



Law Society
of Scotland

Coronavirus (Scotland) Bill

Law Society of Scotland briefing

Stage 1 Emergency Debate

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. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have 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. We seek 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 (Scotland) Bill, introduced to the Scottish Parliament as emergency legislation on 31 March 2020 and due to pass through all Stages on 1 April 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 comments

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 (Scotland) 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 17 Sections and 7 Schedules and is being considered under Rule 9.21 of the standing Orders of the Parliament relating to Emergency Bills. 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, the fast evolving threat it poses to the community at large are potentially devastating and 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 the Parliament will need mechanisms to ensure that scrutiny will take place in a searching and comprehensive manner. When commenting on the Coronavirus Act whilst it was being considered in the

UK Parliament last week we suggested a quadripartite parliamentary group (representing a whole-of-government approach) should be formed to undertake this task.

Our approach to the Bill

There are three 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, and other public health legislation.

Parliamentary Scrutiny and Rule of Law

The Bill is subject to emergency bill procedure in the Scottish Parliament.

Rule 9.21 of the Standing Orders of the Parliament relating to Emergency Bills enables Parliamentary scrutiny of the bill to be extremely curtailed. The Stage 1 debate is according to the Business Bulletin scheduled to begin at 9:30 on Wednesday 1st April. After Ministerial Statements, Stage 2 will take place with what will be a limited opportunity to amend the bill. This is followed by the Stage 3 debate with Decision Time at 6pm. This is a remarkably short period for scrutiny of such an important bill.

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 they can be justified by reference to the current emergency.

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

Respect for Human Rights

We welcome the respect for Human Rights in the Explanatory Notes and Policy Memorandum. 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.

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 (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)).

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.

The [Public Health \(Scotland\) Act 2008](#) includes 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 Act 2020 and this Bill.

Specific Comments on clauses

Part 1

Main Provisions

Section 1 Meaning of Coronavirus

We have no comment to make.

Section 2 Eviction from dwelling houses and Schedule 1

Our Comments

Schedule 1 temporarily extends the notice periods for all evictions, except in certain cases. The provisions also make temporary changes to private rented sector repossession cases going before the First-Tier Tribunal (Housing and Property Chamber).

The Tribunal will have discretion to consider whether it is reasonable in the circumstances to issue an evictions order. The Tribunal already exercises discretion in relation to some eviction grounds.

Schedule 1 will help to provide certainty to tenants in the current circumstances, where they may be struggling to pay their rent. It is important that the interests of landlords and tenants are appropriately

balanced. Furthermore, it will be important for landlords to have sufficient financial support to allow for them to meet or suspend their own liabilities, for example, in circumstances where they rely on rental income which is not being paid by a tenant.

We note that the Bill's Policy Memorandum highlights at paragraph 31 that "consideration has been given to the impact of the provisions on a landlord's human rights with regards to their ability to be able to regain possession of their property in relation to Article 1, Protocol 1[ECHR]." Paragraph 8(1) makes broad provision for Scottish Ministers to make certain modifications, including altering the notice periods provided for by the Bill. We consider the restriction in paragraph 8(2) providing that these powers "may not be exercised so as to result in a period of time being specified that is in excess of six months" is appropriate in the circumstances and will help to ensure that an appropriate balance is struck.

In relation to paragraph 10(1) which concerns errors in notices, we note that this provides that a notice is not invalid by reason of error by failing to take proper account of paragraphs 1 to 9. We note that it is important that awareness raising of these provisions is undertaken so as to ensure proper preparation of notices where at all possible.

Section 3 Temporary extension of moratoriums on diligence and Schedule 2

Our Comments

We have no comments to make.

Section 4 Children and vulnerable adults and Schedule 3

Our Comments

Schedule 3 Part 1 Children

It is imperative that children continue to be protected during the current emergency and it is sensible to adjust the way Children's Hearings, Child Assessment and Child Protection Orders operate.

Para 1: We interpret the reference to 'members' as meaning that there need not be more than two panel members but could not be only one for a hearing. On that basis this seems sensible in the circumstances.

