

## **CORONAVIRUS BILL**

### **Memorandum from the Department of Health and Social Care to the Delegated Powers and Regulatory Reform Committee**

#### **A. INTRODUCTION**

1. This memorandum has been prepared for the Delegated Powers and Regulatory Reform Committee to assist with its scrutiny of the Coronavirus Bill (the Bill). The Bill was introduced in the House of Commons on 19 March 2020. This memorandum identifies the provisions of the Bill that confer powers to make delegated legislation, directions and guidance. It explains in each case why the power has been taken and explains the nature of, and the reason for, the procedure selected.

#### **B. PURPOSE AND EFFECT OF THE BILL**

2. The purpose of the Coronavirus Bill is to enable the Government to respond to an emergency situation and manage the effects of a Coronavirus pandemic. The Bill contains temporary measures designed to either amend existing legislative provisions or introduce new statutory powers which are designed to mitigate these impacts.
3. The Bill aims to support Government in the following ways:
  - Enhancing capacity and the flexible deployment of staff;
  - Easing legislative and regulatory requirements;
  - Containing and slowing the coronavirus;
  - Managing the deceased; and
  - Supporting people.
4. The Bill is required as part of a concerted effort across the whole of the UK to tackle the coronavirus outbreak. The intention is to get to a position whereby the right people (public agencies in all four nations of the UK) can take the right action (as set out in the UK Covid-19 Action Plan) at the right time (as a result of decisions taken by the four UK governments, usually under the auspices of COBR) - using the same powers, at the same time, in the same way.
5. 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 and others – 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.

6. The policy context therefore means that it is not necessary for each tool or power needed to address a coronavirus pandemic to be covered in this Bill. Some exist already in statute. Some exist in some countries 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.
7. The government recognises that these are extraordinary measures – they do not apply in normal circumstances. For this reason, not all of these measures 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, as circumstances allow, over the lifetime of the Act.
8. This Bill provides a number of powers which will enable UK Ministers, and where relevant, the Devolved Administrations to introduce secondary legislation. There are the following regulation making powers:
  - a power for Scottish Ministers to make emergency arrangements concerning medical practitioners;
  - a power in relation to the emergency registration of pharmaceutical chemists and extension of prescribing powers in Northern Ireland;
  - three are in relation to the measures on Emergency Volunteering Leave (EVL) and the establishment of a volunteer compensation fund. Regulations are required to provide for additional periods of EVL should additional pandemic phases occur, to provide additions to the list of excluded workers/employers, and establish a volunteer compensation fund;
  - two regulation making powers for the Home Secretary to make regulations, at the request of the Investigatory Powers Commissioner, to vary the appointment process for Judicial Commissioners by allowing for the appointment of temporary Judicial Commissioners and to vary the urgent warrant procedure. These powers are intended to ensure that the 'double lock' warranty process which underpins the work of the intelligence services and law enforcement agencies can continue to function;
  - four are in relation to the measures on Statutory Sick Pay (SSP). Regulations are required to enable flexibility in determining incapacity to work, entitlement to SSP on additional days and the level of rebate provided, in relation to how coronavirus develops;
  - two regulation making powers for the Secretary of State and for Welsh Ministers to amend the list of enactments containing requirements relating to children, education or training that may be temporarily removed or relaxed by notice;
  - three regulation making powers are for the Department of Health in Northern Ireland to help delay or prevent further transmission of an infectious agent which constitutes a serious imminent threat to public, to bring Northern Ireland's legislation to act for the protection of public health in line with the rest of the UK;
  - one regulation making power is given to Scottish Ministers to make regulations 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. This provision will ensure that Scottish Ministers have powers broadly similar to those that the Secretary of State and Welsh Ministers already have in relation to England and Wales respectively under section 45C of the Public Health (Control of Disease) Act 1984;

- two regulation making powers to provide for the postponement of certain listed polls and referendums;
- two order making powers to temporarily modify the rates and thresholds for National Insurance and to make regulations to adjust Employment Allowance; and
- the Bill also contains the following “structural” powers which together ensure that the substantive measures in the Bill can be turned on and off as needed, transitional cases dealt with and any consequential modifications or updates made. The powers in these provisions are exercisable by the devolved administrations in relation to devolved matters but can still be used by Ministers of the Crown in relation to devolved matters where they have consent from the relevant devolved administration:
  - the Bill contains a standard power in relation to commencement of measures (and allowing related transitional provisions);
  - the Bill will also allow for provisions to be switched off or re-activated if appropriate (and allowing related transitional provisions) – again to ensure they are in force only for the minimal period necessary over the two-year lifetime of the Act, to deal with the outbreak effectively but also proportionately. This on/off switch will be carried out by a type of commencement regulation, which means that it is simply made by a competent Minister, with no parliamentary procedure;
  - the Bill is subject to a two-year sunset – but the Bill contains a power to sunset provisions at an earlier date (so that they can be removed if no longer needed) and to extend the sunset by up to six months at a time (in case the pandemic continues for a longer period). Sunsetting early will require a draft affirmative procedure to be followed, extending the sunset can be done via either draft affirmative or made affirmative to ensure that the Bill can be extended when needed even if Parliament is not sitting at the time;
  - the Bill allows transitional provisions to be made that relate to the sunset of the Bill – to ensure that we can provide any details necessary to bridge how we come out of the emergency arrangements include in the Bill;
  - the Bill contains a standard power to make consequential modification of other legislation in consequence of modifications contained within the Bill. It requires a negative procedure for consequential modifications of secondary legislation and a choice of made affirmative or draft affirmative for modifications to primary legislation (to ensure that modifications can be made at speed if necessary); and

- the Bill also contains a power that ensures the provisions can be updated in line with other underlying secondary changes to reflect any changes in the underlying secondary legislation which the Bill modifies. Many of the provisions work by specifying temporary modifications of secondary legislation but if that underlying secondary legislation is changed then the modifications contained in the Bill will no longer work properly. This power ensures that the necessary changes can be made so that the Bill provisions still work as intended if the underlying secondary legislation is changed. These modifications can be made via either draft affirmative or made affirmative procedure. The made affirmative procedure is available in case the Bill needs updating urgently.

9. The Bill also provides for direction-making powers to:

- enable the Scottish Social Services Council to start considering applications for temporary registration of social workers in Scotland for certain categories of people;
- permit the General Medical Council to temporarily register qualified people as medical practitioners in the event of an emergency which poses a risk to human life;
- ensure Local Authorities in England and Wales adhere to guidance published by the Department for Health and Social Care in relation to meeting care and support needs under the Care Act 2014 during the emergency period;
- provide for the temporary disapplication of disclosure offences in Scotland;
- direct Local Authorities (LAs) to comply with guidance issued by Scottish Ministers about the exercise of their functions, during the emergency period;
- suspend the review of death certificates by a medical reviewer under the Death Certification (Scotland) Act 2011 and the Registration of Births, Deaths and Marriages (Scotland) Act 1965;
- determine to suspend the specified provisions of the Burial and Cremation (Scotland) Act 2016 and the Cremation (Scotland) Regulations 2019;
- disapply the offences under section 35 (organisations not to use barred individuals for regulated work) and section 36 (personnel suppliers not to supply barred individuals for regulated work) of the Protection of Vulnerable Groups (PVG) (Scotland) Act 2007;
- give a “temporary closure” direction (along with guidance) in respect of schools, registered childcare providers and higher and further education institutions; and will support the continued functioning of others where education and childcare can continue to be provided. This is to be conferred on Secretary of State, Scottish Ministers, Departments of Education, the Economy and of Health in Northern Ireland. Associated guidance may be produced;
- enable Scottish Ministers to give boarding or student accommodation closure directions;

- enable the Secretary of State to direct the operator of a port of arrival in the UK to suspend relevant port operations;
- restrict or prohibit events or gatherings; and/or impose restrictions on the opening of premises or to direct that premises are closed for a specific purpose;
- direct the Registrar General or a Registrar to return to non-emergency period methods following the end of the emergency period;
- designate Local Authorities to give a private company or corporation a direction requiring the person to do anything calculated to facilitate the transportation, storage or disposal of dead bodies or human remains, and to provide compensation to those affected. It also gives power to the Secretary of State to direct those persons where it considers a regional or national response is more appropriate or to direct struggling Local Authorities as to how they should exercise their functions or in that case to give directions to the persons concerned in their place. Associated guidance may be produced.

10. The Bill also gives the power to:

- enable the Registrar General in England and Wales and for Scotland to provide Guidance to enable qualified informants to provide information relating to deaths through alternative methods; and
- enable documents relating to deaths to be delivered by alternative methods.

11. Finally, there are also the following powers for which analysis is provided in this memo:

- Rules of Court to enable the expansion of availability of live links in criminal proceedings;
- for Scottish Ministers to make determinations in relation to the handling of ashes;
- arrangements for Scottish Ministers to restore indemnity arrangements for temporarily registered health care professionals; and
- for Welsh Ministers to modify the requirements for DBS checks for workers as a precondition to their starting work.

12. There are several instances in the Bill where there are Henry VIII powers:

- regulation making powers to appoint temporary Judicial Commissioners to carry out Judicial Commissioner functions under the Police Act 1997, Regulation of Investigatory Powers Act 2000, the Regulation of Investigatory Powers (Scotland) Act 2000 and the Investigatory Powers Act 2016 by amending those Acts and to adjust the time limits for urgent warrants given in the Investigatory Powers Act 2016, subject to the negative resolution procedure;
- powers in regulations to amend s.155(1) of the Social Security Contributions and Benefits Act 1992 and s.155(1) of the Social Security Contributions and Benefits Act Northern Ireland 1992 so as to disapply the waiting period limitation given in that section before statutory sick pay is payable, subject to the negative resolution procedure;

- regulation making powers to the Secretary of State or the Minister for the Cabinet Office in relation to the power to postpone elections and referendums to a specified date no later than 6 May 2021 and to amend any legislation for that purpose, subject to the negative resolution procedure;
- regulation making powers to the Welsh Ministers to postpone Welsh Assembly and local authority by-elections to a specified date no later than 5 May 2021 and to make consequential, supplementary, incidental, transitional or savings provision that may amend any legislation, subject to negative resolution procedure;
- powers in relation to the Secretary of State and Welsh Ministers giving notice to temporarily remove or relax statutory requirements on education, training and childcare providers, to make changes by regulations as to the list of legislative provisions that can be affected, subject to no Parliamentary procedure;
- drawing powers to act for the protection of public health in Northern Ireland into line with the rest of Great Britain, to enable health protection regulations to amend any statutory provision to give effect to an international agreement or arrangement subject to negative procedure;
- powers to amend the Coronavirus Act if there is a need to make consequential changes resulting from changes made to subordinate legislation;
- a general power to make consequential modifications needed in consequence of any provision of the Act, subject to affirmative or made affirmative procedure.

## C. DELEGATED POWERS

### ***Emergency Registration of Health Professionals***

#### **Clause 3: Emergency arrangements concerning medical practitioners: Scotland**

*Power conferred on:* Scottish Ministers

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative Resolution Procedure

#### *Context and Purpose*

13. In addition to the UK-wide system of professional registration operated by the General Medical Council, the NHS in Scotland also operates “performers lists” with which a general practitioner (GP) in Scotland must be registered before they can practise on behalf of the NHS. This allows the NHS in Scotland to suspend or bar a GP from practising in the NHS specifically without depending upon the GMC to strike off the GP altogether.

