministers and civil servants may commit vaguely to learning lessons, but through the lens of that romantic story of doing well and seeking to do even better. This story also contradicts many accounts from external stakeholders gathered by the committee for its report, paraphrased as follows: ministers and civil servants describe the sense that they consult far and wide, and receive routine and sufficient challenge to their policies; but, stakeholders are more likely to describe needless centralization and a culture that is not conducive to stress-testing policies during their design.
 - d. While it is straightforward to provide a description of devolved and reserved responsibilities (in a simple table), in practice it is not clear who makes policy for Scotland, and how (see also paras 53-61, this report).
 - e. The Scottish political system is generally not conducive to learning because it is adversarial, despite the new politics rhetoric described in this report’s Background. Debates tend to be partisan, with opposition parties declaring Scottish Government failure and the government defending a story of success. This emphasis on contestation to identify blame encourages the Scottish Government to be overly defensive and many of its critics to focus on ‘gotcha’ moments rather than identify how to learn for the long term (indeed, this was sometimes a feature of the committee inquiry, such as when opposition MSPs highlighted failures regarding public procurement).
 - f. Scottish Government practices are also not conducive to long-term learning and institutional memory. There is too much ‘churn’ among ministers and civil servants, which: “can come at the expense of: 1. Loss of institutional memory and expertise 2. Disruption in continuity of good advice to Ministers (sometimes at short notice) 3. Potentially diminishing the challenge culture with Ministers as those who work on a policy are no longer there to advocate for it or provide frank, evidence informed views, having built a relationship of trust 4. Undermining relationships, trust and understanding with organisations which can then take time to rebuild 5. The loss of expertise available to support the passage of subsequent secondary legislation (and operational delivery) once a Bill team is disbanded” (Scottish Parliament Finance and Public Administration Committee, 2023: 26).
 - g. Scottish Government ministers use the phrase ‘learning lessons’, and related phrases like ‘using the best available evidence’, like political mantras (such as when giving evidence to this committee). When doing so, they rarely specify from what evidence and how they will learn, and how external observers can understand that process. Learning lessons should be part of a well-designed and transparent process in which monitoring and evaluation is a routine part of government work, and governments clarify what methods they use to learn.
293. The Deputy First Minister and Cabinet Secretary for Finance (Shona Robison) gave evidence to this committee (Scottish Parliament Finance and Public Administration Committee, 2023b: 2, 9, 11), describing a general commitment to learn and improve, largely by commissioning the Scottish Covid-19 inquiry:

“Effective decision making often requires evidence on what works, and the Scottish Government is supported in that regard by professional analysts, scientists and other specialists in the civil service and by expert advisory groups such as the Covid-19 advisory group, which played a significant role during the pandemic. Given the varied nature and complexity of decision making, the Government does not claim to always get everything right, but our decisions are supported by professional advice and formal processes, and we have made many decisions that we can be proud of over the years—decisions that have made Scotland a better place and have led to improved outcomes for people living here. However, we are always willing to learn lessons and to improve

... There is no blueprint that can be taken off a shelf to navigate through a global pandemic. Inevitably, therefore, things were done at speed in a way that, in hindsight, leaves us asking whether we would have done such things in normal times and whether we could have done them differently. I absolutely accept that lessons need to be learned. If we have another global pandemic, we will have the experience of what worked and what, perhaps, did not work. The full public inquiry will come up with recommendations on some of that ...

Rapid decision making is required in out-of-the-ordinary situations, but that does not mean that it should not still be good decision making; it means that decisions have to be taken quickly and that the best evidence and advice that has been brought to you has to be relied on. You can rely on experience and on previous decisions and their outcomes, but sometimes the situation is new and there is nothing to draw on. That requires judgement. Sometimes, that will be the right judgement. With hindsight, some decision making is clearly not right, but the best judgement will be made on the best evidence at the time”.

Lessons on the management of reserved and devolved policies.

294. Henderson's (2023) report identifies the tensions and opportunities associated with intergovernmental relations during the pandemic. In addition, multiple issues have arisen regarding the overall outcomes of collective or independent UK, Scottish, and local government action. The overarching theme regards governments muddling through with temporary arrangements to respond pragmatically to blurry governance boundaries, followed by the opportunity to learn how these arrangements worked, and consider how to change them in anticipation of future crisis.

- Audit Scotland reports (Topic 7) identify the difficulties of tracing the details and impacts of multiple schemes designed and/ or delivered at UK, Scottish, and local government levels.
- The Scottish Parliament Social Security Committee (2021: 22) notes that the administration of social security throughout the pandemic involved an often-confusing mix of reserved UK and devolved Scottish schemes administered either by Social Security Scotland on a national basis or via local authorities to maximise the benefits of discretionary payments.
- The Scottish Parliament Finance and Public Administration Committee (2021: 12) notes that the 'Fiscal Framework', to help administer the increased devolution of Scottish Government tax powers, 'broadly worked as intended during the pandemic, though this was more by accident than design'. In other words, rather than being aided by good

intergovernmental relations, the issue of Scottish Government funding was manageable because (a) Barnett reduced the need for budgetary agreement (the UK government decided) and (b) the economic impact of Covid-19 was sufficiently similar across the UK to not produce Scotland-specific issues (2021: 14).

Lessons on test, trace, and isolate systems.

295. Some commentary suggests that, compared to some countries, the UK and Scottish Governments were slow to recognise the importance of test, trace, and isolate systems. For example, countries such as South Korea showed that it was possible to develop enough domestic public and private capacity to support a nationwide large scale community test, trace, and isolate system from January 2020 (Kim et al, 2020). Initially, the UK and devolved governments did not test in the community at this scale, and it took several months to establish comparable systems. The Scottish Government's 'testing strategy was not published until 4 May 2020' (UNCOVER, 2022c: 5). Cabinet Secretary for Health and Sport (Freeman, 2020a: para 5) confirmed that: (a) the initial lack of capacity reflected pandemic planning focusing on influenza, in which testing was not part of strategic preparations, and therefore (b) there was insufficient capacity on which to build a new nationwide strategy focusing on Covid-19: 'For Covid-19, we have had to build our testing capacity from scratch, with the first testing available in Scotland from 10 February this year and a capacity of 350 tests per day in two labs. We have now built up to a capacity of 15,500 tests a day' (Freeman, May 2020a: para 2).
296. This lack of capacity could have had a major impact on policy and practice. For example, the UK-wide lack of community testing contributed to high uncertainty about (a) initial attempts to contain then delay the spread of Covid-19 in the absence of lockdown, (b) when to introduce a compulsory lockdown to deal with an epidemic, and (c) the extent to which a test and trace system would represent a feasible alternative to lockdown, such as to introduce mass asymptomatic testing to facilitate the reopening of schools, colleges, and Universities (UNCOVER, 2022c: 20). Further, the absence of routine testing exacerbated the problem of discharging patients to care homes without confirming the absence of infection, with a policy change to require two negative tests before discharge not in place until 21 April (2022c: 26-7).
297. Therefore, there is considerable scope for the Scottish Government to learn how to design and deliver an effective system far more quickly in the future (2022c). First, counterfactual questions help to establish the stakes for lesson-drawing. For example, if the Scottish Government had been able to use large scale community testing, and had the capacity for contact tracing, would it have acted differently from January-March 2020? Would the relative certainty from testing have reduced the need for precautionary isolation? On community testing, Jeane Freeman (2020a: para 4) provided an equivocal answer in 2020 that may be worth revisiting: 'Even if we had had the capacity for 15,000 tests at the outset, I am not certain that we would have taken a significantly different approach, given everything else that was known and the advice that we were receiving'. However, Freeman (2020a: para 14) seems to make an exception for the specific example of testing before hospital discharge:

'Looking back at decisions that I took individually or as part of the Government at various points on this journey, from the start of this year through to today, had I then had the information, knowledge or experience that I now have, I am sure that I might have made different decisions'.

