# DELEGATED POWERS AND LAW REFORM COMMITTEE

## 9th Meeting, 2021 (Session 6)
## Tuesday 9 November 2021

# Instrument Responses

**Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 5) Regulations 2021 (2021/359)**

On 21 October 2021, the Scottish Government was asked:

The instrument amends the Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Regulations 2021 ("the Scottish International Travel Regulations").

1. Regulation 4(d) inserts a new paragraph (4A) in regulation 3 of the Scottish International Travel Regulations which makes provision to the effect that P is a person who is not vaccinated for medical reasons "by virtue of a determination made in accordance with" either the Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 ("the Requirements Regulations") or the Health Protection (Coronavirus, International Travel and Operator Liability) (England) Regulations 2021 ("the English International Travel Regulations"). Regulation 7B of the Requirements Regulations places an obligation on travel operators to keep relevant information "confidential", which means not using it for any purpose except to determine if a person is permitted to be on certain premises. Relevant information as defined includes "information that can be used to determine if a person (ii) cannot be fully vaccinated against coronavirus for medical reasons" but whether someone cannot be fully vaccinated for medical reasons appears to be a determination made by someone other than a travel operator and not authorised directly by the Requirements Regulations. Regulation 3F of the English International Travel Regulations refers to "a person who is advised by a registered medical practitioner not to undergo vaccination for clinical reasons." Please clarify by whom a determination that a person should not be vaccinated for medical reasons is made and why that power is 'in accordance with' either the Requirements Regulations or the English International Travel Regulations. Please explain why it is considered that the provision made in paragraph (4A) of regulation 3 of the Scottish International Travel Regulations as amended by the instrument makes clear where the responsibility to make that determination lies.

2. Regulation 13 amends schedule 10 (Transitional provisions) of the Scottish International Travel Regulations by inserting text in paragraph 11 after "paragraph 1(3)(d) of schedule 4". Is there an error, insofar as regulation 10(d) of this instrument omits paragraph 1(3) of schedule 4?"

Please confirm whether any corrective action is proposed, and if so, what action and when?"

On 26 October 2021, the Scottish Government responded:

1. Regulation 7B of the Requirements Regulations involves an obligation to keep relevant information "confidential" but that obligation is placed on the person responsible for certain premises rather than, as your letter suggests, a travel operator. This duty of confidentiality is considered important for the purposes of those regulations because the responsibility for ensuring a reasonable system for checking vaccination status lies with persons responsible for premises who will have access to this information and it requires to be suitably safeguarded.

   There is no intention that travel operators or persons responsible for premises will be responsible for making a medical reasons determination. In accordance with regulation 7A(1) of the Requirements Regulations, a person responsible for certain premises must have in operation a reasonable system for checking vaccination status. In accordance with regulation 7A(3), a person is permitted to be on premises if they cannot be fully vaccinated against coronavirus for medical reasons. In accordance with regulation 7A(4), a person responsible for operating a system under regulation 7A(1) must have regard to any guidance issued by the Scottish Ministers. The process for obtaining a medical exemption, including how it is confirmed and may thereby be evidenced for the purposes of the Requirements Regulations, is set out in such guidance (COVID Status: Guidance common questions | NHS inform (nhsinform-n4.azurewebsites.net)). All of this being so, the Scottish Government considers that the process for obtaining and evidencing a medical exemption in accordance with the Requirements Regulations is clear and that new regulation 3(4A) of the Scottish International Travel Regulations operates effectively in its cross reference to the Requirements Regulations. Similarly, the Scottish Government considers that regulation 3(4A) operates effectively in its cross reference to the English International Travel Regulations, where the system involves being able to evidence that a registered medical practitioner has advised against vaccination for clinical reasons.

2. There is no error in regulation 13 amending schedule 10 (transitional provisions) of the Scottish International Travel Regulations by inserting text in paragraph 11 after "paragraph 1(3)(d) of schedule 4" and that regulation 10(d) of this instrument omits paragraph 1(3) of schedule 4. The reference to schedule paragraph 1(3)(d) of schedule 4 has intentionally been left in the transitional schedule (schedule 10) to ensure that this caters for the legal effect of the earlier consolidation as this could leave a gap if omitted. If the cross reference to paragraph 1(3)(d) of schedule 4 were to be omitted, it would suggest that confirmation by the relevant Department before 20 September 2021 pursuant to paragraph 1(1A)(d) of schedule 2 of the 2020 Regulations is not to be treated as confirmation under paragraph 1(3)(d) of schedule 4 whilst that paragraph was in force (between 20 September 2021 and 15 October 2021).

In light of the conclusions set out above, we do not consider that corrective action is necessary.

**Storage of Carbon Dioxide (Licensing etc.) (EU Exit) (Scotland) (Amendment) Regulations 2021 (2021/354)**

On 14 October, the Scottish Government was asked:

1. Regulation 8 of the instrument amends paragraph 5 of schedule 1 of the principal regulations. Paragraph 5 contains interpretation provisions that must be included in a licence. The amendment made to paragraph 5(2) appears to insert "as [it/they] had effect immediately before IP completion day" into the narration of the title of Directive 2009/31/EC, in two places. Is this an error? After the insertion of these words, paragraph 5(2) could be read as if the expressions to which it refers are to be given the meaning in each of (a) Article 3 of Directive 2009/31/EC (with no reference to point in time), (b) amending Council Directive 85/337/EEC as it had effect immediately before IP completion day, (c) European Parliament and Council Directives 2000/60/EC, 2001/80/EC, 2004/35/EC, 2006/12/EC, 2008/1/EC as they had effect immediately before IPCD, and (d) Regulation EC No 1013/2006 (with no reference to a point in time). The intention was presumably that the expressions should have the meanings given Article 3 of Directive 2009/31/EC only. Is it sufficiently clear what meaning the terms listed in section 5(2) are to have in a licence?

2. Is any corrective action proposed, and if so, what action and when?

3. The accompanying documents do not specify whether the Protocol category for this instrument is low, medium or high. It seems most likely from what is said in the Policy Note that the Scottish Ministers consider the category to be low. Could you please confirm?

The Scottish Government responded:

1. The Scottish Government is grateful to the Committee for their observations. As identified by the Committee, the intention of the provision was that the expressions should have the meaning given in Article 3 of Directive 2009/31/EC as it had effect immediately before IP completion day. The amendment to paragraph 5(2) inserting text into the narration of the title of Directive 2009/31/EC in two places is an error.

2. The Scottish Government will bring forward an instrument to clarify this. The corrective instrument will be laid on 2nd November 2021.

The Scottish Ministers consider that Protocol category for this instrument is low.