14. This additional requirement to be registered with a performers list may create a barrier to GPs responding quickly to assist during the emergency. The risk is that although many previously inactive GPs may find themselves registered again as medical practitioners and general practitioners with the GMC, they would still be ineligible to act as a NHS general practitioner because their name is not on a performers list. Modifications to the operation of performers lists are therefore needed to support the emergency response.
15. The modifications will allow general practitioners who have received an emergency registration from the GMC to practise in the NHS in Scotland while their application to join a performers list is being processed. Crucially, the general practitioners do still have to apply and the Health Boards may require that particular general practitioners about whom they have concerns have to complete the full process before practising. Any general practitioner who gives a Health Board cause for concern can still be prevented from practising.
16. Only a small element of this operates by a delegated power; the power to commence or suspend this clause and secondly, the power to modify the terms of the clause.

#### *Justification for taking the power*

17. It is not known at what time during the response effort the Secretary of State will declare an emergency in order to allow the GMC to grant emergency registrations to doctors. This clause would only be required in the event that it is necessary for NHS general practice in Scotland to recruit emergency registrants. As this clause represents a relaxing of requirements which are intended to protect patients, it would not be appropriate to have the modifications in operation for longer than is necessary.
18. As noted, the modifications in the Bill relax requirements which are intended to protect patients. The government proposes that the correct balance has been struck between the protection of patients and the need to increase health service capacity. However, as the emergency develops it may be necessary to reassess where this balance lies. For example, the assumption in the modification is that Health Boards will still be able to process applications but will do so at reduced speed. If the situation were to develop to the point where the Health Boards had no capacity at all to process applications the modifications would require to be updated to reflect that situation. Given the speed at which the situation can change, it is most feasible to make these changes by secondary legislation.

#### *Justification for the procedure*

19. The performers lists system is established by the National Health Service (Primary Medical Services Performers Lists) (Scotland) Regulations 2004. These Regulations are made under the negative resolution procedure. It would be open to the Scottish Ministers currently to make provision substantially similar to the provisions made by this clause by amending the 2004 Regulations. It is therefore considered appropriate to apply an equal level of scrutiny to the use of these powers as would be applied to regulations amending the 2004 Regulations.

### **Schedule 3: Emergency registration of pharmaceutical chemists and extension of prescribing powers: Northern Ireland**

*Power conferred on:* The Council of the Pharmaceutical Society of Northern Ireland

*Power exercised by:* Regulations

*Parliamentary Procedure:* Subject to the negative resolution procedure before the Northern Ireland Assembly

#### *Context and Purpose*

20. The Pharmaceutical Society of Northern Ireland (the Society) is the regulatory body for the pharmacy profession in Northern Ireland. The Pharmacy (Northern Ireland) Order 1976 (the 1976 Order) sets out the powers and responsibilities of the Society including the criteria required to be registered as a pharmaceutical chemist (pharmacist) and the criteria required for a pharmacist's entry in the register to be annotated as either a supplementary or independent prescriber.
21. Schedule 3 amends the 1976 Order to allow the registrar to temporarily enter in the register the name of a person, or a group of persons when advised by the Department of Health in Northern Ireland that an emergency has occurred, is occurring or is about to occur.
22. Provision is also made to allow the registrar to temporarily record an annotation against a pharmacist's record or the record of a group of pharmacists in the register when advised by the Department of Health that an emergency has occurred, is occurring or is about to occur. The purpose of the annotation would be to extend authority to pharmacists who would not normally be authorised under the 1976 Order to prescribe certain drugs, medicines and appliances during the emergency.
23. The Schedule currently provides that certain regulations and provisions of the 1976 Order do not apply to temporary registrations and annotations such as the collection of fees or the completion of Continuing Professional Development. A regulation making power is given to the Society to disapply certain other provisions as may be required during the emergency to permit the expedient temporary registration or annotation of an individual. A regulation making power is also included to allow the Council of the Society to re-apply certain disapplied provisions if required in relation to temporary registrations and temporary annotations.

#### *Justification for taking the power*

24. These powers are required to allow the Society to respond urgently to the need for an increased pharmacy workforce during the emergency. The ability for the Council of the Society to be able to disapply certain requirements may expedite the temporary registration or temporary annotation to the register of persons or pharmacists. This will be important as pharmacists will have key roles in the supply of medicines during an emergency. The power is required to ensure that if a matter has not been considered and needs to be disapplied, the Council could make regulations to cover the requirement during the emergency. The power to re-apply provisions that have been disapplied will be important to ensure that the Council of the Society has the flexibility to ensure that the appropriate safeguards are in place.

*Justification for the procedure*

25. This procedure is consistent with Article 25A of the Pharmacy (Northern Ireland) Order 1976 which requires regulations made by the Council of the Society to be subject to the negative resolution procedure before the Northern Ireland Assembly.

***Emergency registration of social workers***

**Clause 6 and paragraph 1 of Schedule 5: Temporary registration of social workers in Scotland**

*Power conferred on:* Scottish Ministers

*Power exercised by:* Directions

*Parliamentary Procedure:* None

*Context and Purpose*

26. This is a delegated power inserted into new section 46C(1) of the Regulation of Care (Scotland) Act 2001 for the Scottish Ministers to direct the Scottish Social Services Council (“SSSC”) to start considering applications for temporary registration as a social worker in Scotland from certain categories of people. Before issuing a direction, the Scottish Ministers must have regard to any advice from the Chief Medical Officer of the Scottish administration (or such other person as may be designated for the purpose of this paragraph by the Scottish Ministers), and be satisfied that the direction is necessary and proportionate in response to the risk of transmission of coronavirus, and its impact on the provision of social services in Scotland. The Scottish Ministers also have the power to issue a direction to the SSSC so it ceases to consider any further applications for temporary registration as a social worker. The Scottish Ministers must publish any direction.

*Justification for taking the power*

27. It is important there is a trigger point for the SSSC to start considering applications from individuals for temporary registration as a social worker, as opposed to automatically requiring the SSSC to begin this process upon the commencement of these provisions. The latter approach would create an administrative burden on the SSSC, which is why it is also important the Scottish Ministers also have the power to direct the SSSC to cease considering applications for temporary registration if they consider the need for additional resources is no longer required. Using regulations to switch this process on and off will not allow the Scottish Ministers to act quickly enough to alleviate pressures.
28. It will be necessary for the Scottish Ministers to exercise this power flexibly and quickly in the context of a coronavirus pandemic so that the SSSC can start considering temporary

applications for registration immediately. A power of direction enables the Scottish Ministers to respond quickly to deploy additional resources that may be needed to deal with an increase in demand for social work services in Scotland, or to address shortages in cover which may arise if staff are absent from work. The Scottish Ministers have the power under section 58 of the Regulation of Care (Scotland) Act 2001 (“the 2001 Act) to obtain information about the number of social workers which are needed across Scotland.

29. Given the importance of these services to vulnerable groups of people in Scotland, there is a need to act as quickly as possible both for the Scottish Ministers to switch this process on and off.

#### *Justification for the procedure*

30. A direction issued by the Scottish Ministers is not subject to parliamentary scrutiny. This is consistent with the power which the Scottish Ministers have to issue directions to the SSSC under section 43 of the 2001 Act. It is also proposed to be appropriate as the direction will apply for a limited amount of time and will effectively deal with operational and administrative matters that are not considered appropriate for primary legislation. Once the Scottish Ministers obtain information about what social work resources are needed in Scotland, they will need to issue a direction quickly and the lack of parliamentary procedure will facilitate that. The power to issue directions only applies to the SSSC. It will not impact detrimentally on any individuals so as to warrant a higher level of scrutiny.
31. The Scottish Ministers would endeavour to communicate directly with the SSSC to give it advance warning of any direction so they also able to act quickly.

### ***Emergency Volunteers***

#### **Clause 7 and Schedule 6: Emergency volunteering leave (power to provide for additional volunteering periods)**

*Power conferred on:*                    *The relevant national authority*

*Power exercised by:*                 *Regulations*

*Parliamentary Procedure:*        *Negative Resolution Procedure*

#### *Context and purpose*

32. It is not possible to predict the length and frequency of pandemic phases. Schedule 6 provides for an initial right to Emergency Volunteering Leave (“EVL”) of up to a maximum of 4 weeks within a 16 week period. The first such period will start on the date of commencement of the clause (expected to be by commencement regulations in line with

the Bill's general commencement provisions). However, this period may not be sufficient to deal with the initial pandemic phase. This period and subsequent 16 week periods are referred to as 'volunteering periods'.

33. Whilst being conscious of the burden on employers and business, the government considers that it requires the ability to specify subsequent periods to enable repeat volunteering in two scenarios: i) where the initial phase of pandemic lasts longer than expected; and ii) where two or more phases are separate. This is in order to maintain maximum availability of volunteers to shore up services when these come under repeat pressure.
34. The power thus provides a mechanism to reset or renew the 16 week period and the right to up to 4 weeks EVL. In this way an eligible volunteer may take up to 4 weeks EVL in the first 16 weeks, and then be entitled to do the same in the following period of 16 weeks should the emergency situation justify and demand a continued high number of volunteers to plug the gaps in the health and social care system. This could be repeated indefinitely subject to the expiry of the Act. The power is conferred on the Secretary of State in England, Wales and Scotland and the Secretary of State or the Department for the Economy in Northern Ireland. In respect of Northern Ireland, the Secretary of State may not make regulations under the power unless the Department for the Economy in Northern Ireland consents. The power to specify subsequent volunteering periods includes a power to make consequential, supplementary, incidental, transitional or saving provision.

#### *Justification for taking the power*

35. Due to the unpredictable nature of coronavirus and the risks of repeated outbreaks in the UK, the government considers there is a need for EVL to be exercisable on a repeat basis by providing the relevant national authority, with the power to specify for the possibility of consecutive or separate volunteering periods of 16 weeks by way of regulations. Without this power the right to exercise EVL would only be available during an initial period, potentially leaving health and social care services under-resourced. The power would give the option of responding to changing circumstances. An example of this would be where there is one pandemic phase in spring and then again in the winter. In this scenario the Government would require more flexibility around EVL, in effect to be able to allow people to volunteer on more than one occasion. The power to make a consequential etc provision may be helpful to cater for volunteers in consecutive volunteering periods.

#### *Justification for the procedure*

36. The government proposes that the negative procedure would be appropriate given the purpose of the provisions and the need to effect an extension with some urgency. This is balanced against the fact that the time period applicable would be limited on each occasion it is used and subject to the overall limited lifespan of the legislation.

## **Clause 7 and Schedule 6: Emergency volunteering leave (power to provide for further excluded workers)**

*Power conferred on:*                    *The relevant national authority*

*Power exercised by:*                *Regulations*

*Parliamentary Procedure:*        *Negative Resolution Procedure*

### *Context and purpose*

37. Workers of certain employers and professions are not included in the entitlement to take EVL. These exceptions will apply to certain public sector workers who, it is envisaged, will be performing essential public service roles during coronavirus outbreak(s) as well as to the workers of micro-businesses which employ less than 10 people and in certain other employments. The government has been able to identify the initial core of workers who it considers should be exempted from taking EVL and listed these in paragraph 3(1) of the Schedule. However, there are a number of further possible exceptions that the government will need to review and discuss with the appropriate agencies. The government does not currently have the time available before the Bill is introduced to be certain that it has captured all the workers it would be right to exclude. This power has been included so that the government can add further essential exclusions to this list of excluded workers. The power is conferred on the Secretary of State in England, Wales and Scotland and the Department for the Economy in Northern Ireland. The power includes the power to make consequential, supplementary, incidental, transitional or saving provision.
38. The government has considered the need to balance the exceptions to the entitlement against the need to ensure that there will be a large pool of available volunteers. The government considered various options to include reference to other pieces of legislation, but these were deemed too wide and would severely affect the number of potential volunteers.

### *Justification for taking the power*

39. In the government's view it may be necessary to add to the list of excluded workers to ensure that the pool of volunteers does not undermine other national or essential services. The availability of the power will afford the additional time to identify key workers that may need to be exempted from the provisions and provide a flexibility to adjust and restrict the nature of that pool beyond passage of the legislation. The power to make consequential etc provision may be helpful to cater for categories of workers who would have previously had the entitlement to EVL, and may have exercised, or be exercising the entitlement.