298. Second, empirical questions help to identify the extent of learning so far: does the Scottish Government now have the testing and contact tracing capacity to respond to a new health protection emergency? If so, how dependent is it on the UK government resources to support its response? For example, 64% of the daily capacity to perform 77000 tests in Scotland was 'provided by the UK Government' (UNCOVER, 2022c: 17). Third, evaluations help to establish the success of the Scottish Government system. Overarching questions focus on the Scottish Government's choice to build on existing public health and NHS capacity, then bring in private sector capacity during surges of demand, rather than follow the UK government in establishing a new public body which contracted out work to the private sector (2022c: 9; 19). More detailed evaluations focus on the extent to which the Scottish system worked as intended, such as to examine: 'Were the right kinds of tests made available to the right people at the right times and in the right places? Could testing resources have been deployed differently/more effectively?' (2022c: 6).

Lessons on health and social care

Deaths in care homes

299. Key decisions on adult health and social care made – or not made – by the Scottish Government, are an important part of learning lessons from the Covid-19 pandemic given the high rate of care homes deaths in Scotland. Five of the fourteen commissioned research reports for the Scottish Inquiry focus on this issue (Broadfoot et al, 2022; Burton, 2022; Farrell and Frowde, 2022; McHale, 2022; McKay et al, 2022), and others refer to it as part of wider issues.
300. The problem of care home deaths has two distinctive elements in Scotland. First, 'Scotland had the highest rate of COVID-19 related deaths [of] care residents in the UK during the first wave of the pandemic', with '50% of all COVID-19 related deaths in Scotland involved care home residents during the first wave of the pandemic between March and June 2020' (Farrell and Frowde, 2022: 11). Second, from 13 May 2020 until 22 December, the Lord Advocate obliged the reporting 'to the Procurator Fiscal the deaths of all care home residents or workers who may have contracted Covid-19 in the course of their employment or occupation'; 'Operation Koper' described the Police Scotland unit of investigation (Crown Office and Procurator Fiscal Service, 2022; Scottish Parliament Official Report, 13 May 2020, para 28).
301. One key source of lessons on care home deaths relates to a series of decisions and guidance to boost NHS capacity to deal with Covid-19 by discharging patients to care homes in early 2020. A series of Scottish Government statements (from 13 March) described care homes as a necessary alternative to NHS care, prompting a concerted effort to reduce any delays to discharging people from hospitals to care homes, including by providing funding to block book care home beds or allow care home expansion (summarised by Burton, 2022: 10-11; Broadfoot et al, 2022: 35). This guidance stated that admissions should be halted if (a) any to-be-discharged patients or care home residents tested positive for Covid-19, unless (b) the care home is able to manage such cases with effective infection control, largely by (c) isolating the infected resident for 7 days from the 'onset of symptoms' or 14 days 'from their first positive Covid-19 test' if they are 'immune-compromised' or required 'critical' hospital care (2022: 11).
302. Routine testing was not initially required when discharging NHS patients to care homes (2022: 12; UNCOVER, 2022c: 26-7). The judgement to discharge and admit was based on clinical assessment, based on symptoms, and a policy change to require two negative tests before

discharge was not in place until 21 April (UNCOVER, 2022c: 26-7; McHale, 2022: 8-10). The updated guidance also required a discharged patient to be isolated for 14 days (Burton, 2022: 13).

303. During this period, there is some doubt regarding the use of 'legal authority to transfer patients' who lack the 'capacity to consent, because of a condition such as dementia' (McKay et al, 2022: 16; McHale, 2022: 10-13). McKay et al (2022) describe competing pressure and concerns, between:

- the understandable urgency to boost NHS capacity and protect vulnerable people from harm during a health crisis, aided by the NHS' ability to seek consent from a 'welfare attorney or welfare guardian appointed under the Adults with Incapacity (Scotland) Act 2000' or local authority's use 'section 13ZA of the Social Work (Scotland) Act 1968' in the absence of a 'welfare proxy', versus
- the need to make decisions consistent with the ECHR (European Convention of Human Rights), such as to allow a challenge to the 'deprivation of liberty', as well as respect an individual's family life and autonomy by ascertaining their wishes (2022: 17-18) (see this report para 145 on human rights).

304. For example, the Equality and Human Rights Commission (2020) challenged the decisions of NHS Greater Glasgow and Clyde and HC One Oval Ltd, to keep individuals in certain care homes while waiting up to a year for a welfare guardian. It described their initial practices as 'unlawful, discriminatory and contrary to the United Nations Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights'. Further, the Mental Welfare Commission for Scotland (2021: 6) confirmed that 'unlawful moves (involving 20 people) took place across 11 Health and Social Care Partnership areas' (HSCPs), including "making decisions 'internally' rather than recourse to the courts, the critical safeguard for individuals". It also signalled the possibility of a far larger number of inappropriate moves based on an insufficient understanding of laws and procedures (2021: 7). While some problems relate to pandemic urgency, 'Our findings indicate longer standing systemic issues within HSCPs which require urgent action to address in order to safeguard and uphold the rights of the most vulnerable adults'. Its recommendations include better procedures, training, and recording for audit (2021: 8), but their adoption and implementation is not yet clear (McKay et al, 2022: 28).

305. In 2020, Scottish Government and public sector assessments of lessons from these health and social care decisions are rather mixed and incomplete. The First Minister and Cabinet Secretary for Health and Sport have both described mistakes or failures largely with reference to the lack of benefit from hindsight (Farrell and Frowde, 2022: 57). Public Health Scotland (2021) states that: 'No statistically significant association was found between hospital discharge and the occurrence of a care home outbreak'. McKay et al (2022) describe the 'lessons learned' report from Health and Social Care Scotland (HSCS, 2020) as taking 'a largely positive perspective' on the cooperation achieved to overcome barriers to delayed discharge quickly. The HSCS (2020: 4) describes positive experiences in relation to factors including 'shared goals and joint commitment', funding, leadership, and greater local autonomy. It also describes 'One of the biggest challenges' as 'the media coverage of care home deaths, with the alarmist reporting of care homes as "COVID rife" turning families against co-operating in the placement of their relatives' (2020: 5). McKay et al (2022: 23) note that 'There is little discussion on whether family concerns may have been justified'.

