

DRAFT POLICY NOTE

THE HEALTH PROTECTION (CORONAVIRUS) (REQUIREMENTS) (SCOTLAND) AMENDMENT (NO. 2) REGULATIONS 2021

SSI 2021/XXX

The above instrument was made in exercise of the power conferred by paragraph 1(1) of schedule 19 of the Coronavirus Act 2020. The instrument is subject to made affirmative procedure by virtue of paragraph 6(3) of schedule 19 of the Act.

These Regulations amend the Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 (the ‘Principal Regulations’) to provide that late night premises and premises where a relevant event is taking place must operate a reasonable system for checking that persons on, or seeking to enter, their premises are fully vaccinated against coronavirus or are exempt from the requirement to demonstrate that they are fully vaccinated. Relevant premises must also prepare a compliance plan describing how their systems will operate and other measures in place to prevent or minimise the spread of coronavirus. These Regulations amend the Principal Regulations to enable a local authority to take appropriate steps to enforce the requirement to operate a vaccine checking system. These Regulations introduce a right of entry for persons designated by a local authority to enter premises operating a system. These Regulations also remove capacity limits previously in the Principal Regulations on stadia and live events above which a capacity exemption application must be approved by a local authority.

Legislative background

1. The UK Coronavirus Act 2020 received Royal Assent on 25 March 2020. Under that Act, the Scottish Government made regulations (in force from 26 March 2020) to implement physical distancing and impose restrictions on gatherings, events and operation of business activity. From 14 September 2020 they were replaced by the Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020. From 9 October 2020 those Regulations were suspended and replaced by the Health Protection (Coronavirus) Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020. A new levels-based approach was introduced on 2 November 2020, when the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 (“the Local Levels Regulations”) came into force and revoked the previous regulations. On 9 August 2021 the Principal Regulations came into force which revoked the Local Levels Regulations and introduced a new approach to tackling coronavirus.

Policy Objectives

Implement a system of mandatory COVID-19 vaccine certification

In line with our strategic intent to ‘*suppress the virus to a level consistent with alleviating its harms while we recover and rebuild for a better future*’, the policy objectives of Covid Vaccine Certification are to:

- Reduce the risk of transmission of Coronavirus
- Reduce the risk of serious illness and death thereby alleviating current and future pressure on the National Health Service
- Allow higher risk settings to continue to operate as an alternative to closure or more restrictive measures
- Increase vaccine uptake

3. These Regulations implement the COVID-19 vaccine certification scheme (“the scheme”). These Regulations require late night premises and premises where a relevant event is taking place to operate a system for checking that persons on, or seeking to enter, their premises are fully vaccinated against coronavirus or to demonstrate that they are exempt from that requirement.

4. The winter period ahead will pose the significant risk of increased transmission and related pressure on the National Health Service. These Regulations should be considered alongside the latest State of the Epidemic Report. In light of these risks, urgent action is needed across all sectors to ensure compliance with a range of baseline COVID-19 mitigations. Vaccine certification is a further targeted and proportionate measure that is urgently needed to reduce further the risk posed by coronavirus and in doing so alleviate future pressure on the National Health Service.

5. Vaccine certification is one of a range of actions that the Government is taking to deliver its strategic intent and policy objectives. There are continuing statutory requirements to wear face coverings in certain settings, subject to exemptions, to collect contact details in hospitality and entertainment venues and to have regard to guidance on minimising exposure to coronavirus. Other key measures include the vaccination programme, now being expanded to 12-15 year-olds and to provide “booster” vaccinations, the ongoing promotion of adherence to the statutory measures, including through engagement with relevant stakeholders and the maintenance of international travel restrictions.

6. The scheme is being implemented in a targeted and proportionate manner related to higher risk activity. A broader scheme (such as expanding the scheme to apply to all hospitality) would deliver a greater public health benefit. However, the Government’s assessment is that, at this time, a broader application of the scheme would be disproportionate. This will be kept under review. The range of actions that can be taken to reduce risk in these higher risk settings is limited. Scottish Government considers certification to be less intrusive and restrictive than other options, such as mandatory physical distancing, mandatory face coverings, absolute capacity limits, closure or restricted opening hours. This will be kept under review.