### *Justification for the procedure*

40. This power will be exercised by regulations following the negative procedure. The government proposes that the categorisation of which workers are suitable is effective by

regulations and that as extensions to the existing pool and in the context of the clearly identified purpose that negative scrutiny is suitable.

### **Clause 8: Compensation for emergency volunteers**

*Power conferred on:* Secretary of State

*Powers exercised by:* Arrangements

*Parliamentary Procedure:* None

#### *Context and purpose*

41. Clause 8 provides for the Secretary of State to make arrangements for making payment of compensation to emergency volunteers.
42. Compensation will be for some loss of earnings, for travel and subsistence. Compensation for loss of earnings will be paid only to those volunteers who have suffered a loss of earnings that the volunteer would otherwise not have suffered, but for the fact of taking emergency volunteering leave.
43. The arrangements will contain the details relating to these payments, and may include:
  - different provision for different cases;
  - provisions about the procedure for making a claim;
  - provision about how the amount a person is entitled to claim is to be determined; and
  - provision about the manner in which payments are to be made by the Secretary of State.

#### *Justification for taking the power*

44. The Government proposes that it would not be appropriate to set out comprehensive administrative and technical details relating to the compensation fund on the face of the Bill which are capable of being specified pursuant to this power. Furthermore, the availability of the power will afford the additional time required in which to develop the full detail around arrangements for the compensation fund.

#### *Justification for the procedure*

45. The arrangements to be made by the Secretary of State are subject to no parliamentary scrutiny. This is proposed to be appropriate as the power applies insofar as emergency volunteering occurs and relates to administrative and technical details concerning the emergency volunteer compensation fund.
46. The arrangements are required to be published in a manner considered appropriate by the Secretary of State, and a statement about the arrangements must be laid before parliament as soon as practicably possible after they have been made.

## ***Health Service Indemnification***

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

*Power conferred on:* Scottish Ministers

*Powers exercised by:* Arrangement or Direction

*Parliamentary Procedure:* None

#### *Context and Purpose*

47. The Medical Act 1983 section 18A permits the General Medical Council to temporarily register qualified people as medical practitioners in the event of an emergency which poses a risk to human life. Similar provisions exist in the Medicines Act 1968 in relation to pharmacists and further such powers to allow the Nursing and Midwifery Council to temporarily register nurses are created by the Bill (see clause 2).
48. If the emergency warrants it, it is expected that these powers will be used to restore the credentials of retired or otherwise inactive healthcare professionals. It is unlawful to practise as healthcare professional of any kind in the UK without an appropriate indemnity arrangement to cover professional liability claims. It is anticipated that the vast majority of temporarily registered health care professionals will not have indemnity cover in place, it would therefore be unlawful for them to contribute to the response effort. It would not be reasonable to expect people who are offering their assistance in a time of emergency to also fund their own indemnity cover.
49. The purpose of this clause is to permit the Scottish Ministers, in relation to Scotland only, to offer government-backed indemnity cover to any healthcare professional involved in the coronavirus response who does not already have adequate cover.

#### *Justification for taking the power*

50. Such arrangements as the Scottish Ministers may make under this clause will essentially be similar to the terms and conditions of an insurance policy. The government does not consider it to be appropriate to provide in detail for the classes of people and classes of liability which ought to be covered under an offer of indemnity through primary legislation.
51. It is not known at what stage in the emergency it will be necessary to make use of the additional healthcare professionals to whom this offer of indemnity would apply. The government considers it appropriate to allow the Scottish Ministers to monitor the situation and to offer indemnity at the time, and under terms, which seem to them to be the most appropriate given the information available.

### *Justification for the procedure*

52. The additional healthcare professions to whom this offer of indemnity would apply may be needed at very short notice. Therefore, on balance, the government considers it to be impractical to lay a statutory instrument in Parliament before this indemnity can take full effect, delaying the ability of the government to respond during the emergency.

### ***Health and care assessments and plans***

#### **Clause 14 and Schedule 11: Local authority care and support**

*Power conferred on:* Secretary of State and the Welsh Ministers

*Power exercised by:* Guidance and Directions

*Parliamentary Procedure:* None

### *Context and Purpose*

53. This is a power for the Secretary of State (paragraph 18) and Welsh Ministers (paragraph 35) to issue guidance to Local Authorities (LAs) in relation to meeting care and support needs during the emergency period and to direct LAs to comply with that guidance. For Wales, this means that if the Welsh Ministers issue guidance for LAs on how to undertake the prioritisation of services within the emergency period, they will have the power to direct some or all LAs to comply with the guidance.
54. The emergency may leave LAs unable to meet all individuals' eligible assessed needs, as required under the Care Act 2014 and the Social Services and Well-being (Wales) Act 2014, leaving them open to legal challenge. In this situation, LAs will need to be able to undertake a systematic prioritisation of provision in order to mitigate the impacts of the emergency period across their service provision. Concerns around legal challenge and lack of clarity about how to prioritise could cause LAs to delay this process beyond the point of viability, resulting in poor decision-making and worse outcomes than if a mandated move to emergency footing had been taken.
55. The provisions in this Bill relating to the Care Act 2014 and the Social Services and Well-being (Wales) Act 2014 remove duties from LAs to meet all individuals' assessed needs (although LAs will be required to meet an individual's needs where failure to do so would be in breach of that person's human rights). Because of this, it is important for the Government and Welsh Assembly to be able to ensure that the prioritisation of services down to this level takes place consistently, strategically, and ethically.
56. The Government and Welsh Assembly may, therefore, wish to provide guidance on how these changes are operationalised and, if there are concerns that this guidance may not be followed, the Secretary of State and the Welsh Ministers may need to be able to direct some or all LAs to comply with this guidance.

### *Justification for taking the power*

57. Given the scope of the Care Act 2014 and the Social Services and Well-being (Wales) Act 2014 assessments included in this Bill, and the emergency conditions arising from the effects of Coronavirus under which these would be triggered, provision of the power to the Secretary of State and the Welsh Ministers to direct LAs to follow guidance on the prioritisation of services should offer reassurance that LAs can still be required to follow some centrally mandated processes in the use of their powers if this is deemed necessary. Defining the power in this way will allow the Secretary of State and Welsh Ministers to decide whether, given the specific circumstances, the guidance requires the weight of direction.
58. The Government considers that this approach would provide the Secretary of State and Welsh Ministers with an appropriate flexibility to oblige LAs to comply with guidance if it was necessary to give a steer to LAs to ensure coordinated or consistent practise. It is intended that this direction power would not be used if it was apparent LAs were undertaking appropriate prioritisation with due regard to the principles outlined in the guidance. The Government suggests this provides a proportionate approach to the use of the power.

### *Justification for the procedure*

59. Guidance and directions issued by the Secretary of State and Welsh Ministers are not subject to parliamentary procedure. In view of the fact that direction would arise only as considered necessary to give greater effectiveness to guidance and would be applying in limited circumstances and on a temporary basis during the emergency period, the government considers this to be a suitable procedure. Directions would be published, and the Department of Health and Social Care and Welsh Ministers would also endeavour to communicate directly with LAs.

## **Clause 15: Local authority needs assessments and care and support plans: Scotland**

*Power conferred on:*                    *The Scottish Ministers*

*Power exercised by:*                *Direction*

*Parliamentary procedure:*        *None*

### *Context and purpose*

60. This is a delegated power for Scottish Ministers to direct Local Authorities (LAs) to comply with guidance issued by Scottish Ministers about the exercise of their functions, during the emergency period, under the relevant Acts that outline their duties for meeting care and support needs. This guidance will outline how LA's are to exercise their amended functions to promote the prioritisation of services during the outbreak of coronavirus. LAs must have regard to any guidance issued by Scottish Ministers, they must comply with any such guidance when directed to do so and must disregard any other guidance that will be superseded.

61. The outbreak of coronavirus may leave LAs unable to fully perform their functions under the Social Work (Scotland) Act 1968 (including functions relating to the Mental Health (Care and Treatment) (Scotland) Act 2003), The Children (Scotland) Act 1995, The Social Care (Self-directed Support) (Scotland) Act 2013 and The Carers (Scotland) Act 2016. It is proposed that LAs have the discretion to dispense with certain duties, whilst still ensuring they satisfy the duty of providing support. LAs will need to be able to undertake a systematic prioritisation of provision in order to mitigate the impacts of the outbreak across their service provision. Concerns around legal challenge and lack of clarity about how to prioritise could cause LAs to delay this process beyond the point of viability, resulting in poor decision making and worse outcomes than if a mandated move to emergency footing had been taken.
62. Scottish Ministers may, therefore, wish to provide guidance on how this prioritisation is undertaken and mandate its compliance. This is the intention of the delegated power included within these clauses.

#### *Justification for taking the power*

63. Given the scope of the legislative provisions which will be relaxed during the emergency period, this would provide Scottish Ministers with the power to direct LAs to follow departmental guidance on the prioritisation of services and would be a necessary safeguard. This power will only be exercised if it is considered that such guidance requires the weight of direction.
64. This approach promotes flexibility and provides that LAs would have to have regard to such statutory guidance. This power would only be exercised in specific circumstances that would be determined during the course of the emergency period. It should be noted that it may not be necessary to make the direction if LAs demonstrate that they are exercising their functions accordingly.
65. This power is consistent with the approach being taken for the rest of the UK.. It is crucial that a reciprocal regime is in place for Scottish LAs to ensure consistency.

#### *Justification for the procedure*

66. Guidance issued by the Scottish Ministers is not subject to parliamentary procedure. In view of the fact that direction would arise only as considered necessary to give greater effectiveness to guidance and would be applying in limited circumstances and on a temporary basis during the emergency period, the government considers this to be a suitable procedure.

### ***Registration of deaths and still-births etc***

#### **Schedule 12: Registration of deaths and still-births - Giving information to the Registrar General other than in person**

*Power conferred on:* Registrar General

*Power exercisable by:* Guidance

*Parliamentary Procedure:* None

### *Context and Purpose*

67. Sections 2 (in relation to a still-birth) and 16(3) and 17(3) (in relation to deaths) of the Births and Deaths Registration Act 1953 Act require qualified informants to provide information concerning a death or still-birth in the presence of a registrar within a specified timeframe in England and Wales.

68. Paragraph 3 of Schedule 12 to the Bill enables qualified informants to provide information to the registrar by telephone or alternative methods (i.e. not in the presence of a registrar) which are specified by the Registrar General in England and Wales in guidance.

### *Justification for taking the power*

69. The government proposes that it is not appropriate for the Bill to set out a comprehensive set of alternative modes of communication which are capable of being specified pursuant to this power. The list is likely to be detailed, and as such it is proposed that it would be inappropriate for inclusion in primary legislation.

70. It may also be necessary for the Registrar General to exercise the guidance making power flexibly; it is foreseeable that changes to the list of modes would be required. It would not be possible to effect such changes quickly or responsively were the list to be fixed in primary legislation.

71. It is considered appropriate for the power to be delegated to the Registrar General as the matters are administrative in nature and the Registrar General already legislates in relation to a wide range of administrative matters relating to death registration (see e.g. sections 15, 24(2) and 23A(1) of the 1953 Act).

### *Justification for the procedure*

72. The government proposes that guidance issued by the Registrar General is not subject to parliamentary scrutiny as the power applies for a limited amount of time (the emergency period) and relates to administrative details concerning the registration of deaths (and still-births). Similar administrative details relating to the registration of deaths (and still-births) such as the details of a death required to be registered (s.15 of the 1953 Act), the form of death certificate (s.24(2) of the 1953 Act) and alternate officers to whom a details of death may be given (s.23A(1) of the 1953 Act) are specified in regulations that are, similarly, subject to no parliamentary procedure (see s.39(a) of the 1953 Act).

