



Law Society
of Scotland

Law Society Scotland Stage 3 Briefing

Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill

February 2022



Introduction

The Law Society of Scotland is the professional body for over 12,500 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Constitutional Law and Human Rights Sub-committee welcomes the opportunity to consider and comment upon the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) bill at Stage 3. The sub-committee has the following comments to put forward for consideration.

General Comments

Introduction

The Bill makes temporary modifications to the Public Health etc. (Scotland) Act 2008 (“the 2008 Act”) so that health boards have discretion as to whether to pay compensation for self-isolation in connection with coronavirus.

The 2008 Act section 56 imposes a duty on health boards to compensate people who are asked to voluntarily quarantine.

The amendment made by the Coronavirus Act 2020 (“the 2020 Act”) changed the duty on health boards to pay compensation to a discretionary power to do so, during times that Scotland is in a “transmission control period” by virtue of a statutory declaration made under schedule 21(25) of the 2020 Act. This change will expire in March 2022.

The bill reinstates the *duty* on health boards to pay compensation for requests to self-isolate for reasons other than COVID-19. Where the request is made for COVID-19 related reasons, the bill provides that payment of compensation is *discretionary*. This modification has effect for 6 months from the bill’s commencement. The 6 month period can be amended by the Scottish Ministers under the regulation making powers in the bill by being reduced or increased by no more than 6 months at a time.

We note that if the 2008 Act is not amended Health Boards would be put into challenging financial circumstances and this would have a direct impact on patient care.

The Scottish Government could have used powers under the Coronavirus Act 2020 section 90(2) to extend the modification of the Public Health etc. (Scotland) Act 2008. That extension could only have been made until 25 September 2022 initially but could have been subject to further six month extensions (indefinitely).

This Bill differs from what could be done under the 2020 Act:

1. It makes the initial extension until 31 October 2022.
2. It changes the procedures for extension. Under the 2020 Act regulations are subject to the made affirmative procedure. Here the initial extension is by primary legislation, and subsequent extensions are subject to the affirmative procedure (unless they are emergency regulations) and must be accompanied by a statement of reasons.
3. Whereas Schedule 21, para 46 of the 2020 Act made a blanket modification of the compensation provision in the 2008 Act from a duty to a discretion, this Bill makes compensation discretionary only in respect of quarantine for Covid-19.

We welcome the change to the 2008 Act because it is both more narrowly targeted and subject to better procedural control.

Specific Comments on the Bill

1. Discretionary compensation for self-isolation

This section will give effect to the policy intention behind the bill.

2. Expiry of Section 1

This section ensures that section 1 of the bill is extended to 31st October 2022

3. Power to alter expiry date

This section empowers Scottish Ministers to make regulations to provide that section 1 does not expire on 31st October 2022 (or such other date when it would otherwise expire) but on an earlier date or on a later date. However, the later date cannot be more than 6 months after 31st October 2022 (or such other date when it would otherwise expire).

4. Procedure for regulations under section 3

This section provides that regulations to make the expiry date earlier are subject to the negative procedure, whilst regulations to make the expiry date later would, unless the regulations were emergency regulations, be subject to the affirmative procedure (in which case, at the same time as laying the draft regulations for approval, Scottish Ministers must also lay before Parliament a statement of their reasons as to why the regulations should be made).

However, in the case where the regulations would otherwise be subject to the affirmative procedure, the bill includes provision to allow the Scottish Ministers, where they consider the regulations need to be made urgently, to make emergency regulations – in which case, regulations can be made, and become effective immediately, before being approved. However, these emergency regulations would cease to have effect unless they are approved by Parliament within 28 days. Scottish Ministers are also required a statement of their reasons for making the regulations.

The provision for emergency regulations may undermine the procedural improvements in future, but even so that provision is an improvement over the 2020 Act, as regulations will expire after 28 days rather than 40 days, unless approved by the Parliament, and a statement of reasons is still required.

We suggested at Stage 1 evidence that the statement of reasons should also explain why it was necessary to make the regulations *urgently* before they were approved by the Parliament.

We note the Covid-19 Recovery Committee recommendation contained in paragraph 68 of the Committee Stage 1 Report, “*that a requirement to produce a statement of reasons when making regulations under section 3(2) to extend the expiry date of section 1, or when making emergency regulations under section 3, is appropriate and is provided for in the Bill in section 4(3) and section 4(5) respectively. However, in the interests of parliamentary scrutiny, when making emergency regulations, the Committee believes that the statement of reasons should also explain why it is necessary to make the regulations urgently and recommends the Scottish Government considers this in advance of Stage 2*”.

The Scottish Government responded positively to this suggestion and recommendation and brought forward an amendment at Stage 2 which amended section 4(5). Section 4(5) as amended now reads:

(5) If emergency regulations are made, the Scottish Ministers must, at the same time as laying the regulations before the Parliament, lay before the Parliament a statement of their reasons for making the regulations and for making them urgently without their being subject to the affirmative procedure.

This amendment improves Scottish Government accountability under the bill and we commend the Scottish Ministers for making this improvement to the bill.

We also agree with the amendment which introduces to section 4 a new subsection (2A). This subsection obliges Scottish Ministers before making regulations under section 3(1) or 3(2) to consult every Health Board and other persons the Scottish Ministers consider appropriate.

- 1. Coronavirus Act 2020: expiry of paragraph 46 of schedule 21**
- 2. Commencement**
- 3. Short title**

We have no comments on sections 5, 6 or 7.



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