Parliamentary Consideration

7. Scottish Government published [Coronavirus \(Covid-19\) Proposals for a mandatory vaccination scheme](#) on 9 September 2021. The paper was lodged in the Scottish Parliament Information Centre , on 8 September. On 9 September, Parliament debated and approved motion S6M-01123, the text of which is set out below:

That the Parliament commends the extraordinary effort of vaccination teams throughout Scotland, which means that, as of 6 September 2021, 84% of eligible over 18-year-olds were double-vaccinated against COVID-19; recognises that case numbers remain stubbornly high

and that action is needed from all sectors to ensure that baseline COVID measures are rigorously implemented; acknowledges that a number of other countries have introduced COVID certification schemes and that the UK Government has plans to introduce a vaccine certification scheme in England; believes that, in line with the Scottish Government's strategic intent, a COVID Vaccine Certification scheme can provide a targeted means to maximise Scotland's ability to keep certain higher risk settings open, while reducing the impact of transmission and encouraging the remaining sections of the population to get vaccinated; supports the implementation of a COVID Vaccine Certification scheme; agrees that the scheme will apply to nightclubs, sexual entertainment venues, indoor unseated live events with 500 or more attendees, outdoor unseated live events with 4,000 or more attendees and all events with 10,000 or more attendees; notes that measures are being taken to ensure digital inclusivity and to ensure that disabled people are not disproportionately impacted, and agrees that this scheme will be kept under regular review.

8. On 23 September 2021, Scottish Government published [Coronavirus \(Covid-19\) Vaccine certification update](#), which set out more details about the scheme.

9. The Deputy First Minister and Cabinet Secretary for Covid Recovery regularly attends the COVID-19 Recovery Committee. The Committee has taken evidence on the scheme from stakeholders and from the Deputy First Minister, and will have the opportunity to do so again on 30 September 2021.

Consultation and impact assessment

10. Scottish Government Ministers and officials have engaged extensively with equality, human rights and childrens' rights stakeholders and a wide range of business sector representatives from a range of specialisms, including events, music, sport, and the night-time economy, as well as trade unions and the legal profession in developing this scheme.

11. The diverse feedback received has informed the development of the scheme and the Equality Impact Assessment, Child Rights and Wellbeing Impact Assessment and Business and Regulatory Impact Assessment that are published alongside these Regulations. A Data and Privacy Impact Assessment ("DPIA") has been prepared for the implementation of the scheme, including these Regulations. Officials have consulted with the Information Commissioner's Office who have agreed a single DPIA is sufficient. The DPIA is being finalised and will be published as soon as possible. Detailed operational guidance is being developed in consultation with business sector representatives and will be published this week.

12. The Scottish Government has also prepared a paper that summarises the range of evidence available on vaccination certification schemes. It adopts a ["four harms approach"](#) covering the direct harms of COVID-19, the indirect health harms, the social and economic harms. Evidence is drawn from clinical and scientific literature, from public opinion and from international experience. This will also be published alongside the Regulations.

13. Stakeholder engagement and analysis of emerging evidence will continue and will inform development of operational guidance and regular reviews of the scheme. Impact assessments will be reviewed and updated as required.

Implementation

14. The Scottish Government is introducing the scheme after the point when everyone covered by the scheme has been offered two doses of vaccine. The scheme applies only to those over 18, but this will be kept under review as more age groups under 18 are offered two doses of the vaccine. The scheme will also be kept under review to take into account the roll out of booster vaccinations.

15. Initially, the scheme will not permit a negative test result to be offered as an alternative to evidence of vaccination. Nor, at this stage, will a positive test (natural immunity) be permitted as an alternative to evidence of vaccination. However, acceptance of test results will be kept under review. At this stage, the Scottish Government does not consider that it would be appropriate to include testing and, indeed, could undermine one of the policy aims of the scheme, which is to increase vaccine uptake. Also, it is important at this stage to prioritise PCR lab capacity for Test and Protect purposes and, while promoting regular LFD tests is an extremely important aspect of our overall approach, further work would be required on an optimal approach to incorporating testing, including consideration of the appropriateness of self-testing in this context.