## **Schedule 12: Registration of deaths and still-births - Delivery of documents by alternative methods**

<i>Power conferred on:</i>	<i>Registrar</i>	<i>General</i>
<i>Power exercisable by:</i>	<i>Guidance</i>	
<i>Parliamentary procedure:</i>	<i>None</i>	

### *Context and Purpose*

73. Paragraph 5(1) of Schedule 12 to the Bill allows certain documents relating to deaths and still-births under the 1953 Act, Registration of Births and Deaths Regulations 1987 (the “1987 Regulations”) and Births and Deaths Registration Act 1926 (the “1926 Act”) to be provided by alternative methods (such as electronic ones) specified in guidance issued by the Registrar General. Paragraph 5(1) confers a power on the Registrar General to issue such guidance.

### *Justification for taking the power*

74. The government proposes that it would not be appropriate for the Bill to set out a comprehensive set of alternative modes of communication which are capable of being specified pursuant to this power. The list is likely to be detailed, and as such it is proposed that it would be inappropriate for inclusion in primary legislation.

75. It may also be necessary for the Registrar General to exercise the guidance making power flexibly; it is foreseeable that changes to the list of modes would be required. It would not be possible to effect such changes quickly or responsively were the list to be fixed in primary legislation.

76. It is considered appropriate for the power to be delegated to the Registrar General as the matters are administrative in nature and the Registrar General already legislates in relation to a wide range of administrative matters relating to death registration (see e.g. sections 15, 24(2) and 23A(1) of the 1953 Act).

77. The 1953 Act, 1987 Regulations and 1926 Act do not prohibit any modes of delivering the documents required under them and these provisions of the Bill only serve to clarify that certain alternative modes of delivery (such as electronic ones) may be permitted during the emergency period. Whilst it is true to say that the legislation does presently contain provision relating to the mode of delivery of documents (see e.g. s.40 of the 1953 Act, which provides that documents may be delivered by post) this is attributable to the age of the legislation, which contains a level of administrative detail that would be considered inappropriate if the Act were passed today.

### *Justification for the procedure*

78. The guidance issued by the Registrar General is subject to no parliamentary scrutiny. This is proposed to be appropriate as the power applies for a limited amount of time (the emergency period) and relates to administrative details concerning the registration of deaths (and still-births). Similar administrative details relating to the registration of death such as the details of a death required to be registered (s.15 of the 1953 Act), the form of death certificate (s.24(2) of the 1953 Act) and alternate officers to whom a details of

death may be given (s.23A(1) of the 1953 Act) are specified in regulations that are, similarly, subject to no parliamentary procedure (see s.39(a) of the 1953 Act).

**Schedule 12: Registration of deaths and still-births - after the end of the emergency period: transitional provision**

*Power conferred on:* Registrar General or a registrar

*Power exercisable by:* Directions

*Parliamentary Procedure:* None

*Context and Purpose*

79. Paragraph 8(2) requires that a person who provides a registration document by an alternative method in reliance on paragraph 5 of Schedule 12 (delivery of registration documents by alternative methods) must provide the document in accordance with the applicable non-emergency period methods as soon as reasonably practicable after the end of the emergency period, and in any event not later than three months after the end of the emergency period.
80. Paragraph 8(3) allows the Registrar General to give directions extending or dispensing with the deadline in paragraph 8(2). Paragraph 8(6) confers the same in relation to registrars but only in relation to documents required to be given to them specifically.
81. In relation to the Registrar General these directions may be made in relation to specific cases or generally (paragraph 8(4)) and may also vary or revoke directions previously given under the power (paragraph 8(5)). In the case of registrars, these directions may be made only in relation to particular cases (paragraph 8(6)).

*Justification for taking the power*

82. The delegation relates to operational matters concerning extensions or waivers given to specific individuals or groups. The government does not consider it appropriate to burden primary legislation with such detailed matters nor would it be possible to effect such changes quickly or responsively were they to be dealt with in such fashion.
83. The government considers it would be appropriate to delegate the authority to the Registrar General and registrars as the delegation concerns specific operational registration matters.

*Justification for the procedure*

84. Directions made by the Registrar General or a registrar are subject to no parliamentary scrutiny. This is proposed to be appropriate as such decisions are of an operational nature and anticipated to be made on a case by case basis.

## **Schedule 12: Registration of deaths and still-births (Scotland) - Giving information other than in person and dispensing with signing the register**

*Power conferred on:*                *The Registrar General for Scotland (RGS)*

*Powers exercised by:*            *Guidance*

*Parliamentary Procedure:*    *None*

### *Context and purpose*

85. Powers to issue guidance would be conferred upon the RGS in relation to Scotland which would be very similar to the powers conferred on the Registrar General in paragraphs 3(1) and 5(1) of schedule 12 in relation to England and Wales.
86. Paragraph 11 makes provision, comparable to that in paragraph 3(1), so that a person who is required under the Registration of Births, Death and Marriages (Scotland) Act 1965 ("the 1965 Act") to give information about a death or still-birth to the registrar may give the information by telephone or any other methods specified in guidance, if the informant is unable to attend before the registrar in person.
87. Paragraph 12(1) provides, comparable to that in paragraph 5(1), that any document relating to a death or still-birth which is required by or under the 1965 Act may be delivered by any electronic or other means to be specified in guidance issued by the RGS.
88. Paragraph 11 provides for a power of the RGS to issue guidance as to an approved digital means of attesting the death register form (or the register page in the case of a still-birth), and as to the manner in which the registrar may attest that form or the register page on behalf of the informant, where the informant is unable to attend at the registration office to manually sign the form or page.

### *Justification for taking the power*

89. Scottish Ministers propose that this is an appropriate power to take, as it aligns with the procedure that applies for the powers to issue guidance conferred on the Registrar General for England and Wales in Schedule 12.
90. This power to issue guidance would operate as part of the arrangements in the emergency, so that a person would have a duty to provide details of their usual signature to the registrar, in the situation where they are unable to attend before the registrar in person to sign the death registration form (or the register page in the case of a still-birth). Where an alternative of providing a signature to the registrar by means of a digital signature device is available, it is considered that this should be available as an option, instead of providing the information as to usual signature.
91. Providing the details of usual signature will enable the registrar to transcribe the form on behalf of the informant. The death registration form closes the registration process and was initially prescribed by schedule 10 of the Registration of Births, Still-births, Deaths

and Marriages (Prescription of Forms) (Scotland) Regulations 1997 (SI 1997/2348). The form was substituted by schedule 2 of S.S.I. 2005/595.

92. The methods of providing the information as to the informant's usual signature would either be by telephone, or such other methods specified in the guidance. For so long as the emergency arrangements apply, this would be an alternative to the requirement for manuscript signature of the death registration form, which is provided for by S.S.I. 2007/566. In relation to still-births, the current requirement is that the informant must personally attend to sign the birth register in the presence of the registrar, as provided for by section 14(1) of the 1965 Act as currently in force.

*Justification for the procedure*

93. This guidance will contain administrative and technical details of digital signature arrangements, and how a signature may be transcribed on the register (ie, the word or words to be used). In the government's view, it is not considered practical or appropriate for a Parliamentary procedure to apply to the guidance. The government proposes that the procedure should be the same as that for the similar powers proposed for England and Wales in Schedule 12 to which similar justifications apply.

**Schedule 12: Registration of deaths and still-births (Scotland) - transitional provision**

*Power conferred on:* Registrar General for Scotland or a district registrar

*Power exercisable by:* Directions

*Parliamentary Procedure:* None

*Context and Purpose*

94. Paragraph 16(3) includes a power for the Registrar General for Scotland which is equivalent to the power outlined in paragraph 71 above that is conferred on the Registrar General as part of the transitional provisions in this Schedule for England and Wales. Paragraph 16(6) confers the same power in relation to district registrars in Scotland, only in relation to documents required to be given to them specifically, as for the power available to registrars in England and Wales as also described in paragraph 61.

*Justification for taking the power*

95. The justification of the delegation is as explained in paragraphs 77 and 78 above.

*Justification for the procedure*

96. The justification for the procedure is as explained in paragraph 79 above.

## **Schedule 13: Review of medical certificates of cause of death and cremations: Scotland – review of medical certificates of cause of death**

*Power conferred on: Scottish Ministers*

*Power exercised by: Direction*

*Parliamentary procedure: None*

### *Context and Purpose*

97. This schedule gives powers to the Scottish Ministers to suspend the review of death certificates by a medical reviewer under the Death Certification (Scotland) Act 2011 (“the 2011”) and the Registration of Births, Deaths and Marriages (Scotland) Act 1965. This power will be available to be used when the Scottish Ministers are of the view that—

(a) the incidence or transmission of coronavirus disease constitutes a serious and imminent threat to public health, and

(b) the exercise of the powers conferred by this paragraph will be an effective means of expediting the disposal of bodies and better utilise medical resources.

The power will be exercised in consultation with the senior medical reviewer.

98. The 2011 Act updates the certification of death process in Scotland with the aim of introducing a single system of independent, effective scrutiny applicable to the deaths that do not require a Procurator Fiscal investigation and to improve the quality and accuracy of Medical Certificates on Cause of Death.

99. Section 1 of the 2011 Act created the posts of medical reviewer and senior medical reviewers. The primary function of medical reviewers is to conduct reviews of Medical Certificates of Cause of Death (MCCDs). Certificates are sent for review to a medical reviewer under section 24A of the 1965 Act where they have been selected at random for review or under section 4 of the 2011 where an interested person has requested that a review be conducted. The review under both routes of referral is conducted under section 8 of the 2011 Act.

100. The policy proposal is that during the emergency period the Scottish Ministers should be able to determine that the referral for review of MCCDs under section 24A of the 1965 Act and under section 4 of the 2011 Act should be suspended until such time as they determine it is appropriate to re-instate the review system. It is considered that suspending the referral for review of medical certificates of cause of death in an emergency may help to expedite the disposal of bodies and free up medical personnel.

101. The effect of suspending the review of certificates will mean that the majority of those referred for review under section 24A will be abandoned and the death will be registered (enabling funerals to proceed), where a medical reviewer was considering making a referral to the procurator fiscal under section 11, 12 or 16 if the 2011 Act they will be required to do so and the Procurator Fiscal will determine what if any further investigation is required. Referrals under section 4 will be frozen and resumed after the suspension is lifted.

### *Justification for taking the power*

102. This is an emergency power which will only be available when the Scottish Ministers are of the view that the incidence or transmission of coronavirus constitutes a serious and imminent threat to public health, and the exercise of the powers conferred by this paragraph will be an effective means of expediting the disposal of bodies and better utilise medical resources.

103. The government proposes that making provisions in the Bill rather than relying on existing powers of suspension would enable better alignment of powers during any outbreak.

#### *Justification for the procedure*

104. This power is an emergency measure which is designed to be exercised at very short notice, in response to emerging evidence about the spread of coronavirus infection, or imminent risk of spread of infection, and in response to the impact of high morbidity rate on the review system and medical personnel.

105. As such, it is not considered practical for a parliamentary procedure to apply to such a direction. The effect of a suspension is time-limited.

### **Schedule 13: Review of Medical Certificates of Cause of Death and Cremations: Scotland – Handling of Ashes**

*Power conferred on:* Scottish Ministers

*Power exercised by:* Determination

*Parliamentary procedure:* None

#### *Context and Purpose*

106. This Schedule gives powers to the Scottish Ministers to determine to suspend the specified provisions of the Burial and Cremation (Scotland) Act 2016 and the Cremation (Scotland) Regulations 2019. This power will be available to be used when the Scottish Ministers are of the view that—

(a) the incidence or transmission of coronavirus disease constitutes a serious and imminent threat to public health, and

(b) the exercise of the powers conferred by this paragraph will be an effective means of expediting the disposal of bodies and better utilise resources.