Para 2: The doubling of time limits is reasonable in the circumstances and ensures that orders will not simply fall, and therefore the changes should operate without much difficulty. Depending on how long the emergency lasts there may need to be some transition arrangements for the point at which the hearings become due.

Para 3: We take the view that blanket extension of supervision orders by six months may be excessive. We suggest the extension should be three months to allow for system to be adjusted.

Para 8: We welcome the addition of the right of relevant persons and the child to ask a pre-hearing panel to allow for remote attendance for those affected by coronavirus.

Schedule 3 Part 2 Vulnerable Adults

Para 11(1)

We note that this paragraph amends section 13ZA of the Social Work (Scotland) Act 1968 by removing the requirement that a local authority providing a service to an incapable adult must take into account the present and past wishes and feelings of the adult and the views of other interested parties (in terms of the Adults with Incapacity Scotland Act s1(4))- in other words they can move a person with incapacity into a care home even if the adult or their family have objected. We note that this paragraph also amends section 13ZA of the 1968 Act to allow a local authority to take steps to provide community care services to an incapable adult in cases where there is a guardian, welfare attorney or intervener with powers relating to the proposed steps, without obtaining the consent of that person.

We note that these provisions are an exception to the general position that the Bill comes in to force the day after Royal Assent, and that further Regulations will be required to bring these provisions into force at a later date. However we remain concerned about the potential impact of these provisions on the fundamental rights of adults with incapacity, including under Articles 5 and 8 of the ECHR where the adult lacks capacity to consent to such arrangements. This may be particularly acute where the care arrangements proposed amount to a deprivation of liberty.

We acknowledge that urgent measures may be necessitated by the emergency and that hospitals and local authorities must make the best use of limited beds and resources but we highlight the need for an effective mechanism to ensure that those subject to arrangements made under these provisions have access to legal review of the arrangements once the immediate emergency has abated.

We also highlight the need for close monitoring and proper record keeping in relation to arrangements made under these provisions to ensure that the rights of those involved are protected.

Para 11 (2)- (3)

We have no comments to make

Section 5 Justice and Schedule 4

Our Comments

Schedule 4 Part 1 Courts and Tribunals: conduct of business by electronic means

Paragraph 1-3

This paragraph seems sensible, in that it allows service of documents electronically. Electronic communications have become vital.

The definition of electronic signature refers to the Electronic Communications Act 2000. This has been in place for 20 years and therefore is not entirely innovative although its use in criminal law is relatively limited.

We support in general paragraphs 2 and 3 which provide for participation in hearings by electronic means. Paragraph 3(7) permits both accused persons and witnesses to participate electronically in trials, provided the appropriate direction is given by the court.

The Bill does not provide detail about practical considerations such as the need for a secure and reliable data link, or HD standard or better sound and video quality. The system will also need to cope with presentation of documents so that evidence referred to by a lawyer can be seen by both the accused and the witness.

At the same time, the system has to be flexible. It should be easy for the remote parties to connect – they should not need to download software or it should be easy for the remote parties to connect. Ideally this will be available cross-platform and will not require the need to download software.

Paragraph 1(3)

For the purposes of sub-paragraph (2)— 20 (a) electronic transmission of a document by one person (“the sender”) to another person (“the recipient”) must be effected in a way that the recipient has indicated to the sender that the recipient is willing to receive the document.

There are concerns about what happens if the recipient solicitor no longer acts for the accused. On the basis that this provision is enacted, the Law Society would welcome the opportunity to be consulted on the regulations.

Paragraph 6

We note that the definition of “tribunal” for the purposes of this Part does not include the Mental Health Tribunal for Scotland, which has not been transferred to the First-Tier Tribunal for Scotland. We believe it should.

Schedule 4 Part 2 – Fiscal fines

It is not clear why the remit of Fiscal Fines is being increased and it would be helpful for the Government to explain its policy in this area.

Schedule 4 Part 3 Cases beginning with an appearance from custody

We have no comments to make.

Schedule 4 Part 4 – Time limits

We interpret this Part as meaning that solemn time limits are being extended by six months and summary custody time limit by three months.

