

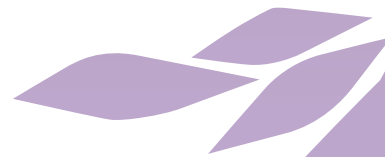


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## Health and Sport Committee Comataidh Slàinte is Spòrs

# Legislative Consent Memorandum on the Coronavirus Bill (LCM (S5)36)



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# Contents

<b>Background</b>	<b>1</b>
<b>Coronavirus Bill</b>	<b>2</b>
<b>Scrutiny of the Memorandum</b>	<b>5</b>
<b>National Health Service</b>	<b>7</b>
Clauses 2 and 6: Emergency registration of nurses and other health and care professionals.	7
Clause 3: Emergency arrangements concerning practitioners	7
Clause 9 and Schedule 8: Mental health and mental capacity	8
Clause 11: Indemnity for pandemic-related health service activity	10
Clauses 15 and 16: Duty of local authority to assess needs: Scotland	11
Clause 17 and schedule 12: Registration of deaths and still births etc. Clause 19 and schedule 13: Review of cause of death certifications and cremations.	11
Clause 34: Vaccination and immunisations	12
Clause 44: NHS pension schemes: Suspension of restrictions on return to work	12
Clause 47 and schedule 1: Health Protection Regulations	12
Clause 49 and schedule 20: Powers relating to potentially infectious persons	13
Clause 56 and schedule 27: Powers in relation to transport, storage and disposal of dead bodies etc.	13
<b>Disclosure Offences, PVG checks</b>	<b>14</b>
<b>Food Supply Chain</b>	<b>15</b>
<b>Conclusion</b>	<b>16</b>
<b>Annexe A - Minutes of meetings</b>	<b>17</b>
<b>Annexe B - Official Reports of meetings</b>	<b>18</b>

# Health and Sport Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Health and Sport.



<http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/health-committee.aspx>



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# Background

1. A Legislative Consent Memorandum (LCM) on provisions in the Coronavirus Bill, an Emergency UK Bill, was lodged on Friday 20 March 2020 by Michael Russell MSP, Cabinet Secretary for Constitution, Europe and External Affairs and supported by Jeane Freeman MSP, Cabinet Secretary for Health and Sport <sup>1</sup>. The LCM was referred to the Finance and Constitution Powers Committee by the Parliamentary Bureau.
2. Given the number of paragraphs of the LCM which have impact on the operation of Scotland's NHS and fall within the remit of the Health and Sport Committee, we agreed to consider the LCM.

# Coronavirus Bill

3. The Coronavirus Bill ['the Bill'] is a UK Government Bill. The Bill was introduced to the House of Commons and given its First Reading on Thursday 19 March 2020. <sup>2</sup>
4. According to the Explanatory notes on the Bill <sup>3</sup> —
  - ” "The purpose of the Coronavirus Bill is to enable the Government to respond to an emergency situation and manage the effects of a covid-19 pandemic. A severe pandemic could infect up to 80% of the population leading to a reduced workforce, increased pressure on health services and death management processes. The Bill contains temporary measures designed to either amend existing legislative provisions or introduce new statutory powers which are designed to mitigate these impacts."
5. The Explanatory notes further state that —

” The Bill aims to support Government in the following:

- Increasing the available health and social care workforce
- Easing the burden on frontline staff
- Containing and slowing the virus
- Managing the deceased with respect and dignity
- Supporting people

“The Bill is required as part of a concerted effort across the whole of the UK to tackle the covid-19 outbreak. The intention is that it will enable the right people from public bodies across the UK to take appropriate actions at the right times to manage the effects of the outbreak.

“As part of its contingency planning, the [UK] Government has considered what measures would be needed during a severe covid-19 outbreak to reduce the pressure of key services and limit the spread of infection.

“The action plan sets out options that can be taken as part of the response. This Bill ensures that the agencies and services involved – schools, hospitals, the police etc. – have the tools and powers they need. Each of the four nations of the UK has its own set of laws, and thus these tools and powers differ to varying degrees in each area. Consistency of outcome will be achieved by making the range of tools and powers consistent across the UK.