107. The determination will be published in such manner as Ministers consider appropriate.

108. These provisions will provide power to the Scottish Ministers to determine to suspend various provisions of the Burial and Cremation (Scotland) Act 2016 (“the 2016 Act”) and the Cremation (Scotland) Regulations 2019 (“the 2019 Regulations”) in the event of an exceptionally high morbidity rate from coronavirus.

109. The Burial and Cremation (Scotland) Act 2016 provides a new framework for burial and cremation and regulation of the funeral industry more generally. The 2019 Regulations make provision for, among other things, who may submit the application for a cremation and provide a legal declaration to be signed by the applicant declaring that they have the legal authority to arrange for the cremation. The provisions enable Ministers to dis-apply the offence in section 49 in relation to this declaration where a cremation is arranged by a person who under section 65 or 66 of the 2016 Act is entitled to make arrangements but where they do not have the legal authority to do so as they are not the highest ranking eligible person. The provisions also enable the Scottish Ministers to suspend certain requirements in sections 53 to 55 and under section 87 of the 2016 Act and in regulations 12 and 13 of the 2019 Regulations in relation to the handling and return of ashes to remove the administrative burden of trying to trace and contact the relevant people. The provisions will be replaced with a requirement to retain the ashes throughout the duration of the suspension of sections 53 to 55 and for the duties in the relevant provisions to apply afresh from such point as the Scottish Ministers lift the suspension of those provisions.

#### *Justification for taking the power*

110. This is an emergency power which will only be available when the Scottish Ministers are of the view that the incidence or transmission of coronavirus constitutes a serious and imminent threat to public health, and the exercise of the powers conferred by this schedule will be an effective means of expediting the disposal of bodies and better utilise resources.

111. The government proposes that making provision in the Bill rather than relying on existing powers of suspension would enable better alignment of powers during any outbreak.

#### *Justification for the procedure*

112. This power is an emergency measure which is designed to be exercised at very short notice, in response to emerging evidence about the spread of coronavirus infection, or imminent risk of spread of infection, and in response to the impact of high morbidity rate on the cremation and funeral industry. As such, it is not considered practical for a parliamentary procedure to apply to such a determination. The effect of a suspension is time-limited.

### ***Investigatory powers***

#### **Clause 21: Appointment of temporary Judicial Commissioners**

*Power conferred on:* Secretary of State

*Power exercised by:* Regulations made by statutory instrument

*Henry VIII powers:* Yes. Regulations may modify the Police Act 1997, the Regulation of Investigatory Powers Act 2000, the Regulation of Investigatory Powers (Scotland) Act 2000 and the Investigatory Powers Act 2016 to apply them to temporary commissioners and make consequential changes.

*Parliamentary Procedure:* Negative resolution procedure

### *Context and Purpose*

113. This is a delegated power for the Secretary of State (in practice the Home Secretary) to allow for the Investigatory Powers Commissioner (IPC) to appoint 'temporary Commissioners' (TCs) to exercise functions normally carried out by Judicial Commissioners (JCs) under the terms of the Investigatory Powers Act 2016 (IPA), the Regulation of Investigatory Powers Act 2000, the Regulation of Investigatory Powers (Scotland) Act 2000 and the Police Act 1997.
114. JCs were established by the IPA in order to provide independent judicial approval of warrants under the IPA for the intelligence and certain law enforcement agencies to carry out various investigatory powers, such as lawful intercept of communications or interference with equipment. They must approve all warrants after being signed by the Secretary of State (or, in relation to certain warrants, the Scottish Ministers), and before the warrant takes effect (except for urgent cases) – this is known as the 'double lock'. There are 15 JCs, sitting under the IPC. They are all serving or former high court judges, and the IPA stipulates what is in practice a lengthy appointment procedure, requiring the approval of the Lord Chancellor, the Lord Chief Justice of England and Wales, the Lord President of the Court of Session, and the Lord Chief Justice of Northern Ireland, before an appointment can be made by the Prime Minister following consultation with the Scottish Ministers.
115. Because of their experience of high judicial office, the JCs are all (bar one) over the age of 70 and are therefore at higher risk of more serious consequences of coronavirus, and of being impacted by containment and delay measures in the government's Action Plan. An inability of the JC cadre to approve warrants would represent an unacceptable risk to national security and the investigation of serious crime. In order to preserve the safeguard of the double lock, it may become necessary to appoint more JCs at a pace which the current procedure does not allow for.
116. Because warrants are considered by JCs using the principles which apply to Judicial Review, it is advantageous that only those judges who have such experience are appointed (hence the restriction in s227(2) of the IPA that Commissioners must hold or have held high judicial office (i.e. High Court or above)). Following discussion with the IPC, the government foresees this restriction applying equally to the appointment of temporary Commissioners.
117. The power to make these regulations would only be exercisable on the advice of the IPC to the Secretary of State that there is a shortage of JCs because of coronavirus, and that the power is necessary to deal with that shortage. The appointment of temporary Commissioners would last for 6 months, renewable up to a total of 12 months. The power to appoint TCs would cease after 12 months or at the automatic expiry of the regulations one year after the Bill receives Royal Assent.

### *Justification for taking the power*

118. The regulation making power includes Henry VIII powers to make amendments to the IPA for the limited purpose of giving effect to the purpose of the Clauses. In view of the limited nature of the modifications, the clear and limited purpose of them, the fact that they can only be made on the recommendation of the independent Investigatory Powers Commissioner and of the need for urgency in order to protect national security and prevent and investigate serious crime, the government considers the negative resolution procedure to be suitable.
119. Furthermore, given the small size of the JC cadre, their particular vulnerability to more serious ill health as a result of Coronavirus and the vital role they play in the process of approving warrants, this measure is a proportionate step to ensure that there are sufficient numbers of JCs available, through temporary commissioners appointed directly and speedily by the Investigatory Powers Commissioner.

### *Justification for the procedure*

120. If these measures become necessary, it is likely to be at very short notice in order to preserve the efficient functioning of the system to approve warrants and for which it is important that the regulations are able to take immediate effect, effected by having Parliament to review the regulations under the negative resolution procedure.

## **Clause 22: Time limits in relation to urgent warrants etc under Investigatory Powers Act**

- Power conferred on:* Secretary of State (in practice the Home Secretary)
- Power exercised by:* Regulations made by statutory instrument
- Henry VIII power:* Yes, Regulations may modify the Investigatory Powers Act 2016 with reference to the period of the warrant.
- Parliamentary Procedure:* Negative resolution procedure

### *Context and Purpose*

121. This is a delegated power for the Secretary of State (in practice the Home Secretary) to extend the time period allowed for Judicial Commissioners (JCs) to consider urgent warrants under the terms of the Investigatory Powers Act 2016 (IPA); and the lifespan of those warrants before they expire.
122. Urgent warrants are requested by the intelligence or law enforcement agencies when the agency considers that there is an imminent threat to life or serious harm, or that there is an intelligence or investigative opportunity with limited time to act that relates to National Security or combatting serious crime. Such warrants must be considered by a JC no more than three working days after being issued and cease to have effect five working days after being issued, unless they are renewed.

123. JCs were established by the IPA in order to provide independent judicial approval of warrants under the IPA and certain other legislation. They must approve all warrants after being signed by the Secretary of State (or, in relation to certain warrants, the Scottish Ministers), and before the warrant takes effect (except for these urgent cases) – this is known as the ‘double lock’. There are 15 JCs, sitting under the IPC. They are all serving or former high court judges. The ‘double lock’ is an integral part of the safeguards contained within the IPA.

*Justification for taking the power*

124. Given the small size of the JC cadre, their particular vulnerability to coronavirus, and the vital role they play in the warranty process, this measure is a proportionate step to ensure that urgent warrants can be considered in time by a JC – and so preserve the ‘double lock’ in the IPA – without the risk of the warrant ceasing to have effect with all the attendant risks to life or to operational requirements which this would entail. The Secretary of State can only make these regulations if the Investigatory Powers Commissioner notifies her that it is necessary to do so because of the effects during the emergency period.

125. This power is intended to address a potential shortage of available JCs, as is the attendant power to allow the IPC to directly appoint temporary commissioners (TCs). While directly appointing TCs will assist considerably in removing any risk to the warranty system, it is clearly not instantaneous, as there will be a requirement for training and induction, etc. This additional measure is therefore required to ensure that the most urgent warrants are not put at risk due to the effects of coronavirus on the JC cadre.

126. The 12 working day limit represents the results of discussions with the Investigatory Powers Commissioner’s Office (IPCO) on the additional time, over and above the current statutory limits, required to service the potential additional burdens which might be placed on the system if, for example, JCs are not able to consider warrants from their offices in IPCO premises, as is currently the case. It is possible in such a scenario that warrants would need to be physically transported to the JC’s home, with staff waiting while they are considered, then transported back and the results then recorded onto the system. Any questions on the warrant would require a return visit, as the security classification of warrants precludes unsecured phone conversations. In practice, as in the current Act, there would probably be a shorter time period specified in the regulations for JC consideration of the warrant – probably up to 9 working days – and then the 12 working days would be applied to the lifespan of the warrant, which is when the warrant ceases to have effect unless renewed. The 12 workings days limit also takes into account the need for no-notice flexibility to deal with a surge of urgent warrants, which often occurs in the aftermath of an actual or attempted terrorist attack.

127. IPCO inspects the warrant requesting agencies on their urgent applications and reports the results of these inspections in their annual report. This would provide transparency on whether there was, for example, an increase in the number of urgent applications subsequently refused by JCs following any increase in time periods. In addition, ss24-25 of the IPA contains provisions and safeguards on how subsequently refused urgent warrants, and the data collected under them, are to be dealt with (which include, for example, a power for the JC to order the destruction of the material obtained under the warrant). These provisions would remain in force.

### *Justification for the procedure*

128. The regulation making power includes Henry VIII powers to make amendments to the IPA for the limited purpose of giving effect to the purpose of the Clause. In view of the limited nature of the modifications and the clear and limited purpose of them, the fact that they can only be made on the recommendation of the independent Investigatory Powers Commissioner, and of the need for urgency in order to protect national security and prevent and investigate serious crime, the Government considers the negative resolution procedure to be suitable.
129. If these measures become necessary, it is likely to be at very short notice in order to preserve the efficient functioning of the warranty system, and it is important that the regulations are able to take immediate effect, but still allowing Parliament to review the instrument subject to the negative resolution procedure in the normal way.

### ***Disclosure: Wales***

#### **Clause 31: Welsh Ministers power to modify requirements relating to DBS checks for work in regulated health and social care services**

*Power conferred on:* Welsh Ministers

*Power exercised by:* Notice

*Parliamentary/Assembly Procedure:* None

### *Context and Purpose*

130. Providers of independent health care are regulated under the provisions of Part 2 of the Care Standards Act 2000. The scheme requires providers of services which fall within the definitions of “independent hospitals”, “independent clinics” and “independent medical agencies” to register with the Welsh Ministers. Welsh Ministers exercise functions as the regulatory body for providers in Wales. Regulations made under Part 2 of the 2000 Act impose requirements on registered providers about a range of aspects affecting the quality of services provided. One of the aspects is the fitness of staff and includes a requirement that staff are vetted before they commence work in the regulated settings.
131. The Regulation and Inspection of Social Care (Wales) Act 2016 provides a scheme for the regulation of a range of social care services. These services are care home services, secure accommodation home services, residential family centres, adoption services, fostering services, adult placement services, advocacy services and domiciliary support services. As with independent health care services, providers are required to register with the regulator (Welsh Ministers) and are subject to a range of requirements about the conduct of their activity which include requirements about vetting of staff.
132. The number of people in Wales who are infected with coronavirus is rising and it is likely that the increase in cases will accelerate significantly. The timing of any

acceleration is unpredictable. Certain providers of health care services and social care services are likely to face a strong call for their services because of the increase in people who are ill or recovering from illness. The providers' ability to provide their services is also likely to be hampered by their existing staff being unable to work if they are affected by illness.

