



Law Society
of Scotland

Coronavirus Bill

Law Society of Scotland briefing for second reading

March 2020



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. The Society sets and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

The Society has a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. The Society seeks to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

We have a number of observations to make on the Coronavirus Bill (HC Bill 122), due to receive its Second Reading on Monday 23 March 2020. Our Public Policy Committee is leading in this response, with additional comments put forward by several of its specialist subcommittees.

If you would like to discuss this paper or would like more information on the points raised, please contact us via the details at the end of the paper.

General remarks

The World Health Organisation (WHO) has stated that "Countries must take a whole-of-government, whole-of-society approach, built around a comprehensive strategy to prevent infections, save lives and minimise impact". At a media briefing on 11 March 2020, WHO's Director General, Tedros Adhanom Ghebreyesus said. "We're in this together, to do the right things with calm and protect the citizens of the world."

The Coronavirus Bill is a significant measure which touches on many aspects of life and potentially limits many rights which we currently enjoy across the UK. It contains 87 clauses and 27 Schedules and is being considered at pace in Parliament. In other circumstances we would highlight the need to scrutinise the legislation carefully and not to sacrifice that scrutiny for speed. However the nature of Covid-19 and the fast evolving threat it poses to the community at large are potentially devastating, so the law's response must match that level of threat with alacrity.

This does not mean that there should not be close scrutiny of how the legislation will work in practice and each legislature in the UK will need mechanisms to ensure that scrutiny will take place in a searching and comprehensive manner. We suggest a quadripartite parliamentary group (representing a whole-of-government approach) should be formed to undertake this task.

We note the terms of clauses 83 and 84 which relate to Parliamentary consideration of the status of non-devolved provisions of this Act.

Clause 83 provides for a report to be made by the Secretary of State every two months on the status of non-devolved provisions of the Bill.

Clause 84 applies where the Act substantively operates for more than a year from the day on which the Act is passed.

Under this clause a Minister of the Crown must make arrangements for a motion in neutral terms to be moved in the House of Commons to the effect that the House has considered the one-year status report, to be moved in that House. A motion to take note of the report should also be moved in the House of Lords.

Clause 83 imposes a duty upon the Secretary of State to make a report at two monthly, regular intervals as to whether certain non-devolved provisions continue to be appropriate. There does not appear to be an equivalent for Scotland of clause 83 for devolved provisions extending to Scotland. Nor is there an equivalent for clause 84 (which relates to Parliamentary consideration where certain non-devolved provisions last longer than one year).

This may be an issue which the Scottish Ministers will seek to legislate upon in a bill they bring forward in the Scottish Parliament. It would be helpful, however, if the Government explained its understanding of how reporting on devolved provisions extending to Scotland is to be addressed.

Our approach to the bill

There are four broad themes which set the context for our comments on the Bill. They are Parliamentary scrutiny and the rule of law, respect for human rights, devolution and other public health legislation.

Parliamentary Scrutiny and Rule of Law

The provisions of this Bill fall within two broad categories:

- A. Henry VIII powers to suspend, modify or grant indemnity from existing statutory laws or common law (eg delict in clause 11), and powers to suspend or revive other provisions of the Bill including to amend provisions of the Act (clauses 6 and 77).
- B. Those which confer new powers (eg the powers in Schedule 20, Part 3) in order to deal with the coronavirus pandemic.

Parliamentary scrutiny of the Bill will be extremely constrained. In the House of Commons the Bill will, subject to the agreement of the House, be considered at Second Reading, in Committee and at Report

Stage for a combined total of 10 hours on 23 March. This is a remarkably short period for scrutiny of such an important bill. In the House of Lords consideration of the Bill is scheduled for 24 and 25 March.

This short timetable and many of the provisions in the Bill would, in other circumstances, be regarded as unacceptable, but we take the view that this approach can be justified by reference to the emergency in which the country finds itself.

We take the view that the ordinary rules of judicial review will apply to regulations made under the Coronavirus legislation.

Respect for Human Rights

We welcome the publication of the Human Rights Memorandum from the Department for Health and Social Care. The Memorandum deals comprehensively with ECHR compliance under the Bill. We would like to highlight some particular features.

Provisions in the Bill engage the European Convention on Human Rights (ECHR) in a number of respects for example Clause 49 and Schedule 20 enable the detention of potentially infectious persons.

Article 5 ECHR asserts the right to liberty and security of the person and that no one should be deprived of liberty except in accordance with a lawful procedure. However lawful detention of persons is compliant with ECHR for the prevention of the spreading of infectious diseases (Art 5(1)(e)).

Provisions in the Bill engage Article 8 (Right to respect for private and family life). We note that there “shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of...public safety or the economic well-being of the country, for the protection of health...or for the protection of the rights and freedoms of others (Art 8(2)).