“While vital, this Bill is just one part of the overall solution. It is therefore not necessary for each tool or power needed to address the covid-19 pandemic to be covered in this Bill. Some exist already in statute. Some exist in some parts of the UK but not others. This Bill aims to level up across the UK, so that the actions to tackle this threat can be carried out effectively across all four nations.

“These are extraordinary measures that do not apply in normal circumstances. For this reason, the legislation will be time-limited for two years and it is neither necessary nor appropriate for all of these measures to come into force immediately. Instead, many of the measures in this 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. These measures can subsequently be suspended and then later reactivated, if circumstances permit, over the lifetime of the Act.

“The lifetime of the Act can itself be ended early, if the best available scientific evidence supports a policy decision that these powers are no longer needed. It is also possible to extend the lifetime of the Act for a further temporary period, again if it is prudent to do so.

“This facility can be adjusted so that early termination (‘sunsetting’) can apply to some provisions; and further extension can be applied to others. The aim is to make sure that these powers can be used both effectively and proportionately.



“These provisions also take due account of the UK’s devolution settlement in a way that enables swift action to be taken when and where it is needed. The commencement (and all associated decisions) will be activated to implement a COBR decision. UK Government Ministers will control the use of provisions on matters that are reserved for England only. This is intended to be a streamlined system that is nonetheless consonant with the role of the Devolved Administrations.

“The Bill includes provisions which relate to a wide spectrum of areas across the UK as explained below. However, they are all focused on responding to circumstances that may arise as a result of the covid-19 pandemic.”

## Scrutiny of the Memorandum

6. Scottish Parliament Standing Orders state that an LCM should normally be lodged with the Scottish Parliament two weeks after the introduction of a relevant Bill in Westminster.
7. Due to the nature of the Bill, the Committee received indication that an LCM would be lodged but not within these timescales. At our meeting on 17 March 2020, in anticipation of a shortened timescale for the Committee's scrutiny of a Memorandum, we agreed our approach.
8. We agreed to consider those aspects of the Memorandum relating to matters falling within our remit.
9. At our meeting on the 24 March 2020, we held an oral evidence session with Jeane Freeman MSP, Cabinet Secretary for Health and Sport. The evidence session explored a range of issues and is fully reported in the official report of our meeting <sup>4</sup>.
10. Not all of the powers provided for in the Bill and covered by the LCM are reserved powers and the LCM notes in a number of places the desirability of using the Bill to achieve a consistency of powers across the four home countries. The LCM also notes for a number of provisions the existence of powers in Scotland to make either regulations or enact legislation however it notes the use of the Bill is to expediate the delivery of powers.
11. To assist Parliament in considering the LCM we set out in the following paragraphs those measures in the Bill which fall within our remit. Those are the areas we endeavoured to cover in our session today with the Cabinet Secretary. This report brings together information in these areas taken from the LCM, the Scottish Parliament Information Centre (SPICe) Committee briefing and the explanatory notes to the Bill.
12. The Scottish Government LCM states <sup>5</sup> —

” “The Bill introduces measures which may be implemented in the event of an outbreak of Covid-19. These are designed as temporary measures directed specifically at allowing a flexible public health response during an outbreak. The Bill will have a limited life of two years which may be extended if necessary. The measures include new statutory powers and duties applicable to public authorities. They may be categorised as follows—

- a. measures to enhance the capacity and flexible deployment of staff
- b. relaxation of regulatory requirements in specific areas
- c. enhanced public health measures designed to contain the virus or slow its spread
- d. measures designed to deal with excess deaths
- e. measures to collect information necessary to deal with disruption to the food supply chain.”

13. The LCM adds —

” “The Bill contains measures designed to either amend existing legislative provisions or introduce new statutory powers which are designed to mitigate the impacts of an outbreak of the Coronavirus and to provide public bodies with powers and measures to support an effective response to this.”

14. This report covers all Health related clauses before covering a clause relating to disclosure offences and finally those relating to the food supply chain.