#### *Justification for taking the power*

133. The power for Welsh Ministers to modify the requirements for DBS checks for workers as a precondition to their starting work is an essential requirement to increase flexibility and to allow providers to respond rapidly fluctuations in the demand for their services. The time for receiving an enhanced DBS check under s.113B of the Police Act 1997 typically takes 3- 4 weeks. It is possible that during a period of emergency that this period will lengthen. Where the receipt of an enhanced certificate is a precondition to the commencement of employment it will act to obstruct providers from responding in an agile way to rapid fluctuations in demand for and their ability to supply services. In England vetting requirements for similar settings allow workers to begin work before an enhanced disclosure is received. The wording of the regulatory requirements in the schemes under both the Care Standards Act 2000 and the Regulation and Inspection of Social Care (Wales) Act 2016 do not permit this even in an emergency. The provision will provide equivalence for Wales, should the Welsh Ministers consider it safe and appropriate to do so, during the period of the emergency.

#### *Justification for the procedure*

134. No Assembly procedure is required for the exercise of the power to issue a notice. The scope of the power is limited to the single issue of modifying or disapplying requirements about DBS checks. The provision requires Welsh Ministers to issue a notice and to include on the notice a statement of why the notice is appropriate and proportionate. The purpose is to put providers in Wales in the same position as those in other parts of the UK during the period of the coronavirus emergency.

### ***Disclosure: Scotland***

#### **Clause 32: Temporary disapplication of disclosure offences: Scotland**

*Power conferred on:* The Scottish Ministers

*Power exercised by:* Direction

*Parliamentary Procedure:* None

#### *Context and Purpose*

135. Clause 32 confers a power on the Scottish Ministers to issue a direction that disapplies the offences under section 35 (organisations not to use barred individuals for regulated work) and section 36 (personnel suppliers not to supply barred individuals for regulated work) of the Protection of Vulnerable Groups (PVG) (Scotland) Act 2007. It is intended to ensure that NHS boards who are employing temporarily registered healthcare workers are not inadvertently committing an offence if they have not obtained a PVG disclosure check in advance.

*Justification for taking the power*

136. This power is an emergency measure whose purpose is to enable the Scottish Ministers to act quickly, decisively and proportionately in response to the substantial risk to public health in Scotland posed by the spread of coronavirus.

137. It should be noted that the power must be exercised within the devolved competence of the Scottish Ministers, which is circumscribed by a number of factors, including the need to act compatibly with the Convention rights. As such, Ministers must act proportionately in exercising these powers.

*Justification for the procedure*

138. The government considers that this procedure would be appropriate as this power is designed to be exercised at very short notice, in response to emerging evidence about the spread of coronavirus, to allow steps to be taken to ensure adequate staffing within the NHS. As such, it is not considered practical for a parliamentary procedure to apply to such a direction.

***Schools, childcare providers etc***

**Clause 35 Schedule 15, Part 1: Temporary Closure of Educational Institutions and Childcare Premises - Schools, 16 to 19 Academies, further and higher education institutions, Registered childcare providers**

*Power conferred on:* Secretary of State and Welsh Ministers (with power to delegate to others)

*Power exercisable by:* Directions

*Parliamentary Procedure:* None

*Context and Purpose*

139. Paragraphs 1 and 2 of Schedule 15 to the Bill enables the Secretary of State and the Welsh Ministers, to give a “temporary closure” direction to responsible bodies, including, proprietors and governing bodies of institutions, in respect of schools, registered childcare providers and higher and further education institutions in England or Wales. In

doing so, the Secretary of State or the Welsh Ministers will have due regard to advice from the Chief Medical Officer or the Chief Medical Officer's deputies and will only issue a direction where it is deemed a necessary and proportionate act in response to the risk of transmission of coronavirus. The direction would be in place for a specified period and could be revoked sooner if deemed to be no longer necessary.

140. Paragraph 4 provides that the Secretary of State or the Welsh Ministers may authorise a local authority to exercise the temporary closure direction power in Paragraphs 1 or 2. In England this would be in relation to a registered childcare provider, a school or 16-19 Academy in their area. The Secretary of State may also authorise the Office for Students (OfS) to exercise the power in relation to higher education providers. The Welsh Ministers may authorise local authorities in relation to childcare providers or schools, and the Higher Education Funding Council for Wales in relation to institutions within the higher education sector.
141. Paragraph 1(1) outlines the scope of this direction making power. The power provides that a temporary closure direction may relate to specified educational institutions in England, to all educational institutions in England or any part of England, or to educational institutions in England of a particular description. Paragraph 1(2) provides similar power to the Welsh Ministers in respect of Wales. Paragraph 2(1) and 2(2) to the Schedule makes similar provision for the Secretary of State and the Welsh Ministers in respect of registered childcare providers.
142. Paragraph 1(6) provides that a temporary closure direction in relation to an educational institution may require the taking of reasonable steps generally, or reasonable particular steps to prevent the admission of persons to the premises of an institution; that a direction may relate to attendance of persons generally or of specified persons; that it may relate to all or specified purposes of the educational institution; that it may make different provision for different purposes (for example imposing different requirements on different institutions); and that it may make other provision which the Secretary of State or the Welsh Ministers considers appropriate in connection with the matters directed.
143. Paragraph 2(6) makes similar provisions in relation to registered childcare providers and purposes connected with the provision of childcare. These powers require a registered childcare provider to which it applies, to take reasonable steps to ensure that persons do not, for a specified period, attend the premises of the provider for purposes connected with the provision of childcare. This is in recognition that some types of childcare provision (including childminders) operate from domestic premises. It would not be reasonable or proportionate to close the premises in these circumstances, instead we propose to direct that childcare provision cannot be delivered from these premises.
144. The Secretary of State or the Welsh Ministers must publish any direction. The Secretary of State or the Welsh Ministers will also have delegated power to provide guidance on how to comply with the direction. A person to whom a direction is given under Paragraph 1 or 2 must have regard to any guidance given by the Secretary of State or the Welsh Ministers.

#### *Justification for taking the power*

145. There are no existing powers which are considered suitable for the purposes of directing temporary closure of educational institutions or childcare providers. The

government may need to take radical and urgent action to protect the interests of the population in the context of a coronavirus pandemic. It is therefore imperative the Secretary of State or the Welsh Ministers are enabled to close educational institutions and childcare providers at speed, where this has been deemed appropriate and proportionate, and the decision has been taken with due regard to advice from the Chief Medical Officer or the Chief Medical Officer's deputies

146. The Government proposes that it is appropriate that these powers should sit with the Secretary of State or the Welsh Ministers to ensure that a direction can be issued nationally if required. However, allowing the Secretary of State or the Welsh Ministers to authorise local authorities, the OfS or the Higher Education Funding Council for Wales to exercise these powers on their behalf, recognises that in some situations it may be appropriate for decisions on temporary closures to be taken in response to local circumstances. Educational institutions and childcare providers will be best placed to make decisions about how to implement temporary closures at a local level but must have due regard to any guidance provided by the Secretary of State and the Welsh Ministers, or where authorised, the local authority, OfS or Higher Education Funding Council for Wales.

147. The Department considers that it has struck the right balance; providing clarity as to the matters the directions will cover in regards to attendance of persons and premises, further any directions will be temporary and must be exercised having due regard to advice from the Chief Medical Officer (or that Officer's deputies), whilst giving the appropriate amount of flexibility for the Secretary of State to the Welsh Ministers to respond in a proportionate manner in a coronavirus pandemic which would not be possible through existing legislation. Allowing the Secretary of State or the Welsh Ministers to authorise local authorities, the OfS or the Higher Education Funding Council for Wales to use these powers also enables them to be used in such a way that is responsive to local circumstances.

#### *Justification for the procedure*

148. Directions issued by the Secretary of State or the Welsh Ministers are not subject to parliamentary scrutiny. The Government proposes that it is appropriate as the power will be applied as a temporary measure for a specified time, with the ability to revoke the direction sooner if deemed appropriate. The powers are being introduced in the context of a public health emergency where it is imperative that the Secretary of State and Welsh Ministers (and, where there is an authorisation in place, local authorities, the OfS or the Higher Education Funding Council for Wales) is able to respond flexibly and at speed for the purpose of ensuring public protection.

149. In terms of the knowledge available to the public in relation to the directions, it may also be noted that the directions must be published and that the Department and Welsh Ministers would endeavour to communicate directly with the relevant institutions, as far as is practicable.

#### **Clause 35 and Schedule 15, Part 1: Temporary Closure of Educational Institutions and Childcare Premises, Guidance**

*Power conferred on:* Secretary of State and Welsh Ministers (with power to delegate)

*Power exercised by:*            *Guidance*

*Parliamentary Procedure:*    *None*

*Context and Purpose*

150. The Secretary of State, Welsh Ministers or those whom they have authorised to exercise their closure powers may issue guidance under paragraphs 5(3) of Schedule 15. A person to whom a direction is given must have regard to any such guidance.

*Justification for taking the power*

151. There is no existing power to issue guidance in the circumstances in which this new power to do so would be exercised. It is proposed to be necessary and appropriate to have such guidance to support those who might be given a direction under it to ensure that those following any direction do so based on the best evidence available to those giving the direction.

*Justification for the procedure*

152. The guidance issued by the Secretary of State or the Welsh Ministers is not subject to parliamentary scrutiny. This is considered appropriate as the guidance will apply for a limited amount of time and will deal with operational and administrative matters that are not considered appropriate for legislation. Operational and administrative matters could include advice on managing communications with parents or implementing arrangements for students to undertake learning from home.

**Clause 35 and schedule 15: Temporary closure of educational institutions and childcare premises - Closure of schools etc and further and higher education institutions**

*Power conferred on:*            *The Scottish Ministers*

*Power exercised by:*            *Direction*

*Parliamentary Procedure:*    *None*

*Context and Purpose*

153. Paragraph 8(1) of schedule 15 confers a power on the Scottish Ministers to give a “educational closure direction” to the relevant operator of an education establishment in Scotland. This will allow Ministers to direct those managing schools, early learning and childcare providers, out of school care providers, further education institutions, higher education institutions and Scottish Qualifications Authority-approved exam centres that are not any of those establishments to temporarily close the establishments under their management during the emergency period.

154. Ministers may give an educational closure direction to the relevant operator or operators of one or more named educational establishments, all educational establishments in Scotland or a part of Scotland, or educational establishments of a particular description.
155. The effect of an educational closure direction given in respect of an educational establishment is to require the relevant operator to take reasonable steps to restrict access to that establishment. An educational closure direction may further require a relevant operator to take such reasonable steps (whether general or specific) that are prescribed in a direction. A direction may make different provision for different establishments within the same direction, impose restrictions on access to either the whole of the premises of an establishment or part of it or in respect of all or only specified activities, and make such other ancillary and incidental provision as the Scottish Ministers consider appropriate. In terms of paragraph 12 of schedule 15 relevant operators will be under a duty to comply with educational closure directions, and failure to do so is enforceable by Ministers obtaining a court order for interdict or specific implement.
156. As an educational closure direction will significantly impact on the education provided to children and young people at educational establishments, and on the ability of a relevant operator or other persons to carry out their statutory functions in that regard, a direction may further direct that failure to comply with an existing duty or time limit imposed under any enactment or rule of law relating to education be disregarded to the extent that it is attributable to a temporary closure direction. A direction in these terms will be subject to a review requirement every 21 days.
157. While there is no statutory time limit on the duration of an educational closure direction, the Scottish Ministers are clear that this is an emergency measure designed to take decisive action to protect public health, where doing so is necessary. The power has to be exercised within devolved competence of the Scottish Ministers, which includes that it must be exercised proportionately. Paragraph 7(2) of schedule 15 requires Ministers to have regard to relevant advice from the Chief Medical Officer for Scotland, and it requires Ministers to be satisfied that a direction would be a necessary and proportionate action in response to the incidence or transmission of coronavirus. Paragraph 7(1) of schedule 15 places a duty on a relevant authority to have regard to any advice from the Chief Medical Officer. The placing of this duty on these authorities reinforces the current system of decision making for establishments in Scotland where it would be expected that the relevant authority would close their own establishment on advice from the Chief Medical Officer. The powers provided to the Scottish Ministers are however necessary to ensure that closure or certain requirements connected with continuation can be enforced if circumstances require it.