Similar considerations apply to the exercise of Article 9 rights of freedom of thought, conscience and religion which are subject to limitations prescribed by law and are necessary...in the interests of public safety, for the protection of...health. Similarly to Article 11 which allows restrictions on freedom of peaceful assembly and association which are necessary in a democratic society in the interests...public safety...for the protection of health.

It is clear that Article 5, 8, 9 and 11 rights are qualified, not absolute and that their exercise in current circumstances will be balanced with the wider interests of public safety and the protection of individual and community health.

The Human Rights Act 1998 applies to the acts of public authorities under the Bill and we encourage public authorities which undertake coronavirus functions to ensure that compliance with Convention rights

continues and that human rights and the law are respected when applying the provisions of the Coronavirus legislation.

Devolution

There is a convention, declared in the Scotland Act 1998 Section 28(8), that the UK Parliament will not normally legislate with regard to matters that are within the legislative competence of the Scottish Parliament without the consent of the Parliament.

Many of matters to which the Bill relates are within the legislative competence of the Scottish Parliament.

Subject to the Parliament's agreement the Legislative Consent Motion for the Coronavirus Bill will be debated by the Scottish Parliament on Tuesday, 24 March.

There are different legal systems operating in the various jurisdictions but there needs to be a "consistency of outcomes [to be] achieved by making the range of tools and powers consistent across the UK."¹

There is recognition that provisions in the Bill "can be commenced from area to area and time to time, so as to ensure that the need to protect the public's health can be aligned with the need to safeguard individuals' rights." Such measures can subsequently be suspended and then later reactivated, where circumstances permit, over the lifetime of the legislation (Paragraph 7 of the Explanatory Notes). The Scottish Government will bring forward Coronavirus legislation relating to devolved matters in the near future.

Civil Contingencies Act 2004 and other Public Health legislation

Legislation already exists to deal with circumstances related to pandemic disease.

The [Civil Contingencies Act 2004](#) is the current legislation covering emergencies and creates a framework for civil protection in the UK. The Act provides for local arrangements for civil protection and the employment of emergency powers under Orders in Council.

The emergency powers in the Act allow for temporary regulations to deal with serious emergencies. Emergency powers under the Act are subject to rigorous safeguards and can only be used in exceptional circumstances.

¹ See Paragraph 5 of the Explanatory Notes (<https://publications.parliament.uk/pa/bills/cbill/58-01/0122/en/20122en.pdf>).

The [Public Health \(Control of Disease\) Act 1984](#) (amended by the Health and Social Care Act 2008) as respects England and Wales and the Public Health (Scotland) Act 2008 include quarantine, detention and medical examination, and other powers, for local authorities and Health Boards.

The Government should explain how these laws will interact with the Coronavirus legislation.

Specific Comments on clauses

We propose in this section to comment only on provisions which apply to Scotland.

Part 1

Main Provisions

Interpretation, Emergency registration of health professionals, Temporary registration of social workers, Emergency volunteers.

Clauses 1, 2, 3, 6, 7, and 8, 11 and schedules 1, 2, 5, 6 and 7

Our comments

We have no comment to make.

Registration of deaths and still-births etc

Clause 17(2) (and Part 2 of Schedule 12), Clause 19 (and Schedule 13)

Our comments

Clauses 17(2) and 19 and Schedules 12 part 2 and 13 of the Bill apply to Scotland. The provisions include:

- a. Amending the Burial and Cremation (Scotland) Act 2016 to allow any relative of the deceased to complete the cremation application form.
- b. Changing the review of death certificates under the Certification of Death (Scotland) Act 2011.
- c. Suspending review of certificates by the Death Certification Review Service (DCRS). The Bill will enable Scottish Ministers to suspend this system to free up medical personnel and expedite the disposal of bodies.

The Bill makes similar changes to the relevant legislation relating to England and Wales and Scotland to streamline processes.

The impact of these provisions regarding the reporting of deaths to the Crown Office and Procurator Fiscal Service (COPFS) is unclear. COVID-19 is a notifiable disease and in those circumstances the issue of cremation forms and the processes is undertaken by COPFS.

Suspension of DCRS has implications for scrutiny of cremations but may be justified in the public interest.

It will be important for appropriate information about these changes to be available to the public.

Investigatory powers

Clause 21

Our comments

Clause 21(5) provides for notification of appointments of judicial commissioners. The regulations should also provide for notification to the Scottish Ministers of the appointment of temporary Judicial Commissioners. It would seem relevant that the Scottish Ministers should have such official notice as they have a role under the Investigatory Powers Act 2016 in the appointment of Judicial Commissioners. Under section 227 of the Investigatory Powers Act 2016 the Prime Minister appoints Judicial Commissioners. Section 227(5) states: "Before appointing any person under subsection (1) the Prime Minister must consult the Scottish Ministers.". In light of this, it would seem appropriate that notification of the appointment of temporary Judicial Commissioners should also be given to the Scottish Ministers.

Food supply

Clauses 23 to 27 (and Schedule 14)

Our comments

Clause 25(2)(c) provides "in a case where the recipient is not a government authority, the information is anonymised".