The rationale for the need for a statutory extension should be provided by the Government. Extensions could be dealt with on a case by case basis, with judges taking the current circumstances into account.

We also have concerns about the increase of time limits in summary cases, as this could mean that someone is imprisoned for more than 40 days when the maximum sentence could be subject to the presumption against short sentences and be twelve months or less.

Schedule 4 Part 5 Trials on indictment

We note that Scottish Ministers may by regulations provide that trials on indictment are to be conducted by the court sitting without a jury.

This proposal, if enacted, would be a fundamental change to the Scottish criminal justice system. Pleas of the Crown such as murder and rape must at present be heard in the High Court before a judge and jury. Trial under solemn procedure with a jury often takes place in the Sheriff Court.

Ministers would have to ensure that such a change has been considered very carefully, is a proportionate and time limited measure and has been properly balanced against the current emergency situation as a result of coronavirus and its potentially fatal consequences where social distancing cannot feasibly be observed.

The potential for a case backlog during the current crisis would not, on its own, be sufficient reason for such a departure.

Accordingly, we are unable to support the terms of Schedule 4 Paragraph 11 concerning the power of Scottish Ministers to provide by regulations that trials on indictment are to be conducted by the court sitting without a jury. We need further information about the content and terms of the regulations which are envisaged under this paragraph. Paragraph 11 (2) provides that regulations may be made only if Scottish Ministers are satisfied that the making of regulations is necessary and proportionate in response to coronavirus but no detail is provided about the considerations which will give rise to the regulations being made. This provision is premature in the circumstances and requires fuller consideration and consultation in order to avoid unintended consequences.

We are willing to assist the Scottish Ministers to ensure that the Courts continue their crucial and important work in this period of national emergency but the interests of justice and the rule of law are not served by taking the proposed step at this time.

Schedule 4 Part 6 Evidence

The proposed amendment to the Criminal Procedure Act 1995 section 259 affects the hearsay requirements and is of considerable potential concern. This could mean that a witness in a trial could give evidence and not be subject to evidence on oath or under cross examination. We cannot therefore support the extension of hearsay provisions contained in Schedule 4 Part 6.

Depending on the technology employed, the witness may be able to give evidence from their house, or from some other location.

One of the reasons for allowing hearsay, given in section 259(2)(a), is that the person is “by reason of bodily or mental condition, unfit or unable to give evidence in any competent manner”.

The Court will need to ensure witnesses do not attempt to avoid giving oral evidence when they are fit enough to give evidence, can do so by electronic means, but claim that would not be reasonably practicable.

Schedule 4 Part 10 Legal Aid

We agree with these provisions which provide the statutory authority for the Scottish Legal Aid Board to exercise flexibility in payment during the Emergency. We expect that there will be further regulations soon to provide the detailed rules.

Section 6 Alcohol licensing and Schedule 5

Our Comments

We welcome the provision that a personal licence holder who fails to comply with the three-month time limit as set out at s87(1) of the Licensing (Scotland) Act 2005, as a result of matters relating to coronavirus, is treated as having complied if the Board extends the period to allow training requirements compliance. We think it would be better if the Bill simply extended the three month period as per s87(1) to either six or even nine months to allow compliance.

Section 7 Functioning of public bodies and Schedule 6

Our Comments

Schedule 6 Freedom of Information paragraphs 5-8

It is not clear how the extended timescales will apply to requests made under the existing law but with a response deadline which takes the applicant into the extended period under this Bill. For example, should the Bill become law on Friday 3 April, it is not clear whether the timescale for a request made twenty working days before say Monday 6 April would be based on a timescale calculated when the request was received, or whether it would be subject to the extended timescale.

In the absence of any saving provisions retaining the shorter period for requests in the system, the extended deadlines will apply to requests such as this which are already in the system. If this is the intention this should be clarified in the interests of applicants and those responding to requests.

Schedule 6 Power to publish or make available documents for inspection electronically - paragraphs 10, 14 and 15

We welcome the provisions of paragraph 10 which relates to the power to publish or make available documents for inspection electronically and paragraph 15 which imposes the requirement to provide copies of committee documents.