# National Health Service

## Clauses 2 and 6: Emergency registration of nurses and other health and care professionals.

15. The SPICe briefing <sup>6</sup> notes that one of the key considerations in the response to the virus is ensuring the NHS is prepared for increased demand. This includes the provision of adequate numbers of staff.
16. The Bill seeks to permit the temporary registration of healthcare professionals, and thereby quickly boost the numbers of available qualified staff. It does this by allowing the Nursing and Midwifery Council and the Health and Care Professions Council to temporarily register “fit, proper and suitably experienced persons” <sup>7</sup> . It is expected that this will include recently retired staff and those who are almost qualified.
17. The General Medical Council and General Pharmaceutical Council already have similar emergency powers for doctors and pharmacists.
18. The regulation of healthcare professionals is mainly reserved to Westminster. However, this does not include professions which became regulated after devolution. This includes Operating Department Practitioners and Practitioner Psychologists.
19. Provisions are also made for emergency temporary regulation of social workers by creating a new power in the register held by the Scottish Social Services Council to register retired social workers, student social workers and those on a career break to apply to be temporary social workers. This provision applies should it be decided more social workers are needed.
20. Schedule 5, to make recruitment easier, extends the time from 6 months to 12 months in which a social care worker has to register.

## Clause 3: Emergency arrangements concerning practitioners

21. In order to practise as an NHS GP in Scotland, a doctor must be on the ‘performers list’ of the relevant NHS board. The Bill seeks to temporarily remove this requirement to allow recently retired GPs to quickly return to practise.

## **Clause 9 and Schedule 8: Mental health and mental capacity**

22. Clause 9 of the Bill aims to amend the existing mental health and mental capacity legislation. Schedule 8 relates to the Mental Health (Care and Treatment) (Scotland) Act 2003<sup>8</sup> and the Criminal Procedure (Scotland) Act 1995<sup>9</sup>. The modified provisions are intended to be used only where it is not appropriate to rely on the existing mental health legislation.
23. The explanatory notes for the Bill<sup>10</sup> explain that the provision cover the following —

- ” a. The modification of forms that are used in connection with the Mental Health (Care and Treatment) (Scotland) Act 2003 and Criminal Procedure (Scotland) Act 1995 or for such forms to be read as if they were so modified.
- b. Extending maximum periods of detention to 120 hours.
- c. Permitting a short term detention certificate (STDC) to be granted without the need to first consult a mental health officer in certain circumstances and permits a second STDC to be granted.
- d. Enabling a mental health officer (MHO) to apply for a Compulsory Treatment Order (CTO) under section 63 of the 2003 Act founded on only one mental health report, provided the MHO considers that it would be impractical or involve delay to obtain two mental health reports.
- e. Where a serving prisoner is found to be suffering from mental disorder and requires medical treatment, Scottish Ministers may make a transfer for treatment direction (TTD) under section 136(2) of the 2003 Act. Paragraph 6 permits that Ministers may be so satisfied on the basis of one report from an AMP, where they consider that to obtain two reports would be impractical or involve delay.
- f. Extending the limit on the length of time nurses can detain patients in hospital from 3 to 6 hours.
- g. Allowing for a prisoner to be transferred to hospital by a TTD.
- h. Section 136(3) and (6) provide that where a prisoner is to be transferred to hospital by a TTD they should be so moved within 7 days of the date the direction was made. Paragraph 8 provides that the transfer may be made as soon as practicable after that period.
- i. Enabling reviews of certain orders and directions at certain specified intervals carried out by responsible medical officers (RMO) to be suspended.
- j. Suspending the requirement imposed on Scottish Ministers in certain circumstances to make a reference to the Tribunal in respect of hospital directions or transfer for treatment directions.
- k. Allowing that, where certain conditions are met, the RMO may administer medication to someone being treated under mental health legislation after the 2 month period laid out in the 2003 Act without the need to seek a second opinion from a designated medical practitioner (DMP) if the RMO has made a request for a DMP visit and it would cause undesirable delay to wait for the DMP's assessment.
- l. Allowing a Mental Health Tribunal panel to operate with a reduced number of members where it is not practical to proceed with the required three members, as long as one of the members is a legal member or Sheriff Convener.
- m. Allowing the period of extension for assessment orders to be increased at the discretion of the court, from 14 days to 12 weeks.