It is not clear what this information is likely to be or how it will be anonymised.

Disclosure: Scotland

Clauses 32 and 33

Our comments

Clauses 32 and 33 concern the suspension of disclosure requirements in Scotland.

These allow Scottish Ministers to disapply provisions under the Protection of Vulnerable Groups (Scotland) Act 2007 which could mean that those otherwise barred from carrying out work with children and vulnerable adults may be allowed a temporary reprieve.

While we recognise the potential stress on certain workforces during the crisis we have concerns that a direction that disapplies or modifies the Protection of Vulnerable Groups (Scotland) Act 2007 may be issued by the Scottish Ministers without any wider consultation.

Such a disapplication could have serious safeguarding issues for vulnerable people including children and adults with mental health issues. There should at least be the requirement to consult with the Children and Young People's Commissioner Scotland and the Mental Welfare Commission for Scotland.

Schools, childcare providers etc

Clause 35 (2) (and Part 2 of Schedule 15)

Our comments

Schedule 15 (13) provides that the published version of the direction must not identify any individual without their consent.

We agree with this approach.

Powers to direct suspension of port operations

Clause 48 (and Schedule 19)

Our comments

Under paragraph 3 of Schedule 19 the Secretary of State may give directions to "any person" requiring that person to make arrangements of various kinds. Given the width of the term "any person" it could include a private company or some other non-public entity or natural person. No mention is made, however, of the

Secretary of State being required to make payment for what is required. Clarity is required on whether that is a reasonable outcome and what is envisaged in practice.

Powers relating to potentially infectious persons

Clause 49 (and Schedule 20)

Our comments

Schedule 20 paragraph 2(3) it refers to notification of an “infected area” being published in the London Gazette.

There are other notification provisions in the Bill which refer to the Edinburgh Gazette (eg Schedule 20 paragraph 25(3), Schedule 21(12)(3)) or the Belfast Gazette. It would seem that the paragraph 2(3) provision should apply to all the Gazettes published in the UK.

We note the powers that a public health officer, police constable and immigration officer will have where they have “reasonable grounds to suspect” that an individual is “potentially infectious”. It may be that widely drafted powers are necessary for the coronavirus situation, but this provision could be clearer.

It would be helpful if Ministers could give examples of what they envisage would be “reasonable grounds” for suspicion in this context.

There is a discrepancy in the offence provisions in Schedule 20. The criminal sanction which an English court can apply under Schedule 20 paragraph 23(2) is limited to a fine and does not include imprisonment.

However under Schedule 20 paragraph 45 (2) all offences prosecuted in a Scottish court are triable only summarily and carry a 12 month maximum sentence or a fine not exceeding level 5 (£5000).

The maximum sentence would be subject to the presumption against short sentences. The Presumption Against Short Periods of Imprisonment (Scotland) Order 2019 extended the presumption against short prison sentences from three to 12 months. The legislation is not a ban on short sentences of less than 12 months nor are they completely abolished — there is simply a presumption against such sentences unless the court considers that there is no other method of dealing with the person.

We would like to seek an explanation for the different penalty levels applicable per jurisdiction for the same breach of the law.

Powers relating to events, gatherings and premises

Clause 50 (and Schedule 21)

Our comments

These provisions enable the Secretary of State to prohibit or restrict events and gatherings, and to close premises, if the public health situation requires such action.

This streamlines existing legislation in England and Wales, to ensure events or gatherings can be prevented quickly. The power is extended to Scotland and Northern Ireland where there is no equivalent legislation.

Schedule 21 paragraph 9(2) deals with offences for England and Wales where a person guilty of an offence under this paragraph is liable on summary conviction to a fine.

On the other hand for Scotland, Schedule 21 paragraph 20(2) provides a person guilty of an offence under this paragraph is liable on summary conviction, to a fine not exceeding the statutory maximum, or on conviction on indictment, to a fine. Again there is no reason given for this divergence in penalties.

Final provisions

Clause 75

Clause 75 provides for the Bill to expire two years after it has been passed, subject to certain exceptions in clause 75(2) and subject to clause 76 which allows the period to be extended or shortened for certain purposes. These provisions may cause confusion as whether and when any particular provision has expired.

The following main questions arise:

- a. Why is the Bill's duration two years if the epidemic is likely only to last one year?
- b. Why not provide for the Bill to expire after one year but, to allow for flexibility, make provision for certain provisions to be extended for a further period by regulations subject to affirmative procedure?

Clause 76 of the Bill allows a "relevant national authority" which includes Ministers of the Crown and Scottish Ministers to alter the expiry date for any provision of the Bill. The relevant national authority can bring the provisions to an end six months earlier or six months later than the two-year period provided for in section 75.



For further information, please contact:

Michael Clancy

Head of Law Reform

Law Society of Scotland

DD: 07785 578333

michaelclancy@lawscot.org.uk