- 305.1. A legitimate overall impression *could* be that the Scottish Government considers the experience to be a win overall, since it freed up crucial NHS capacity. However, to some extent, this prioritisation of the NHS remains an implicit aim that is not backed by a transparent record of (a) decisions to balance these NHS benefits with the costs in social care, or (b) a clear assessment of the scope for unintended consequences, particularly in a care home sector of which the Scottish Government has limited knowledge or control (McKay et al, 2022: 25-6).
306. The Cabinet Secretary for Health and Sport (Freeman, 2020a; 2020b) gave oral evidence on health and social care to the Scottish Parliament Health and Sport Committee on 27 May and 4 June 2020. Jeane Freeman presented the Scottish Government position that testing before NHS discharge and care home admission should be seen in a wider context of policies for care homes: ‘testing, in and of itself, is not the only precautionary measure that should be taken ... we issued guidance to care homes on 13 March, which advised them of the measures that we needed them to take to reduce the risk of transmission inside the care home. The guidance at that point included that communal activity should end or levels thereof significantly reduce; that residents should eat in their own rooms; that infection prevention and control measures should be ensured; that personal protective equipment should be used; and that visiting should be stopped, with some exceptions. Alongside testing, all those measures contribute to preventing the transmission of the virus’ (Freeman, 2020a: para 13-14).
307. Jeane Freeman’s judgement on discharge without testing can be paraphrased (from Freeman, 2020b: paras 19; 23-4) as: (1) it was essential to maximise hospital capacity, to deal with the Covid-19 pandemic, by making sure that anyone fit to be discharged safely should be discharged; (2) older people should not be kept in hospitals likely to contain many people with Covid-19; (3) they would only be discharged if showing no Covid-19 symptoms, and at the time the confirmed documentation of systematic transmission by the WHO was rare, and (4) their discharge should have been safe if care homes followed Scottish Government guidance (McKay et al, 2022: 22 provide a similar summary). In addition, Nicola Sturgeon (INQ000339033: 455) notes that the testing technology was not sufficiently accurate at the time, and that WHO advice was limited testing capacity could be better used for other purposes. INQ000346089: 71 also states that ‘our social care partners – in local government and in the third and independent sectors’ agreed with point 1.
- 307.1. The Scottish Government also ‘intervened to engage in the direct provision of personal protective equipment’ (from 19 March), supported a ‘recruitment portal through the Scottish Social Services Council to ensure that care homes could access staff if staff absence rates meant that their rotas were at risk’ (29 March), increased funding for adult social care (1 April), and modified rules on sick pay and death-in-service to address a disincentive for care staff to be tested (24 May) (Freeman, 2020b: para 2).

Care home visiting

308. There were profound unintended consequences of Scottish Government decisions on isolation and physical distancing. In particular, the lengthy care home lockdown in 2020 ‘caused great distress and is likely to have contributed in a number of cases to cognitive and emotional decline and even death’ (McKay et al, 2022: 29; see also McHale, 2022: 18-21). McKay et al (2022: 40) describe concerns that ‘social care and human rights concerns were marginalised in the interests of infection control’. Broadfoot et al (2022: 45) recount interviewee descriptions of ‘inhumane policy’.

309. The Scottish Government made a series of choices to limit visits to care homes, including to:
- move towards 'essential visits' from care staff and one relative, and to isolate residents in their rooms as much as possible (13 March 2020)
 - suspend non-essential visits unless a resident is dying or in dementia-related distress (16 March)
 - allow a staged return to some visiting, subject to risk assessment and the absence of Covid-19 cases for 28 days (25 June)
 - allow more outdoor visits and invite plans for indoor visiting (8 August)
 - allow the resumption of routine visits in the absence of Covid-19 cases for 28 days (3 September)
 - shift towards more restrictions following a return to lockdown in January 2021, followed by
 - 'open with care' guidance which 'set out an incremental approach to resuming meaningful contact for all adults living in care homes in Scotland' (24 February 2021) (Burton, 2022: 31-2; McKay et al, 2022: 33-5).
310. Learning will focus generally on the moral and legal considerations regarding the proportionality of the measures and the infringement of human rights enshrined in the ECHR: 'Whilst it is important that any visiting policies take account of the evolving evidence about the harm posed from the virus, these need to be carefully balanced with the evidence about the positive impact on health and wellbeing from seeing family and loved ones has on residents in considering what is necessary, justified and proportionate' (Farrell and Frowde, 2022: 56).
311. There are unanswered questions regarding the low extent to which 'the human rights of residents and their families, including the proportionality of measures generally or in individual cases' were considered in early 2020 (McKay et al, 2022: 29). By 2021, there is evidence of change, producing 'a more human rights based approach and greater involvement of relatives in producing more balanced guidance' (2022: 29). It would be worth probing the extent to which this change reflected learning from experience and feedback, or would not have happened as quickly or substantively without considerable external pressure.

DNACPR in policy and practice

312. There are unresolved issues regarding Scottish Government policy and public sector practice in relation to DNACPR (Do Not Attempt Cardiopulmonary Resuscitation, to restart someone's breathing or heart). Farrell and Frowde (2022: 12) state that, compared to the rest of the UK, Scottish policy on DNACPR is relatively 'clear and coherent'. Updated guidance 'now incorporates a stronger human rights-based approach' to incorporate ethical principles such as 'respect for autonomy and bodily integrity, as part of upholding a person's dignity', ideally with patients 'being provided with information and being able to make decisions about their end-of-life care' (2022: 12; 82).
313. However, 'further data is needed on how this was implemented in practice during the COVID-19 pandemic', to take into account factors such as the: inappropriate use of invasive CPR, lack of information to patients to inform choice or the last-minute provision of information, lack of joined-up understanding of DNACPR requests in health and social care, or the withholding of

treatment without the clear consent of patients (2022: 12; 84-7). McKay et al (2022: 57) also describe 'concern that vulnerable individuals were pressurised to agree to DNACPR notices, or placed on them without their consent'.

314. This experience of DNACPR practice is part of a wider issue regarding early guidance on the 'prioritisation for treatment' in relation to people deemed already close to death or facing low quality of life, which 'was problematic in terms of human rights and the law, and could potentially have led to discriminatory care' (McKay et al, 2022: 51-5).
315. Farrell and Frowde (2022: 85-96) outline the ethical and human rights principles underpinning the design of DNACPR policies and procedures, including cases in which someone lacks mental capacity, but there is high uncertainty about the impact of such ambitions on the delivery of health services during the pandemic. Further, they report (a) concerns noted by the Joint Committee on Human Rights (House of Commons and House of Lords) that some care providers were applying DNACPR notices routinely without involving patients or their carers, but (b) a general reluctance to investigate the matter in Scotland now because there would be the chance to do so in the Scottish Covid-19 inquiry later (2022: 99-101).