- n. Enabling detention on the advice of just one medical practitioner (instead of the two required under the 2003 Act), if the court considers that it would be impractical in the circumstances to secure the second recommendation and the court is satisfied that the evidence of the single practitioner is sufficient.
- o. Providing that the conveyance or admittance of accused or convicted persons to hospital may be achieved as soon as is practicable after the end of the prescribed time limits in the 1995 Act.
- p. Allowing the Tribunal to decide a case without a hearing in the circumstance where the patient may have requested oral representations or oral evidence to be heard. In those circumstances, relevant parties could make written submissions to the Tribunal before a decision is reached.
- q. Allowing medical practitioners in Scotland who are not independent (e.g. are in the same hospital, or with a supervisory relationship, or working in an independent hospital where the patient is being treated), to examine a patient for the purposes of the 2003 Act.”

## **Clause 11: Indemnity for pandemic-related health service activity**

- 24. The Bill includes powers to provide indemnity cover against clinical negligence for health care workers and others carrying out activities connected to care and treatment in response to the pandemic.
- 25. This is intended to act as additional protection for instances of clinical negligence not already covered under pre-existing indemnity arrangements. There are already a number of sources of indemnity cover for professionals, including state indemnity schemes, commercial insurance policies or through membership of a professional body.
- 26. The Scottish NHS operates the Clinical Negligence and Other Risks Indemnity Scheme <sup>11</sup> (CNORIS) on behalf of NHS Boards for claims made against their employees. However, the associated regulations prevent pay-outs for anyone not employed or engaged by the health board. As a result, it is envisaged that the provisions of the Bill may create some gaps, so Ministers are given a discretionary power to indemnify cases not covered, acting as an insurer of last resort. This may arise through health and care staff taking on additional roles in response to the pandemic.
- 27. Similar provisions are being taken covering the four nations.

## **Clauses 15 and 16: Duty of local authority to assess needs: Scotland**

28. These provisions increase flexibility for social care decision making during the period in which the provision is in force. It does this by allowing local authorities to not comply with particular assessment duties where complying would not be practical or would cause unnecessary delay in providing support to people. It allows partial compliance with the duties.
29. The aim is to protect vulnerable people by allowing rapid prioritisation of urgent cases at a time when there is likely to be an influx of discharges from hospital, an influx of new cases from the community and a reduction in the social care staff available.
30. The core duty on local authorities to provide care and support to people in need of assistance will remain in place.
31. The provisions will clarify that authorities can provide support without first conducting an assessment. The provisions will also change duties to carry out a number of social care assessments into powers to assess. This will allow authorities to deliver urgent support and decide if and when assessments are required. The provisions will cover all cases in which adults may be being assessed for social care.
32. Duties under the Carers (Scotland) Act 2016 <sup>12</sup> and associated regulations are also amended to convert the duty to prepare an adult carer support plan/young carer statement to a power to do so. The duty to provide carer support remains.
33. These powers are consistent with powers to be applied to the other parts of the UK.

## **Clause 17 and schedule 12: Registration of deaths and still births etc. Clause 19 and schedule 13: Review of cause of death certifications and cremations.**

34. These powers aim to streamline the registration of deaths and still-births for a period to avoid the system becoming overwhelmed.
35. These provisions allow funeral directors to act as informants for the purposes of death registration, and for notifications and documents relating to deaths to be conveyed by telephone and by electronic means.
36. Where a certificate of death is being reviewed the death cannot be registered and funerals cannot proceed until the review has been completed. Clause 19 allows the Scottish Ministers to suspend the requirement for the review of randomly selected Medical Certificates of Cause of Death under the Certification of Death (Scotland) Act 2011 <sup>13</sup>.



37. Clause 19 and schedule 13, Part 2 suspend the statutory procedures for the handling of ashes by funeral directors and cremation authorities. The Scottish Ministers will have the power to determine the point when the duties should be suspended from and when it is appropriate to re-instate them.
38. There is a duty on local authorities to provide a funeral where no one else is available. The duty includes a requirement for the local authority to attempt to locate the family and ascertain if they wish the ashes. This duty, in relation to ashes, is temporarily suspended.

