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Scottish Parliament
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Dear Murdo

CORONAVIRUS ACT 2020: REVIEW AND EXPIRY OF DEVOLVED PROVISIONS

Thank you for your letter of 1 May.

I very much recognise the importance of the matters which the Committee has raised and have responded to each of the questions below, though in doing so I am mindful that, as we are not yet at the stage where any provisions are being considered for expiry, it is difficult at present to predict the circumstances in which these powers may be used. Nonetheless, the Committee rightly notes that important decisions will need to be taken in due course, not just on expiry of provisions but on how this is done. I have asked officials to ensure this is included within ongoing official-level engagement between the four nations on the operation of the Act, to ensure the steps leading up to taking these decisions are being considered before the powers need to be used.

Taking each of the questions raised by the Committee in turn:

(i) Section 90 of the UK Act confers power on either the Scottish Ministers, or a Minister of the Crown with consent of the Scottish Ministers, to change the expiry date of devolved provisions in the Act. What factors does the Scottish Government consider will determine whether that power is exercised by Scottish or UK Ministers?

The arrangements covering expiry of provisions whereby powers can be exercised by either Scottish Ministers or UK Government Ministers (with the consent of Scottish Ministers) are similar to those which apply to commencement, where - in areas which are within devolved competence and where provisions extend to Scotland - powers can be commenced by Scottish Ministers or they can consent to UK Ministers doing so. In such cases, when deciding whether to consent, Ministers will consider the effect of the SI but also whether it is appropriate for this to be done by way of UK SI rather than an SSI.

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The principle behind this approach is to recognise and accommodate UK-wide arrangements to ensure consistency where needed, but to also ensure that devolved matters can be fully analysed and considered, and decisions taken, to suit the circumstances in Scotland.

In advance of our first report to Parliament and in the early stages of operating the powers in the legislation, we are not yet at the point where any provisions have been proposed for expiry either by Scottish Government or by UK Government, or by another Devolved Administration in the case of UK-wide powers. At the point of a proposal to change the expiry date we would expect there to then be consultation between the administrations and, if a power in the UK Act was deemed to be no longer necessary in Scotland, that would then be a matter for discussion between the Scottish Government and the UK Government.

Whilst it is not possible to say with certainty how these processes would operate at this point, given they have not yet had to be used, we would expect that a relevant factor in deciding who exercises the powers relating to changing the expiry date of provisions would be the extent to which the provision was considered no longer necessary or appropriate.

For example, the Scottish Government could identify that a provision is no longer necessary nor appropriate in Scotland, but it could be deemed to continue to be necessary or appropriate elsewhere in the UK. Alternatively, bringing forward the expiry date of a provision could be proposed by one of the other nations, and supported by others. If there were an agreed position across the four nations on expiry it might be appropriate for powers to be exercised by UK Ministers in the same way as can be done for commencement of certain provisions. If the decision on expiry related to Scotland only, or to a provision which only applied to Scotland, we would expect that to be undertaken by Scottish Ministers. But in all cases, full consultation would be required before a decision was taken, in line with the principle of the four nations approach.

(ii) Where the power is exercised by UK Ministers with Scottish Ministers' consent, the regulations will be laid in the UK Parliament only. How will the Scottish Government facilitate scrutiny by the Scottish Parliament of the decision to alter the expiry date of relevant provisions?

Were the Scottish Government to give its consent to UK Ministers exercising power to alter the expiry date of a provision, we would expect the decision that the provision no longer continued to be necessary to have been informed by our own reporting process and reports to Parliament on the legislation. It would, therefore, be open to Parliament and to this Committee in particular to scrutinise as part of its consideration of our report.

We would only give consent in such cases based on evidence that this was appropriate to the operation of the provision in Scotland.

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(iii) Sections 97-99 give the UK Parliament a role in scrutiny of when non-devolved provisions of the UK Act should be switched off. Section 98 in particular requires expiry regulations to be brought forward if the UK Government's motion to continue the effect of such provisions is rejected. There is no equivalent for parliamentary scrutiny of the devolved provisions of the Act. How does the Scottish Government intend to keep Parliament informed of the status of the provisions of the Act and the government's view on the appropriate time for expiry, and to seek Parliament's views on those matters?

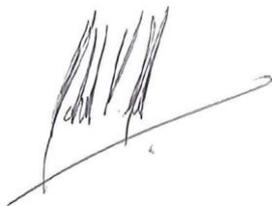
Whilst there is no equivalent for the Devolved Administrations of the six month parliamentary review which was added by amendment during the Act's UK parliamentary passage, our reporting to Parliament will include our conclusion on the continuity necessity of provisions. Through this we would identify those provisions which are deemed to continue to be necessary following the end of each reporting period, and any which are deemed no longer necessary and therefore are considered for expiry.

I would, therefore, expect this reporting process to be the route to inform the Parliament on the Scottish Government's view on the appropriate time for expiry if provisions are no longer considered necessary, and that our engagement and participation in the Parliament's scrutiny of those reports would offer this Committee and the wider Parliament as a whole the ability to provide its view on these matters.

(iv) Would it be appropriate to amend the UK and/or Scottish Acts to replicate the effect of section 98 for devolved provisions?

Any proposal to amend the UK Act in this way would need to secure both the UK Government and other Devolved Administrations' agreement, and would require all legislatures to then agree on necessity for this process and how it would operate. In view of the likely timescales and complexity set against the urgent needs of the present situation in responding to the pandemic, it is our view that a legislative solution is unlikely to be available.

I do however recognise the importance of the point that is raised. I suggest, therefore, that my officials and the Committee clerks could discuss what non-statutory options exist to provide the Committee and Parliament with a form of equivalent scrutiny role to that set out in section 98 of the UK Act.



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