Lessons on health and social care: establishing an evidence base

316. In each case, it is difficult to establish how much knowledge the Scottish Government had in relation to adult care homes for older people and their capacity to perform the Covid-19 tasks identified above. Examples are as follows.
317. Burton (2022: 8) notes that UK and devolved governments lacked complete data on care home residents: 'we do not reliably know who lives in a care home in Scotland (on a permanent or temporary basis) using large-scale national routinely collected data'. Farrell and Frowde (2022: 55) describe an estimated 'over 40,000 residents living in 1083 adult care homes across Scotland', including around 30,000 older residents.
318. During the emergency period from March 2020, it was difficult to establish how many people were being discharged, the reliability of using symptoms for diagnosis (e.g. when patients had dementia), the numbers of people discharged without a Covid-19 test, or the legality of each discharge when the patient lacked capacity (Burton, 2022: 13-16; 25). Farrell and Frowde (2022: 62-3) describe Scottish Government and Care Inspectorate reluctance to release data on care home related deaths, and they were only provided after a BBC FOI request, showing that: 'Between 1 March and 21 April 2020 in Scotland, 82% of the 3,595 discharged patients were not tested. 843 care homes received 5,198 residents who had been discharged from hospital between 1 March and 31 May 2020. The data also shows the 752 homes which took in untested patients between 1 March and 21 April 2020. 75 care homes also took in at least one patient who had tested COVID-19 positive, and who had not received a negative test prior to discharge' (2022: 56; see also McKay et al, 2022: 19).
319. It was difficult to obtain 'clear and comprehensive data on COVID-19 deaths involving care home residents in Scotland', especially during the period covered by Operation Koper (Farrell and Frowde, 2022: 38; 56; Burton, 2022: 44-5; McKaey et al, 48-50; McHale, 2022: 17-18).
320. There is limited understanding of how well care homes were able to adhere to Scottish Government guidance on aims such as infection prevention and control (McKay et al, 2022: 68-79). Initial feedback identified the lack of clearly communicated guidance from a single authoritative source (McHale, 2022: 22), a variable ability of care homes to meet standards for

PPE, and 'In March 2020 there were no COVID-19 tests routinely available for care home staff' (Burton, 2022: 18-19; 21).

321. There is patchy and variable evidence on how care homes were able to understand guidance and manage procedures to allow for restricted visiting. Care Inspectorate rules changed, and it reduced visits (Burton, 2022: 33), which exacerbated the lack of evidence of practice (McHale, 2022: 23-4) and left some care home managers feeling 'unsupported during the pandemic, and at the same time overwhelmed by reporting requirements and frequently changing guidance' (McKay et al, 2022: 40).
322. There is a lack of 'formal evaluation of DNACPR decision-making in Scotland during the pandemic in relation to individuals in their own homes, in care homes or in hospitals' (Burton, 2022: 40; McHale, 2022: 69-71). There is a worrying lack of evidence on patterns regarding 'individual treatment decisions on admission to hospital, to intensive care, or to a ventilator' (McKay et al, 2022: 55).
323. There is little clarity on the use in Health Boards of 'ethical advice and support groups' when making decisions to ration critical care (McHale, 2022: 34-8).

Lessons on shielding and managing the higher risks of illness and death among vulnerable groups

324. Broadly speaking, 'shielding' policy has two elements: (1) identifying those at highest risk of Covid-19 related illness and death, and (2) supporting them to stay as physically isolated as possible from people who could transmit Covid-19 (in other words, it is distinct from a subsequent process led by the JCVI to identify a priority list for vaccination). The UK government led a four nations approach to shielding policy, with the design influenced strongly by the UK and devolved government Chief Medical Officers (UNCOVER, 2022f: 4). The policy involved (a) identifying the people at highest risk of major illness and death from Covid-19, largely with reference to non-communicable diseases including cancers, heart disease, and respiratory diseases rather than age, (b) recommending that they remain completely isolated from the wider population, to minimise their risk of infection, initially for 12 weeks from 26 March) and (c) provide additional support relating to the shielding process, including the delivery of food and medicines.
325. Multiple statements by the Scottish Government identify routine and continuous learning in relation to shielding and the maintenance of 'highest risk' lists, as well as a desire to reflect on Scottish Government practices (e.g. INQ000215488: 151; 180; 461; 479-80; 515-23). This learning relates partly to the practicalities of policy delivery. Issues include the need to communicate more effectively and provide clearer guidance in relation to (a) who is considered to be vulnerable in relation to shielding, and (b) major changes to terminology and guidance. For example, the Scottish Government: removed its advice to avoid outdoor exercise (18 June 2020) and stay isolated from people in their household (8 July 2020), paused (23 July) and ceased its shielding advice (1 August), provided additional guidance on avoiding school and work in Level 4 areas (23 October), then withdrew this advice (26 April 2021) and did not provide advice for additional shielding in December 2021 (UNCOVER, 2022f: 10).
326. In addition, UNCOVER (2022f) recommend a wider focus on learning in relation to the 'ethical, public health, human rights and other principles' that underpinned key choices, since people 'required to shield were asked to accept conditions of intense isolation' and it was 'vital for the

Scottish Government to be as confident as possible that these requirements were proportionate to the risks faced, and were not in force for any longer than necessary' (2022f: 12). Key questions include: (a) who was included on the list, or added to that list over time (b) what additional support they should have been entitled to, (c) how did shielding affect their health (e.g. the impact of isolation and digital exclusion on mental health, and lower access to services for physical health), and (d) how did the impact of shielding intersect with other sources of harm, including racial and ethnic marginalisation, economic deprivation, homelessness, prison or immigration detention (2022f: 4-5)?

327. UNCOVER's (2022f: 14-16) summary of ongoing research by Public Health Scotland and the Scottish Government describes 3.3% of the population shielding in Scotland (179,728 people), a high reported impact of health harms from isolation, a recommendation to protect those at highest risk but not repeat the shielding policy during future pandemics, profound inequalities relating to poverty, insufficient attention to the carers of people who were shielding, and the need for better government communications regarding key choices and guidance.

Lessons on PPE: preparedness and evidence-based decisions

328. Audit Scotland (2021f: 3) states that the Scottish Government's lack of pandemic preparation contributed to its problems with PPE. For example, had it implemented fully the 'improvements identified as part of pandemic preparedness exercises', it could have purchased PPE in 2019 at half the cost in 2019 and prevented the worst excesses of short supply by April 2020 (2021f: 3-4). Both Audit Scotland and UNCOVER (2022e: 13) summarise surveys among NHS staff that identify shortages in practice, with many 'being asked to re-use single-use PPE'. Audit Scotland (2021f: 3) identifies a series of additional problems associated with the rapid purchase of PPE during 2020, including:

- the higher risk of fraud or low VFM when awarding contracts worth £98m 'to new suppliers with no competition'
- vulnerability to patchy supply in a global market (before establishing domestic production capacity)
- high uncertainty about hospital stocks when the NHS was addressing low stock so frequently (often daily)
- a lack of time to ensure that PPE fit properly, coupled with inequalities of fit when masks seemed to be modelled largely on the faces of white men
- the needless environmental cost to the disposal of inappropriate PPE.

329. In that context, Audit Scotland (2021a: 5) recommended a return to 'procuring personal protective equipment (PPE) through a competitive tender process as soon as practicable, considering options that reduce the environmental impact where possible, while demonstrating good value for money and robust quality assurance'.

330. This assessment is complicated somewhat by uncertainty about what PPE would have been procured for NHS and other staff and if it was suitable for Covid-19. UNCOVER (2022e: 12) relate some problems of procuring PPE to uncertainty regarding what masks to recommend in relation to: (a) emerging evidence in early 2020 on Covid-19 spread via aerosol as well as droplets, and (b) 'a Health and Safety Executive report that found no material difference

between the N95 and FFP2 respirator masks'. The more important distinction was between well and ill-fitting masks.