#### *Justification for taking the power*

158. As noted, this power is an emergency measure whose purpose is to enable the Scottish Ministers to act quickly, decisively and proportionately in response to the substantial risk to public health in Scotland posed by coronavirus during the emergency period.
159. Existing powers of the Scottish Ministers, or of all those responsible for the management of schools and other educational establishments, are not considered to be well-suited to the consistent and comprehensive application of emergency measures

that, it is considered, the current threat of pandemic is likely to require. Indeed, existing measures in relation to educational establishments do not apply to all such establishments currently operating in Scotland.

160. A wide-ranging power exercisable by direction is therefore put forward as considered necessary and appropriate. It should be noted that the power must be exercised within the devolved competence of the Scottish Ministers, which is circumscribed by a number of factors, including the need to act compatibly with the Convention rights. As such, Ministers must act proportionately in exercising these powers. The Bill expressly requires Ministers to be satisfied, before giving a direction, that it would be necessary and proportionate to do so, and to have regard to medical advice.

#### *Justification for the procedure*

161. This power is an emergency measure which is designed to be exercised at very short notice, in response to emerging evidence about the spread of coronavirus infection, or imminent risk of spread of infection, among children and young people and others attending educational establishments in Scotland. As such, it is not considered practical for a parliamentary procedure to apply to such a direction. An educational closure direction will have effect for a specified time only. Ministers are required by paragraph 13(1) of schedule 15 to publish any direction.

#### **Clause 35 and schedule 15: Temporary closure of educational institutions and childcare premises - School boarding accommodation**

*Power conferred on:* Scottish Ministers

*Power exercised by:* Direction

*Parliamentary Procedure:* None

#### *Context and Purpose*

162. Paragraph 10(1) of schedule 15 confers a power on the Scottish Ministers to give a “boarding accommodation closure direction” to the relevant manager of a school boarding establishment in Scotland.

163. This will allow Ministers to direct those managing a “school boarding establishment”, which covers residential provision at or arranged by a school and school hostels, to temporarily close the establishments under their management for a specified period. In order to prevent the spread of infection, a direction may also provide for pupils for whom school boarding accommodation is provided to be confined in their school boarding accommodation for a specified period.

164. Ministers may give a boarding accommodation closure direction to the relevant manager or managers of one or more named school boarding establishments, all such establishments in Scotland or a part of Scotland, or a school boarding establishment of a particular description.

165. A boarding accommodation closure direction may require a relevant manager to take such reasonable steps (whether general or specific) that are prescribed in a direction. A direction may make different provision for different establishments within the same direction, impose restrictions on access to either the whole of the premises of a school or part of it or in respect of all or only specified activities, make such other ancillary and incidental provision as the Scottish Ministers consider appropriate, and make any supplementary, transitional, transitory or saving provision as may be required. In terms of paragraph 12 of schedule 15, relevant operators will be under a duty to comply with boarding accommodation closure directions, and failure to do so is enforceable by Ministers obtaining a court order for interdict or specific implement.
166. A direction may further direct that failure to comply with an existing duty or time limit imposed under any enactment or rule of law relating to education be disregarded to the extent that it is attributable to a boarding accommodation closure direction. A direction which includes such a disapplication provision will have to be reviewed after 21 days, in terms of paragraph 13(3).
167. While there is no statutory time limit on the duration of a boarding accommodation closure direction, the Scottish Ministers are clear that this is an emergency measure designed to take decisive action to protect public health, where doing so is necessary. The power has to be exercised within devolved competence of the Scottish Ministers, which includes that it must be exercised proportionately. It is recognised that this will be an even more important consideration in the case of boarding pupils being temporarily confined to their accommodation.

#### *Justification for taking the power*

168. This power is an emergency measure whose purpose is to enable the Scottish Ministers to act quickly, decisively and proportionately in response to the substantial risk to public health in Scotland posed during the emergency period.
169. Existing powers of the Scottish Ministers, or of those responsible for the management of school boarding establishments, are not considered to be well-suited to the consistent and comprehensive application of emergency measures that, it is considered, the emergency period is likely to require. Indeed, existing measures in relation to school boarding accommodation do not apply to all such establishments currently operating in Scotland.
170. In this instance, the government considers that a wide-ranging power exercisable by direction is therefore necessary and appropriate. It should be noted that the power must be exercised within the devolved competence of the Scottish Ministers, which is circumscribed by a number of factors, including the need to act compatibly with the Convention rights. As such, Ministers must act proportionately in exercising these powers. The Bill expressly requires Ministers to be satisfied, before giving a direction, that it would be necessary and proportionate to do so, and to have regard to medical advice.

#### *Justification for the procedure*

171. This power is an emergency measure which is designed to be exercised at very short notice, in response to emerging evidence about the spread of coronavirus infection, or

imminent risk of spread of infection, among children and young people attending educational establishments in Scotland. As such, the government does not consider it to be practical for a parliamentary procedure to apply to such a direction. A boarding accommodation closure direction will have effect for a specified time only. Ministers are required by paragraph 13(1) of schedule 15 to publish any direction.

### **Clause 35 and schedule 15: Temporary closure of educational institutions and childcare premises - Student accommodation**

*Power conferred on:* *Scottish Ministers*

*Power exercised by:* *Direction*

*Parliamentary Procedure:* *None*

#### *Context and Purpose*

172. Paragraph 11(1) of schedule 15 confers a power on the Scottish Ministers to give a “student accommodation closure direction” to the relevant manager of student accommodation in Scotland.

173. This will allow Ministers to direct those managing student accommodation, to temporarily close the establishments under their management for a specified period. In order to prevent the spread of infection, a direction may also provide for students to be confined in their accommodation for a specified period.

174. Ministers may give a student accommodation closure direction to the relevant manager or managers of one or more named student accommodation premises, all such premises in Scotland or a part of Scotland, or student accommodation of a particular description.

175. A direction may make different provision for different premises within the same direction, impose restrictions on access to either the whole of the student accommodation premises or part of it or in respect of all or only specified activities, make such other ancillary and incidental provision as the Scottish Ministers consider appropriate, and make any supplementary, transitional, transitory or saving provision as may be required. A student accommodation closure direction may further require a relevant manager to take such reasonable steps (whether general or specific) that are prescribed in a direction. In terms of paragraph 12 of schedule 15 relevant operators will be under a duty to comply with a student accommodation closure direction, and failure to do so is enforceable by Ministers obtaining a court order for interdict or specific implement.

176. While there is no statutory time limit on the duration of a student accommodation closure direction, the Scottish Ministers are clear that this is an emergency measure designed to take decisive action to protect public health, where doing so is necessary. The power has to be exercised within devolved competence of the Scottish Ministers, which includes that it must be exercised proportionately. It is recognised that this will be an even more important consideration in the case of students being temporarily confined to their accommodation.

*Justification for taking the power*

177. This power is an emergency measure whose purpose is to enable the Scottish Ministers to act quickly, decisively and proportionately in response to the substantial risk to public health in Scotland posed during the emergency period.

178. The government therefore considers a wide-ranging power exercisable by direction to be necessary and appropriate. It should be noted that the power must be exercised within the devolved competence of the Scottish Ministers, which is circumscribed by a number of factors, including the need to act compatibly with the Convention rights. As such, Ministers must act proportionately in exercising these powers. The Bill expressly requires Ministers to be satisfied, before giving a direction, that it would be necessary and proportionate to do so, and to have regard to medical advice.

*Justification for the procedure*

179. This power is an emergency measure which is designed to be exercised at very short notice, in response to emerging evidence about the spread of coronavirus infection, or imminent risk of spread of infection, among young adults or adults staying in student accommodation in Scotland. As such, the government does not consider it practical for a parliamentary procedure to apply to such a direction. A student accommodation closure direction will have effect for a specified time only. Ministers are required by paragraph 13(1) of schedule 15 to publish any direction.

**Clause 35 and Schedule 15: Temporary closure of educational institutions and childcare premises**

*Power conferred on:* Scottish Ministers

*Power exercised by:* Guidance

*Parliamentary Procedure:* None

*Context and Purpose*

180. Ministers may issue guidance in relation to compliance with their functions under Part 2 of schedule 35 described above. A person to whom a direction is given must have regard to any such guidance.

*Justification for taking the power*

181. There is no existing power to issue guidance in the circumstances in which this new power to do so would be exercised. Scottish Ministers propose that this is necessary and appropriate to support those who might be given a direction under this Part by way of up-to-date guidance which is based on the best evidence available to the Scottish Ministers.

### *Justification for the procedure*

182. The purpose of any guidance as may be issued by the Scottish Ministers is to support those to whom a direction under this Part has been given in complying with such a direction. Given the short notice at which such directions are envisaged to be given, and the fast-changing circumstances to which any guidance issued, and re-issued where the evidence warrants it, it is considered it would be impractical and unnecessary for a parliamentary procedure to apply. It should be noted that the duty imposed by this provision is to have regard to the guidance.

### **Clause 35 and Schedule 15: Temporary closure of schools, institutions of further and higher education institutions and day care and child minding premises**

*Power conferred on:* Department of Education, Department for the Economy and Department of Health in Northern Ireland

*Power exercisable by:* Directions

*Assembly Procedure:* None

### *Context and Purpose*

183. Paragraph 13 of Schedule 15 to the Bill enables the Department of Education in Northern Ireland to give a “temporary closure” direction to managers of schools in Northern Ireland. In doing so, the Department will have regard to advice from the Chief Medical Officer or their deputy and will only issue a direction where it is deemed a necessary and proportionate act in response to the risk of transmission of coronavirus.

184. Paragraph 13(1) outlines the scope of this direction making power. The power provides that a temporary closure direction may relate to schools in Northern Ireland, to all schools in Northern Ireland or any part of Northern Ireland, or to educational institutions in Northern Ireland of a particular description. Paragraph 14(1) to the Schedule makes similar provision giving a power to the Department for the Economy in respect of institutions of further education and higher education. Paragraph 15(1) to the Schedule makes similar provision giving power to the Department of Health in respect of registered child minders and providers of day care. In the following paragraphs references to “the Department” are to whichever Department is relevant in the circumstances.

185. Paragraph 14(4) provides that a temporary closure direction in relation to a school may require the taking of reasonable steps generally, or reasonable particular steps to prevent the admission of persons to the premises of a school; that a direction may relate to attendance of persons generally or of specified persons; that it may relate to all or specified purposes of the school; that it may make different provision for different purposes (for example imposing different requirements on different institutions); and that it may make other provision which the Government considers appropriate in connection with the matters directed.

186. Paragraph 15(4) makes similar provision in respect of institutions of further education and higher education. Paragraph 16(4) makes similar provision in respect of registered

child minders and providers of day care. The powers in paragraph 15 require a person to which a direction applies, to take reasonable steps to ensure that persons do not, for a specified period, attend the premises of the provider for purposes connected with the provision of day care or child minding. This is in recognition that some types of childcare provision operate from domestic premises. It would not be reasonable or proportionate to close the premises in these circumstances, instead we propose to direct that day care or childminding provision cannot be delivered from these premises.