## **Clause 34: Vaccination and immunisations**

39. The National Health Service (Scotland) Act 1978<sup>14</sup> requires that vaccinations and immunisations must be administered by a doctor, or under their direction. The Bill removes this requirement to allow a wider range of professionals to administer vaccines and immunisations.
40. This also applies to the existing national programme as well as any new vaccines and is primarily intended to free health service capacity to deal with the pandemic.

## **Clause 44: NHS pension schemes: Suspension of restrictions on return to work**

41. Clause 44 makes provision relating to the removal of restrictions on retired members of the NHS Pension Scheme who return to work. This will temporarily suspend current restrictions on payment of pension benefits for members who have retired from the NHS Pension Scheme and return to work, to maximise staff availability.

## **Clause 47 and schedule 1: Health Protection Regulations**

42. This part of the bill gives Scottish Ministers powers to create regulations including emergency regulations as may be required “for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Scotland”<sup>15</sup>.
43. The power is broad and could include imposing restrictions or requirements on or in relation to persons, things or premises. There are some safeguards built into the bill, for example, regulations cannot force someone to receive medical treatment. However, the schedule contains a list of possible restrictions on people, premises and things, including that someone could be removed and detained in a hospital or other suitable establishment. In relation to premises, restrictions or requirements could include closing premises.

44. These powers mirror those available in England and Wales, and thereby create consistency across the UK.

## **Clause 49 and schedule 20: Powers relating to potentially infectious persons**

45. These powers include directing or removing people for screening and assessment, requiring them to stay there for up to 48 hours and restricting the movements of those who test positive.

## **Clause 56 and schedule 27: Powers in relation to transport, storage and disposal of dead bodies etc.**

46. These powers aim to extend capacity within the death management process in the event of very high levels of deaths related to covid-19. They are aimed at preparedness.

47. The explanatory note sets out that <sup>16</sup> –

“The Bill introduces powers of direction to give local authorities the necessary powers to direct those in the death management system to ensure excess deaths caused by covid-19 do not overwhelm the system. National and local authorities across the UK will have, where necessary, additional powers to direct organisations to support the death management processes. This will ensure that deceased bodies can be stored, transported and disposed of with care and respect.”

48. They also allow for local authorities to direct providers to “do anything calculated to facilitate the effective management of excess deaths caused by COVID-19”.

# Disclosure Offences, PVG checks

## Clause 32: Temporary disapplication of disclosure offences

## Clause 33: Temporary power to reclassify disclosure requests made in connection with PVG scheme membership

49. The Bill provides for two general powers to amend the Disclosure scheme in Scotland.
50. Clause 32 allows Scottish Ministers to modify or effectively ignore two sections of the (Protection of Vulnerable Groups (Scotland) Act 2007<sup>17</sup>), the Act that is associated with the PVG scheme. The Ministers will be able to specify a range of circumstances and time period for any changes.
51. The sections in the 2007 Act are about offences related to offering positions in regulated work to individuals who have been barred from doing that work. Despite the very general powers contained in clause 32 to change or disapply these sections, it would still be an offence for a barred person to seek work in a regulated profession or regulated work, because any new direction would not affect the relevant section (34) of the 2007 Act.
52. Clause 33 allows Ministers to confirm, through Disclosure Scotland, that an individual is a member of a PVG scheme, but not provide information about convictions. A safeguard remains in place, because an individual cannot be a member of a PVG scheme for protected adults or children if they are barred from regulated work with those groups. This could streamline the recruitment of staff if Disclosure Scotland's capacity to process checks is compromised by the infection.'