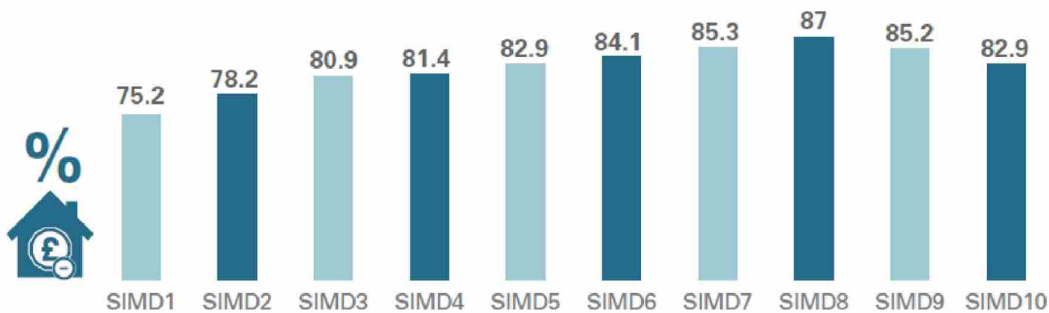
331. The wider PPE experience also demonstrates problems with vague arguments, expressed by UK and Scottish Governments, that they were following the best evidence or advice at the time. In particular, UNCOVER (2022e: 14) identifies 'Conflicting messages and confusing guidance around community use of face masks or coverings in the early stages of the pandemic'. The confusion reflected high scientific uncertainty linked inextricably to political debate, regarding: (a) if policy should address Covid-19 spread via aerosol as well as droplets (and how to define aerosol versus droplet), (b) if the aim of mask wearing was to protect the wearer or people in their vicinity, (c) who should receive the benefits, and bear the burdens, of mask wearing, (d) if high quality masks would be in short supply in health and social care if members of the public sought to buy them, and (e) if wearing lower quality masks had a significant community benefit (Cairney and Kippin, 2023a: 107). Further, the WHO and SAGE appeared to discourage community mask wearing until April 2024 and did not provide strong encouragement until around June 2020 (2024: 107). Yet, the Scottish Government recommended their use in April 2020 and the UK government followed in May 2020 (Tatlow et al, 2021: 31).
332. Such examples suggest that, for good pragmatic and political reasons, ministers go beyond the evidence or advice available to them at the point of decision. If so, it would be useful to prompt the Scottish Government to reflect, in more detail, on its frequent and vague reference to making decisions with reference to the best available evidence.

Lessons on vaccines and vaccination

333. Key decisions on the research and development, approval, production, and supply of Covid-19 vaccines were made at a UK level. For example, UNCOVER (2022d: 8-9) summarise rapid changes in 2020 from initial discussions in SAGE in March, to the setup of the UK vaccine taskforce by the UK GCSA in April, trials coordinated by UK universities and pharmaceutical companies from June, and the approval of the first (Pfizer) vaccine by the UK Medicines and Healthcare Products Regulatory Agency (MHRA) in December. These vaccines are produced outside of Scotland (in the UK or elsewhere) and the UK government cancelled its contract with Valneva to produce a vaccine in Scotland (2022d: 9). In that context, UNCOVER (2022d: 10) suggests examining the prospect of vaccine production in Scotland.
334. The UK government led a four nations approach to vaccination, with each government following the Joint Committee on Vaccination and Immunisation's (JCVI) advice on which people to prioritise. UNCOVER (2022d: 12-13) summarises the very strong relationship between JCVI advice and Scottish Government action, with one exception ('the decision to vaccinate 12-15 year olds with a single dose of the Pfizer vaccine, where it followed the four CMOs advice'). In particular, the JCVI related prioritisation to 'risk groups' and identified old age as the main risk, then identified risk in relation to care home residence, clinical vulnerability, and underlying health conditions. Over time, it added references to carers, learning disabilities, homelessness, and prisons. It also provided advice on vaccination during pregnancy, reducing the time period between vaccines, and providing a third ('booster') jab in response to the emergence of new variants. In that context, UNCOVER (2022d: 13) suggests that the Scottish Government did not provide its own rationale for vaccination, including a lack of discussion of ethical issues regarding who should receive priority treatment for a clearly beneficial intervention.

- 335. Audit Scotland (2021g: 3; and UNCOVER, 2022d: 15) declared the initial vaccination programme in Scotland to be largely a success, 'with good collaboration, joint working and new digital tools developed at pace'. As such, the Scottish Government could take positive lessons on those successes 'to inform the implementation of further stages of the vaccine programme and the wider delivery of NHS services'. For example, INQ000215488 (98-9) describes the initial need to co-opt NHS staff to deliver 400,000 doses per week at peak capacity, followed by the development of core staff able to do 150-200,000 per week during booster campaigns.
- 336. By mid-2021, the main unresolved issue regarded variations of uptake in relation to deprivation and ethnicity, prompting greater data collection and joint work with stakeholders to understand the problem and tailor outreach work (2021g: 13-14; UNCOVER, 2022d: 24). Public Health Scotland (2022) identified similar inequalities in relation to the uptake of Covid-19 and flu vaccines in late 2022.
- 337. To all intents and purposes, the Scottish Government (2021c) equality impact assessment distinguished between the intended and unintended consequence of policy, to determine that policy 'does not unlawfully directly discriminate with respect to any of the protected characteristics (including age, disability, sex, pregnancy and maternity, gender reassignment, sexual orientation, race, religion or belief, marriage or civil partnership)'. This unintentional inequality of outcomes is not the same as ensuring equality of outcomes. The need to learn lessons on vaccine uptake from Scottish, UK, and international experience remains clear (UNCOVER, 2022d: 25).

Deprivation – At 24 August 2021, uptake was lowest among people living in the most deprived areas.



Ethnic group – At 24 August 2021, uptake was highest in the white ethnic group at 88.2 per cent.

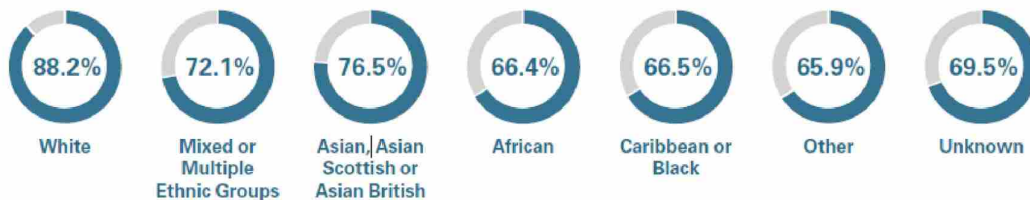


Figure 8.1; Vaccine uptake in relation to deprivation and ethnicity (Source: Audit Scotland, 2021f: 13, informed by Public Health Scotland)