We note that in relation to planning matters that paragraph 14 will allow for Local Review Bodies to be able to continue to operate without hearings being open to the public.

More generally, Schedule 6 paragraph 14 amends the Local Government (Scotland) Act 1973 section 50A so that the public can be excluded from council meetings "whenever it is likely that, if members of the public were present, there would be a real and substantial risk to public health due to infection or contamination with coronavirus".

Subsection (2) closes meetings where information has been provided by Government or is the meeting is restricted by a court order.

Subsection (4) allows an authority to exclude the public by resolution in respect of certain matters, but that would usually be the first order of business at the hearing in question. The consideration of the resolution is therefore public.

However, paragraph 14 does not specify who is to make that decision which may lead to issues of interpretation. If the intention is to ensure that hearings for the foreseeable future are to be closed to the public then it would be helpful to specify who is to assess the likelihood of risk – whether this is the Chief Executive or another senior officer, Scottish Ministers, the council leader or a committee chair or convenor. If it is to be the council itself (which would probably be the default in the absence of other provision) then that would require a meeting to take place in order to decide the point and this meeting would have to be open to the public until the decision had been made, which would seem counter-intuitive.

Section 8 Other measures in response to coronavirus and Schedule 7

Our Comments

Paragraph 6 concerns the irritancy of commercial leases, extending the 14 day notice period to terminate a commercial lease due to non-payment of rent to 14 weeks. We note that these provisions apply irrespective of whether a notice has already been served before the Act comes into force, provided the 14 day period has not already expired.

In respect of paragraphs 8-10, we welcome the extension of time limits to prevent planning permission or planning permission in principle lapsing because development has not begun within the immediate future. It is likely that there will be situations where development cannot commence due to current restrictions. We note, however, that the provisions do not cover those permissions which may have already lapsed before the “emergency period” begins, for example during March 2020.

We note that there is no similar extension provided in this Bill or other legislation in relation to listed building consents or consents under section 36 of the Electricity Act 1989 and there may be merit in consideration being given to these matters. We do note that the contents of the Electricity Act 1989 is a reserved matter. The implementation period of section 36 consents are sometimes extended by letter from the Scottish Ministers – that may provide sufficient reassurance in relation to such consents on an interim basis. In addition, consideration may require to be given to other specified time periods within the Town and Country Planning (Scotland) Act 1997, for example, those relating to purchase notices and blight notices.

Paragraphs 20-22 (Anatomy Act 1984: extension of periods)

We have no comments to make

Part 2

Supporting provisions

Section 9 Subordinate legislation making powers

Our Comments

The provisions of this Bill fall within two broad categories:

- a. Wide Ministerial powers to suspend or modify existing statutory laws or common law, and powers to suspend or revive other provisions of the Bill including to amend provisions of the Act, such as Sections 10 and 13.
- b. Those which confer new powers in order to deal with the coronavirus pandemic.

Sections 10 Power to suspend and revive provisions and Section 11 Expiry

Our Comments

Section 10 provides that regulations may suspend or revive the operation of any provision of Part 1 and may make different provision from area to area.

Section 11 provides for the Bill to expire on 30 September 2020 subject to regulations bringing the expiry date forward under section 12 or under 11(3) by extending the expiry date to 31 March 2021 or 30 September 2021.

The following main questions arise:

- a. Why is the Bill's duration potentially 18 months if the epidemic is likely only to last one year?
- b. Why not provide for the Bill to expire at 30 September but, to allow for flexibility, make provision for certain provisions to be extended for a further period by regulations subject to affirmative procedure?

Section 12 Power to bring forward expiry

Our Comments

We note these provisions and have no comment to make.

Section 13 Power to amend act in consequence of amendments to subordinate legislation

Our Comments

This is a necessary power but should be used sparingly and after consultation.

Section 14 Reports by Scottish Ministers

We agree with this provision. However clarity is required on what will happen if the reporting period ends within the recess.

Section 15 Ancillary provision

We have no comments to make.

Section 16 Commencement

We have no comments to make.

Section 17 Short Title

We have no comments to make.

For further information, please contact:

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