16. The Scottish Government is implementing the scheme at the soonest possible operational opportunity. In designing the urgent implementation and initial operationalising of this scheme, the Scottish Government's aim is to strike the right balance between implementing this scheme as quickly as possible and doing so in a graduated manner that is proportionate and will deliver the optimum public health benefit.

Review

17. The Principal Regulations require Scottish Ministers to review the requirements imposed by those regulations at least once every 21 days. Scottish Ministers will also continue to assess whether any less intrusive alternative measures could be introduced to achieve the same combination of policy objectives in respect of the higher risk sectors concerned.

Requirements in the regulations

18. These Regulations provide that persons responsible for late night premises or premises where a relevant event is taking place are required to operate a reasonable system for checking that persons on, or seeking to enter, their premises are fully vaccinated against coronavirus or exempt from the requirement to demonstrate that they are fully vaccinated. Late night premises or premises where a relevant event is taking place must refuse access or remove a person that cannot demonstrate that they are fully vaccinated or exempt from that requirement. Premises are required to prepare a compliance plan describing how their system will operate and the other measures put in place to prevent or minimise the spread of coronavirus. These Regulations provide that in considering what is a reasonable system, they must have regard to any guidance issued by the Scottish Ministers.

19. The requirement to have a system in place includes the legal requirement to process any data that it is necessary for the operation of that system. A person to whom information has been supplied that can be used to determine whether someone is fully vaccinated, cannot be fully vaccinated for medical reasons or is a participant in a trial of a vaccine against coronavirus must treat that information as confidential.

20. For the purposes of these Regulations “late night premises” are premises that: serve alcohol at any time between 0000 hours and 0500 hours; have a dancefloor, or other designated space, provided for dancing by customers; and play live or recorded music for dancing, unless they are being used for a funeral, marriage ceremony, civil partnership registration, or a reception or gathering which relates to such occasions.

21. For the purposes of these Regulations, “a relevant event” is an event planned on the basis that: (i) it will be attended by more than 10,000 people; or (ii) it will take place wholly or mainly outdoors and will be attended by 4,000 or more people simultaneously (excluding children under 5 years of age and people working at the event), and not all of those attendees will be seated; or (iii) it will take place wholly or mainly indoors and will be attended by 500 or more people simultaneously (excluding children under 5 years of age and people working at the event), and not all of those attendees will be seated. These Regulations provide that certain events are exempt, including those relating to a funeral, marriage ceremony or civil partnership registration.

22. These Regulations repeal Part 3 of the Principal Regulations which provided capacity limits on stadia and live events. Settings which were previously subject to the capacity limits will now largely be covered by the certification scheme which seeks to achieve the same policy aims and the continued use of capacity limits was therefore not considered necessary at this stage, given the need for restrictions to be proportionate..

23. These Regulations provide that failure to ensure that there is a reasonable system in operation will be an offence. Regulation 16(4) of the Principal Regulations provides that it is a defence to a charge of committing that to show that, in the circumstances, the person had a reasonable excuse. These Regulations amend the enforcement provisions of the Principal Regulations to clarify the requirement that persons to whom a notice is given must, so far as reasonably practicable, comply with that notice. The purposes for which a local authority may designate persons to enforce the Principal Regulations are amended to include the requirement to operate a system by relevant premises. These Regulations also introduce a right of entry for persons designated by a local authority to enter premises operating a system for the purpose of enforcing the requirement to operate a system by a relevant premises.

24. The Scottish Government is mindful of the need for businesses to adapt to the requirements introduced by these Regulations. The Regulations come into force on 05:00 on 1st October 2021, but the Regulations delay the application of the enforcement provisions in the Principal Regulations as they apply to the Scheme (other than the duty of confidentiality) until 05:00 on 18 October 2021. This is intended to allow businesses a reasonable period of time to implement Certification before there is any prospect of enforcement action being commenced against them.