Lessons on the unequal impact of Covid-19 and Covid-19 policies

338. Bambra and Marmot's (2023) report to the Inquiry identifies the highly unequal impact of Covid-19 and Covid-19 policies (see also Priestley, 2020; Farrell and Frowde, 2022: 61; McHale, 2022: 61-5). This problem has been addressed to some extent by the Scottish Government (Boyle, 2020). Audit Scotland (2022a: 19) identifies a gap between the Scottish Government's commitment to equalities at (a) a 'high level' and (b) in practice, since it 'did not always clearly document the expected impact of spending decisions on equalities outcomes'. While it conducted EQIAs to assess the unequal impact of lockdowns, it did not always perform the same task for funding decisions (2022a: 19).
339. Audit Scotland (2022b: 5) identifies particular problems associated with the 'rural economies' that (a) relied more on hospitality and tourism, and contained more self-employed and small businesses, which (b) made them more affected by lockdown and 'less able to withstand prolonged interruptions to their cash flow'. Further, younger people were more likely to work in these sectors, while a greater proportion of 'female-owned businesses' were affected by 'trade restrictions' (2022b: 5).
340. The Scottish Parliament Equalities and Human Rights Committee (2021: 3-4) identifies a wide range of potential lessons, or the need to better understand enduring issues in relation to inequalities, including:
- The importance of 'cash based approaches' to financial support for individuals, to 'respect people's dignity and maximise flexibility (see also Greene, 2022: 45-58)
 - The spread of Covid-19 among vulnerable older people in care homes, and the more general 'gap between the policy intention and people's experiences of social care'.
 - Issues of 'poor practice' in relation to the use of Do Not Attempt Cardio-pulmonary Resuscitation (DNACPR) forms among older people.
 - Digital exclusion, such as in relation to unequal online education provision and issues with poor rural connectivity.
 - Issues with the varying local authority delivery of services, and access to public transport, in relation to disability.
 - The disproportionate impact of Covid-19 mitigation on women (see also Arshed, 2021 on the impact on women entrepreneurs).
 - Unresolved issues with the Scottish Government response to its Expert Reference Group on COVID-19 and Ethnicity.
 - The UK government's marginalisation of asylum seekers, such as with 'No Recourse to Public Funds' (see also Käkelä and Sime, 2023; Scottish Parliament Social Security Committee, 2021: 10).
 - The need to protect the 'heritage and culture' of Showpeople.
 - The backlog of 'mental health support', particularly for children and young people (see also Marini, 2022a; 2022b; and McHale, 2022: 39-51 on resuming NHS care more generally).

- Disruptions to health visiting and other support for parents of babies and young children.
 - The need to better understand the 'impact of the pandemic on Scotland's LGBT community'.
 - Limited support for 16 and 17 year olds who left school without being able to begin work.
 - The human rights of prisoners, such as during lockdowns.
341. McCluskey et al (2022: 12) describe the reinforcing impact of Covid-19, lockdowns, and alternative education arrangements, on existing educational inequalities. Generally speaking, 'those who fared better at this time were those young people who already had the skills and confidence to be self-directed learners, working autonomously and independently to complete assigned work. Added to this were issues related to physical learning and study space available at home and parental support ... the pandemic has accentuated and deepened vulnerabilities and pre-existing disadvantage that creates inequality of experience, learning and outcomes for some particular groups of children'. Further, factors such as poverty, disability, and rurality affected meaningful access to education during the switch from in-person to online provision (2022: 11). In that context, Mcluskey et al (2022: 11) identify the need to learn from the successes and failures of temporary Scottish Government arrangements, to inform approaches to longstanding problems or reform plans. For example, an exams fiasco of 2020 exposed not only problems with the systematically unfair impact of temporary assessment decisions (to deal with the need to close schools from March 2020), but also 'a system already under strain' (2022: 11; see Kippin and Cairney, 2022; 2023b on the fiasco, INQ000215480: 165-6 on the Priestley report to the Scottish Government, and John Swinney INQ000287771: 41 'I felt I made fundamental mistakes in my handling of the SQA exam results in August 2020').
342. The pandemic and lockdown also halted essential in-person youth work services, producing 'a negative impact on the mental health and wellbeing of young people, particularly those most marginalised and vulnerable (Mcluskey et al, 2022: 2).
343. The Scottish Parliament Education, Children and Young People Committee (2022: 3) identifies:
- unequal access to the 'education and childcare hubs' set up for the children of key workers and children defined as 'vulnerable' in relation their risk of domestic harm, disability, or ill health of their parents (defined by Scottish Government, 2020e), and
 - "the negative impacts on attainment and 'learning loss'" which tend to be 'felt more strongly by socio-economically disadvantaged pupils' (2022: 7), exacerbated by
 - the insufficient gathering of data, 'to identify and understand needs of different groups and to allocate resources accordingly' then establish 'how different cohorts have been affected by Covid' and issues such as the 'digital divide' (2022: 8; 12), and
 - high uncertainty about the impact of additional funding on non-temporary teacher recruitment and support for children with additional support needs (2022: 10).

Lessons on stakeholder engagement

344. Most Scottish Government witness statements provide a long list of the groups or stakeholders that they consulted while making decisions. It is not possible to infer the quality of this engagement from the statement of quantity. The general Scottish Government line is that key

stakeholders were included meaningfully in ongoing Covid-19 relevant working groups, such as COSLA (Convention of Scottish Local Authorities) and SOLACE (a local government professional body) for local authority schemes, but it is often difficult to identify wider meaningful engagement during a period of rapid decision-making.

345. The Scottish Government should learn from the gaps that arise between their account of consultation and statements made by groups to other organisations, including the Scottish Parliament. For example, Audit Scotland (2022a: 17) draws on work by the Scottish Parliament Economic, Energy, and Fair Work Committee and others to identify the stakeholders either not involved in discussions or critical of the low quality of interaction.
346. A common Scottish Government response to this concern is to state that many groups were consulted, but some were dissatisfied with subsequent decisions. This general response does not lend proper respect to the concerns expressed frequently by stakeholders.
347. Further, the Scottish Government's emergency response shifted the balance between (1) a general and often vague commitment in the Scottish Government to make policy in partnership with stakeholders and citizens, to avoid internalising choices or relying only on elite scientific sources of external advice, and (2) the centralising effect of emergency decision-making, prompting the internalisation of rapid choices and high reliance on elite scientific sources).
348. One well documented example is the absence of consultation with citizens or organisations representing people with disabilities. Shakespeare et al (2021: 104) draw on work by 'disabled people's organisations and activists', many of which surveyed their members in 2020, to find 'that disabled people have been excluded from the decision-making process and that their needs have been overlooked'. For example, Glasgow Disability Association (2020: 28) identify routine exclusion from local and national decision-making, and recommend that participation by 'equalities groups' is built into the National Performance Framework indicators. In the case of Covid-19, such participation may have helped decision-making bodies to recognise more quickly the disproportionate (1) deaths among 'people with intellectual disabilities' and (2) impact of Covid-19 and 'lockdown' measures on social care and 'disabled people's mental health and wellbeing' (Shakespeare et al, 2022: 107; McHale, 2022: 25-9).
349. The Scottish Government also seemed, at times, to be surprised at the level of consultation requested by faith groups, such as regarding the impact of lockdown on the opportunity to worship collectively, and disquiet following the reopening of hospitality before places or worship (e.g. INQ000215482: 68-73).

Lessons on recording and transparency

350. Generally speaking, there remain unresolved issues regarding what should be recorded, why, and how (Scottish Parliament Finance and Public Administration Committee, 2023). Audit Scotland (2022a: 18) also identifies specific examples of the patchy recording of decisions, coupled with the unclear use of data, which made it 'difficult to see how some financial decisions were reached'. Examples include the administration of some business support schemes and the inconsistent recording of spending decisions over £1m (2022a: 20). It presents a contrast between some areas of decision-making and the Scottish Government commitment to make sure that all financial decisions were 'evidence-based, transparent, accountable and legal' (2022a: 18).