# Food Supply Chain

**Clause 23: Power to require information relating to food supply chains**

**Clause 24: Authorities which may require information**

**Clause 25: Restrictions on use and disclosure of information**

**Clause 26: Enforcement of requirement to provide information**

**Clause 27: Meaning of “food supply chain” and related expressions**

**Schedule 14: information relating to food supply chains: financial penalties**

53. Central to the UK and Scottish Governments’ response to Covid-19 is to ensure that the supply of food to all parts of the country is maintained.
54. To be able to monitor the food supply chain and be alerted to any disruption, clauses 23 to 27 and Schedule 14 of the Bill make provision to require people within food supply chains to provide information.
55. Requirements may be imposed on any person in the food supply chain, including producers (agriculture, fisheries, aquaculture), and anyone between the producer and the person who is provided with the food or drink for personal consumption (“intermediaries”).
56. People who are connected with the supply chain may also be required to provide information. This includes those supplying seeds, stock, feed, equipment, fertiliser, pesticides for use in agriculture, aquaculture or fisheries; anyone providing goods or services to producers or intermediaries (e.g. related to safety or quality of food or drink or welfare of animals); or anyone representing actors within or connected to the supply chain.

## Conclusion

57. Parliament is invited to consider this report and the Official Report from today of our evidence session with the Cabinet Secretary for Health and Sport in consideration of the LCM on the Coronavirus Bill, which subject to the following two comments the Committee supports.
58. We wish to highlight our concerns about the Human Rights implications of the Mental Health Clause 9 and Schedule 8 of the Bill, in particular those powers enabling:
- a mental health officer (MHO) to apply for a Compulsory Treatment Order under section 63 of the 2003 Act founded on only one mental health report, provided the MHO considers that it would be impractical or involve delay to obtain two mental health reports; and
  - reviews of certain orders and directions at certain specified intervals carried out by responsible medical officers (RMO) to be suspended.
59. We also wish to draw to the attention of Parliament the commitment of the Cabinet Secretary for the Constitution, Europe and External Affairs in his statement to Parliament on 19 March in relation to ongoing updates <sup>18</sup> :
- ” I make a commitment today that we will institute, after discussion across the Parliament, appropriate reporting on how and when the powers in the bill have been used by the Scottish Government and in our own further emergency coronavirus legislation, which we hope to bring forward before Easter in order to put on the statute book other urgent legislative changes specifically for our own competences. We will embed such reporting and renewal—including on our use of provisions in the UK bill—in law.”

# Annexe A - Minutes of meetings

8th Meeting, 2020 (Session 5) Tuesday 24 March 2020

**1. Decision on taking business in private:** The Committee decided whether to take items 4 and 5 in private.

**2. Coronavirus Bill (UK Parliament legislation):** The Committee took evidence on a legislative consent memorandum from—

Jeane Freeman, Cabinet Secretary for Health and Sport, Derek Grieve, Interim Head of Health Protection Division, Jamie MacDougall, Deputy Director, Social Care Support, John Paterson, Solicitor, and Johanna Irvine, Solicitor, Scottish Government.

**4. Coronavirus Bill (UK Parliament legislation):** The Committee considered a draft response.

# Annexe B - Official Reports of meetings

[Tuesday 24 March 2020](#) - evidence from the Scottish Government

- 1 [Legislative Consent Memorandum: Coronavirus Bill 2019-20](#)
- 2 [Coronavirus Bill 2019-21](#)
- 3 [Coronavirus Bill 2019-21 Explanatory Notes](#)
- 4 Heath and Sport Committee, [Official Report](#), 24 March 2020.
- 5 [Legislative Consent Memorandum: Coronavirus Bill 19-20](#)
- 6 The Scottish Parliament Information Centre, [Legislative Consent Memorandum Committee briefing](#)
- 7 [Coronavirus Bill 2019-21](#)
- 8 [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003](#)
- 9 [Criminal Procedure \(Scotland\) Act 1995](#)
- 10 [Coronavirus Bill 2019-21 Explanatory Notes](#)
- 11 [Clinical Negligence and Other Risks Indemnity Scheme](#)
- 12 [Carers \(Scotland\) Act 2016](#)
- 13 [Certification of Death \(Scotland\) Act 2011](#)
- 14 [National Health Service \(Scotland\) Act 1978](#)
- 15 UK Government. [Impact assessment - Coronavirus Bill: summary of impacts](#)
- 16 [Coronavirus Bill 2019-21 Explanatory Notes](#)
- 17 [Protection of Vulnerable Groups \(Scotland\) Act 2007](#)
- 18 Scottish Parliament, [Official Report](#) 19 March 2020 col 59.