Learning the same lessons on prevention

351. The Scottish Parliament Finance and Public Administration Committee (2021: 24-5) reiterates its longstanding point that the Scottish Government has not fully delivered on its promise to pursue a more 'preventive' approach to policy, to exploit the 'real economic and societal benefits in prioritising spend for preventative measures' (this rather vague concept is described in depth by Cairney and St.Denny, 2020). Successive Scottish (and UK) governments have made this broad commitment to 'prevention' being better than 'cure', but without learning how to turn a vague ambition into concrete policy measures. As Topic 1 describes, the lack of progress on health inequalities contributed to a lack of pandemic preparedness. When connecting health inequalities to pandemic preparedness and responses, the Scottish Government and its partners need to clarify what health inequalities are, and how exactly governments should seek to reduce health inequalities. This work is essential to get beyond broad strategies towards delivering on tangible commitments.

Lessons on resilience, sustainability, and recovery in specific policy sectors

352. In some cases, there are lessons to be learned on anticipating economic shocks. In higher education, Covid-19 exposed the vulnerability of Universities to unexpected shocks to their financial sustainability. For example, if international student tuition fees represent 57% of all tuition fees, and tuition fees account for 32% of income overall, then (a) a sudden halt to international travel will have a disproportionately high impact on the sector, and (b) the impact is harder to address among the many Universities who regularly report annual deficits (Currie, 2020: 7-8). As with tourism, the impact of international travel is disproportionate because international visitors spend more per person (O'Connor, 2021: 5).

353. In some cases, there are lessons to draw on the administration of an initially temporary scheme. In the housing sector, emergency legislation helped to protect tenants from eviction by introducing a ban in the short term and extending the eviction notice period (Berry, 2021). There are lessons to be learned from the short term (e.g. did the legislation work as intended?) and longer term (e.g. how to manage rent arrears associated with the pandemic period) (Combe, 2021)

354. In other cases, the shift from crisis to recovery is often described as an opportunity to learn and reimagine policy sectors. In climate change policy, there are parallels regarding the requirement for major policy change to deal with crisis, as well as the push to imagine a 'green recovery' and 'just transition' that combines economic and climate justice policy aims (Reid and Davies, 2021: 4; Evensen et al, 2020: 4). In equalities policy, "Post-recovery plans have a unique chance to consider what sort of 'normal' we want to go back to, or move away from, as an LGBT+ inclusive society" (Taylor, 2021: 3). Third sector and social care organisations have also argued that the pandemic should prompt the Scottish Government to rethink how it regulates and funds adult social care provision (Chaney and Sophocleous, 2021).

Lessons on police enforcement

355. INQ000215491 (72-83; 92-7) describes Police Scotland's enforcement of regulations on individual behaviour, such as via Fixed Penalty Notices. This level of fine was lower than in the rest of the UK. Police Scotland used a four Es approach – 'Engage, Explain, Encourage and, only where necessary, Enforce' – and 'Enforce' accounted for 6% of engagement (INQ000215491: 98). The Scottish Government's use of Levels of regional lockdown, according

to rate of Covid-19 transmission, presented some challenges for a nationwide police force. On 9 April 2020, the Scottish Government established an 'Independent Advisory Group (IAG) on Police Use of Temporary Powers', which reported on 25 August 2021. The IAG described the four Es approach as generally successful with high voluntary compliance overall, and non-compliance usually among people already known to Police Scotland. It also describes a shift of FPN use, from the breaching of stay at home orders during lockdown 1, to the breaching of rules prohibiting social gatherings in homes or private spaces in subsequent lockdowns (INQ000215491: 158). In that context, one reflection may be that issuing FPNs for being outdoors became inappropriate when knowledge of virus spread became more available.

Topic-based recommendations

Topic 1 Roles and responsibilities for emergency and pandemic preparedness

356. Reflect further on Covid-19 preparedness as the nature of the virus and policy problem changed from 2020-22. Until March 2020, there was a lack of preparedness related to adapting old pandemic influenza guidelines to new Covid-19. However, by May 2020 the UK and Scottish Governments had more information and had revised plans to deal with Covid-19 in the future. In that context, identify the key elements of Scottish Government preparedness that would apply in relation to future novel emergencies. When Scottish Government witnesses (for Module 1) described learning lessons, they referred generally to setting up Covid-19 inquiries, or to rapid trial-and-error learning when dealing with crises such as PPE supply. So far, it is difficult to see how the Scottish Government proposes to learn lessons from its lack of pre-2020 preparedness to boost future preparedness.

Topic 2 Learning from previous experiences of emergency response

357. Establish a Division within government dedicated to fostering lessons from international experience and reflecting on their applicability to lessons learned from within government (rather than, for example, relying on a Foreign and Commonwealth Office unit to perform that task). This task is essential to bringing together (1) analytical civil servants gathering and sharing new insights from research, and (2) operational civil servants developing experiential knowledge without having the same opportunities to share as well as learn lessons.

Topic 3 The challenges caused by Covid-19

358. Produce an updated account of the 'Scottish approach' that makes a clear distinction between (1) aspirations for decision-making, and (2) how decision-making actually works in the Scottish Government. Develop a general guide to Scottish Government operations which consolidates multiple descriptions of decision-making, including the NPF focus on whole-government approaches, the mechanisms to ensure ministerial accountability to Parliament, and how to understand the intersection between UK and Scottish decision-making. This account should be accessible and understandable to a typical citizen.

Topic 4 Phases of Scottish Government decision-making

359. Produce a comprehensive account of the Scottish Government science advisory system, reflecting on initial reliance on (and access to) SAGE and other UK bodies, the rapid establishment of new sources of advice, and new work such as by the Standing Committee on Pandemics (described in paras 112, 122). Reflect on how narrow science advice on epidemiology relates to the wider four harms discussions. For example, is there a mechanism for the civil service to consolidate this information and advice? Or, is this consolidation necessarily a matter for individual ministerial judgement?

Topic 5 Scottish Government communication

360. Provide more open reflection on issues regarding Scottish Government communication to the public. Multiple Scottish Government submissions provide an expansive and evidence-informed account of the problems of UK government conduct and communication, such as when noting the negative impact of its treatment of Dominic Cummings. However, it does not provide

equivalent levels of reflection on how it addressed and communicated in relation to similar problems, such as initial Scottish Government support for Dr Catherine Calderwood before – and a rapid shift in personnel and roles after – her resignation.

Topic 6 Parliamentary procedures and mechanisms

361. Co-produce with the Scottish Parliament a new set of guidance on how to seek parliamentary approval, and ensure parliamentary scrutiny, during emergencies. The Scottish Parliament emergency process was able to deal with Scottish Government business quickly, but not in a way that guaranteed sufficient scrutiny during the production of policies with profound societal and economic impacts. This process should include reflections on how to deal with the two-fold lack of Scottish Parliament scrutiny when key Scottish ministerial powers are provided by UK legislation.

Topic 7 Funding Covid-19 policy

362. Explore the potential for meaningful National Audit Office (NAO) coordination of four nations audits, or at least a co-produced reflection on what happened and how it could be audited well. A key element of UK and devolved government testimony has described (a) four nations activity, and (b) the inability to separate devolved and UK influence on devolved government policy, since it was so dependent on UK government financial and legislative support. If so, the formal separation of NAO and Audit Scotland responsibilities for audit does not address the blurry boundaries between UK government and Scottish Government responsibilities for spending.

Topic 8 Learning from successes and failings

363. Use a new Division (Topic 2) to oversee and evaluate the implementation of policy lessons to arise from Inquiry processes. This pursuit of lesson-drawing relates to different categories of decision-making, including:

- Using the Covid-19 experience to prepare for the next novel pandemic.
- Learning how to gather evidence and make informed choices during a period of unusually high uncertainty characteristic of novel emergencies.
- Learning how to manage decision-making processes in the face of different pressures. For example, the Scottish Government juggles two contradictory policymaking drivers: to *decentralise*, to encourage cooperation among public bodies with the knowledge and discretion to act in relation to local circumstances (a feature of the general language of emergency preparedness); and, to *centralise*, to encourage uniformity in response, and clear lines of communication and accountability.

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Annex 2: Matters to be addressed from Letter of Instruction

Professional Background and Expertise

Please provide details about your academic qualifications and professional experience. In particular, please provide details about your roles and responsibilities as:

- a. Professor of Politics and Public Policy in the Division of History, Heritage, and Politics, University of Stirling including your research interest in the fields of politics and public policy;

Paul Cairney's research expertise spans comparisons of policy theories and their methods (to explain how policymaking works), international policy processes (such as to compare the UK with other political systems), UK and devolved policymaking (and Scottish Government in particular), and sectors such as environmental and health policy (including public health). He has written or co-written 14 books, 97 articles in international peer reviewed journals, and 31 chapters in edited books. To date, his research has been cited by other research over 13000 times.

- b. Special Advisor to the Scottish Parliament's Commission on Parliamentary Reform (2017);

Cairney's role included to advise the commission on how research on the Scottish Parliament could inform its deliberations. He worked regularly with the Chair and senior Clerk to inform its report. In 2023, Cairney was a Special Advisor to the Scottish Parliament's Finance and Public Administration Committee. His roles included to (1) produce a report – then provide oral evidence - to inform the Committee's thinking about the inquiry 'Effective Scottish Government decision-making', (2) work regularly with the senior clerk to inform the analysis of written and oral evidence, and (3) advise the committee on who to call as witnesses and how to interpret their findings.

- c. Editor of (i) the journal Evidence & Policy (2020-21, with Professor Kat Smith) (ii) the Politics of Evidence Based Policymaking section of Humanities & Social Sciences Communications (2017-20) (iii) Special Issues of Politics & Policy (2018, with Professor Chris Weible) and (iv) the Journal of European Public Policy (2022);

Cairney was co-editor of Evidence & Policy (with Professor Katherine Smith) for 18 months. His roles included to (1) assess the quality and relevance of submitted research, (2) work with colleagues to commission referee reports, and (3) decide if research should be published, revised or rejected. For Humanities & Social Sciences Communications, he oversaw the production of a Special Issue on 'the politics of evidence based policymaking', which included commissioning articles from key experts, co-authoring articles with key actors in policy and practice (such as the European Joint Research Centre), and deciding which papers should be published. For Politics & Policy, he co-edited (with Professor Chris Weible) the Special Issue 'Practical Lessons from Policy Theories', which sought to publish articles using policy theories to inform how policy actors (and researchers) should think about and engage in policymaking systems. For the Journal of European Public Policy, he edited the Special Issue 'The politics of policy analysis: theoretical insights on real world problems', which encouraged new insights on how policy actors can address existential policy problems such as climate change and global public health. The overarching theme of this work is the contribution of policy theories (or the empirical study of policymaking) to policy and practice, to

encourage policy actors and researchers to base their expectations (such as for evidence-informed, integrated, and coherent policy) on policymaking reality.

2. Please provide details about any reports, articles or papers you have published about the response of the Scottish and/ or UK Government to the Covid-19 pandemic.

The list below is abridged from Cairney's Wordpress page <https://paulcairney.wordpress.com/covid-19/> - which lists all relevant activity (including a series of blog posts connected to the articles or chapters listed below). Most of this research focuses on UK government decision-making, with the exception of (1) a co-authored (with Dr Sean Kippin) focus on how the UK and devolved governments addressed their exams crises during COVID-19 'lockdowns', and (2) a brief contribution to the Scottish Parliament's Citizens' Panel commissioned to support the work of the Covid 19 Committee (based on these written notes <https://paulcairney.files.wordpress.com/2021/01/cairney-scottish-parliament-covid-23.1.21.pdf>).

Most recent activity:

1. Draft introduction to a UK COVID-19 policy book in progress (draft [Chapter 1 Cairney OUP UK COVID-19 12.4.22](#)).
2. Published (November 2023) book on [UK policy and policymaking](#) (draft [Chapter 6 Responding to crisis: COVID-19 policy and policymaking](#))
3. Paul Cairney and Federico Toth (2023) 'The politics of COVID-19 experts: comparing winners and losers in Italy and the UK', *Policy and Society*, <https://doi.org/10.1093/polsoc/puad011>

COVID-19 Publications in academic journals or books (largely focusing on 2020)

1. Christopher Weible, Daniel Nohrstedt, Paul Cairney, David Carter, Desera Crow, Anna Durnová, Tanya Heikkila, Karin Ingold, Allan McConnell & Diane Stone (2020) 'COVID-19 and the policy sciences: initial reactions and perspectives', *Policy Sciences* <https://doi.org/10.1007/s11077-020-09381-4>
2. Paul Cairney and Adam Wellstead (2020) 'COVID-19: effective policymaking depends on trust in experts, politicians, and the public', *Policy Design and Practice* <https://www.tandfonline.com/doi/full/10.1080/25741292.2020.1837466> (PDF)
3. Paul Cairney (2020) 'The UK Government's COVID-19 policy: assessing evidence-informed policy analysis in real time', *British Politics*, <https://rdcu.be/b9zAk> (PDF)
4. Paul Cairney (2021) "The UK government's COVID-19 policy: what does 'guided by the science' mean in practice?", *Frontiers in Political Science*, [doi: 10.3389/fpos.2021.624068](https://doi.org/10.3389/fpos.2021.624068)
5. Sean Kippin and Paul Cairney (2021) 'The COVID-19 exams fiasco across the UK: four nations and two windows of opportunity', *British Politics*, [PDF](#) & [Annex](#) & [LSE blog](#)
6. Sean Kippin and Paul Cairney (2022) 'COVID-19 and the second exams fiasco across the UK: four nations trying to avoid immediate policy failure', *British Politics*,

forthcoming (Exams 2 Annex:

<https://paulcairney.files.wordpress.com/2021/11/exams-2-annex-5.11.21.pdf>)

7. Paul Cairney (2021) 'Evidence-informed COVID-19 policy: what problem was the UK Government trying to solve?' in (eds) John Bryson, Lauren Andres, Aksel Ersoy, and Louise Reardon *Living with Pandemics: Places, People and Policy* (Cheltenham: Edward Elgar) [PDF https://paulcairney.files.wordpress.com/2021/08/cairney-uk-covid19-problem-def-for-reardon-et-al-v2-5.10.20.pdf](https://paulcairney.files.wordpress.com/2021/08/cairney-uk-covid19-problem-def-for-reardon-et-al-v2-5.10.20.pdf)