187. The Department must publish any direction. The Department will also have delegated power to provide guidance on how to comply with the direction. A person to whom a direction is given under paragraph 13, 14 or 15 must have regard to any guidance given by the Department.

#### *Justification for taking the power*

188. The delegated power allows for the temporary closure of specific schools, further or higher education institutions and childcare providers, by the Department where it has had regard to advice from the Chief Medical Officer or their deputy, and the government considers the issue of a direction to be a necessary and proportionate act in response to the risk of transmission of coronavirus during the emergency period. The Department is delegated to provide guidance on the implementation of temporary closures.

189. The Department has contractual powers and grant funding provisions in certain but not all cases. The government considers these to be potentially insufficient for reasons including that: (i) they largely relate to educational performance or mismanagement, (ii) they could not be exercised as quickly as needed, and (iii) they could not easily be exercised in relation to large numbers of institutions or areas. The Department may need to take radical and urgent action to protect the interests of the population in the context of an emergency period. It is therefore imperative the Department is enabled to close schools and other educational establishments and childcare providers at speed, where this has been deemed appropriate and proportionate, and the decision has been taken with regard to advice from the Chief Medical Officer or their deputy.

190. Although educational establishments and childcare settings are diverse, the government considers it suitable that this power should sit with the Department to ensure a consistent, joined-up and proportionate approach is taken and that any decisions on closures are informed by expert advice from the Chief Medical Officer or their deputy. Schools and other educational institutions and childcare providers will be best placed to make decisions about how to implement temporary closures at a local level, but must have regard to any advice provided by the Department.

191. The government considers that it has struck the right balance; providing clarity as to the matters the directions will cover in regards to attendance of persons and premises including the fact the powers will be temporary and must have regard to advice from the Chief Medical Office or his deputy, whilst giving the appropriate amount of flexibility for the Department to respond in a proportionate manner in a coronavirus pandemic.

#### *Justification for the procedure*

192. Directions issued by the Department are not subject to Assembly scrutiny. The government considers this to be appropriate as the power applies for a limited amount of time and relates to directions that will only be a temporary measure. The powers are being introduced in the context of an emergency period where it is imperative that the Department is able to respond flexibly and at speed for the purpose of ensuring public protection.

193. In terms of the knowledge available to the public in relation to the directions, it may also be noted that the directions must be published; and that the Department would endeavour to communicate directly with the relevant institutions, as far as is practicable.

194. The guidance issued by the Department is not subject to Assembly scrutiny. This is considered appropriate as the guidance will apply for a limited amount of time and will deal with operational and administrative matters that are not considered appropriate for legislation. Operational and administrative matters could include managing communications with parents or implementing arrangements for students to undertake learning from home.

#### **Clause 35 and Schedule 15: Temporary Closure of Educational Institutions and Childcare Premises, guidance**

*Power conferred on:* Department of Education, Department for the Economy and Department of Health in Northern Ireland

*Power exercised by:* Guidance

*Parliamentary Procedure:* None

#### *Context and Purpose*

195. The relevant Department may issue guidance under paragraphs 14(8), 15(8) or 16(8) of Schedule 15. A person to whom a direction is given must have regard to any such guidance.

#### *Justification for taking the power*

196. There is no existing power to issue guidance in the circumstances in which this new power to do so would be exercised. It is proposed to be necessary and appropriate to have such guidance to support those who might be given a direction to ensure that those following any direction do so based on the best evidence available to the Department.

#### *Justification for the procedure*

197. The guidance issued by the Department is not subject to Assembly scrutiny. The government proposes that this is appropriate as the guidance will apply for a limited amount of time and will deal with operational and administrative matters that are not

considered appropriate for legislation. Operational and administrative matters could include advice on managing communications with parents or implementing arrangements for students to undertake learning from home.

### **Clause 36 and Schedule 16: Temporary continuity directions: education, training and childcare**

*Power conferred on:* Secretary of State (with power to delegate to others) or the Welsh Ministers

*Power exercisable by:* Directions (with power to delegate others)

*Parliamentary Procedure:* None

#### *Context and Purpose*

198. Clause 36 and Paragraphs 1 and 2 of Schedule 16 allow respectively the Secretary of State or the Welsh Ministers the power to make directions in connection with the running of the education, training and registered childcare systems in England or Wales (“a temporary continuity direction”. Paragraph 1(4) provides that a temporary continuity direction may require the taking of reasonable steps generally, or reasonable particular steps to secure the continued provision of education or childcare; a direction may require an educational institution, or a registered childcare provider to stay open, re-open, or open at times when it would normally be closed; it may require an educational institution, or registered childcare provider to admit specified persons (for example those affected by a temporary closure direction) for the purposes of receiving education, training or childcare or related services at that institution; it may require the alteration of term, holiday or examination dates; it may require a relevant institution to arrange for the provision of transport and other services for the purposes of education of childcare; it may make different provision for different purposes (for example imposing different requirements on different persons) and it may include other provisions in connection with the direction as the Secretary of State considers appropriate. In Paragraph 3 there is provision for the Secretary of State to authorise the exercise of this power by local authorities in relation to registered childcare providers in the local authority area, a school in the area or 16-19 Academy in its areas; and the Office for Students (OfS) in relation to higher education providers. The Welsh Ministers may authorise a local authority or the Higher Education Funding Council for Wales to exercise this function in relation to the higher education sector. The direction would be in place for a specified period and could be revoked sooner if deemed to be no longer necessary.

199. For the purpose of this direction we have excluded childminders from the definition of registered childcare providers. Childminders usually operate from domestic premises and we do not believe it is proportionate to include them within the scope of this direction.

200. The power provides that before giving a temporary continuity direction, the Secretary of State, or the Welsh Ministers or anybody to which they have authorised this function, must have had regard to any advice from the Chief Medical Officer or the Chief Medical Officer’s deputies, and must be satisfied that the direction is a necessary and

proportionate means of achieving the continued provision of education, training or childcare.

*Justification for taking the power*

201. The delegated power is intended to cover a number of situations which may arise during the emergency period, for example, where educational institutions and childcare providers should continue to operate to support the continued education of children and students as well as enable parents to continue working. This would be in a temporary period and in line with advice from the Chief Medical Officer or that Officer's deputies and where it is necessary and proportionate. Where some educational institutions may have to close, these powers will support the continued functioning of others where education and childcare can continue to be provided. This will reduce the impact on children's education and support the continued functioning of the economy by allowing parents to continue working.
202. There are no existing powers that could be used to ensure continuity of education, training or childcare provision in these circumstances. Delegating the power to the Secretary of State and the Welsh Ministers will ensure a joined-up and proportionate approach is taken nationally, and that any decisions are in line with expert advice from the Chief Medical Officer or that Officer's deputies where that is necessary.
203. We also recognise that different localities may need to be able to respond appropriately to local need, ensuring a proportionate approach to implementing continuity arrangements, e.g. provision of childcare. For this reason, we also believe it is appropriate to include provisions that allow the Secretary of State or Welsh Ministers to authorise a local authority, the Higher Education Funding Council for Wales or the OfS to exercise these powers on their behalf.
204. The Department considers that it has struck the right balance given the purpose of the provisions; providing clarity on the face of the Bill as to when this power will be used whilst giving the appropriate amount of flexibility to respond in a coronavirus pandemic.

*Justification for the procedure*

205. Directions issued by the Secretary of State or the Welsh Ministers are not subject to parliamentary scrutiny. This is considered to be appropriate as the power applies as a temporary measure for a specified time, with the ability to revoke the direction sooner if deemed appropriate. Furthermore, they will be applied in the context of a public health emergency where it is imperative that the Secretary of State or the Welsh Ministers or bodies authorised to exercise this power, are able to respond flexibly and at speed. In using this power regard will be had to any advice from the Chief Medical Officer or that Officer's deputies, and it will only be used where deemed necessary and proportionate.
206. It may also be noted that the directions must be published, and that the Department would endeavour to communicate directly with the relevant institutions, as far as is practicable.

**Clause 36 and Schedule 16: Temporary continuity directions: education and childcare, guidance**

*Power conferred on:* Secretary of State or Welsh Ministers (with power to delegate)

*Power exercised by:* Guidance

*Parliamentary Procedure:* None

*Context and Purpose*

207. The Secretary of State or the Welsh Ministers, may issue guidance under paragraph 4(4) of Schedule 16. A person to whom a direction is given must have regard to any such guidance.

*Justification for taking the power*

208. There is no existing power to issue guidance in the circumstances in which this new power to do so would be exercised. It is proposed to be necessary and appropriate to have such guidance to support those who might be given a direction under it to ensure that those following any direction do so based on the best evidence available to those giving the direction.

*Justification for the procedure*

209. The guidance issued by the Secretary of State or the Welsh Ministers is not subject to parliamentary scrutiny. This is proposed to be appropriate as the guidance will apply for a limited amount of time and will deal with operational and administrative matters that are not considered appropriate for legislation. Operational and administrative matters could include advice on managing communications with parents or implementing arrangements for students to undertake learning from home.

**Clause 36 and Schedule 16: Notices temporarily removing or relaxing statutory provisions or Academy agreement provisions: England and Wales**

*Power conferred on:* Secretary of State or Welsh Ministers

*Power exercisable by:* Notice

*Henry VIII power:* Yes: the power permits the Secretary of State or Welsh Ministers to disapply or modify provisions of specified primary legislation by notice.

*Parliamentary Procedure:* None

*Context and Purpose*

210. Clause 36 and paragraph 5 of Schedule 16 allows the Secretary of State by notice to disapply or modify to the extent specified for a specified period any provisions of primary legislation listed in sub-paragraph 4(6) of that Schedule or similar provisions in Academy arrangements in England. Paragraph 7 allows the Welsh Ministers by notice to disapply or modify for a specified period any legislative provisions listed in sub-paragraph 7(6) of that Schedule.
211. Such notices may limit the disapplication or modification of a provision by reference to specified persons or areas or some other matter. They may also make consequential provision modifying provisions of other legislation as the Secretary of State or the Welsh Ministers considers appropriate. The purpose of the power is to allow the Secretary of State or the Welsh Ministers to provide clarity and protection to prevent individuals and bodies from breaching duties that they cannot practicably discharge, or that it would be inappropriate to expect them to discharge, in the light of the health emergency.
212. The notice period must not exceed 1 month and Secretary of State and the Welsh Ministers must explain in the notice why the measures contained in it are appropriate and proportionate in all the circumstances and the need for the notice must be kept under review (and it may be cancelled). Notices must be published and the Secretary of State or the Welsh Ministers must take reasonable steps to bring them to the notice of people likely to be affected by them.

#### *Justification for taking the power*

213. It will be necessary for the Secretary of State or the Welsh Ministers to be able to disapply or modify the specified provisions of primary legislation and make necessary consequential provision to provide clarity and protection to local authorities, childcare providers, educational establishments and others about their continuing obligations in the light of the ongoing health emergency and any measures (such as continuity directions under paragraph 1 and paragraph 2 of Schedule 16 j610SCH) which may be made in consequence of it. Although the Bill sets out the primary provisions which may need to be disappplied or modified, it may be necessary to disapply provisions in a flexible way in light of the circumstances as they develop, including in light of local circumstances in order to strike the right balance between the importance of the obligations contained in the provisions and the unfairness to those who could not, or could not be expected to, comply with them given the emergency situation and its consequences,
214. There will be specific protections in this power in that it provides that its use is necessary and proportionate and will be limited to particular provisions set out in the Bill itself (and any amendment of that list will be by regulations – see below) or to any necessary consequential provision. In addition, as set out above, there are a number of protections which are included in the power including that the direction will be time limited and must be kept under review so that it will not last any longer than is necessary in the circumstances and that any notice must be published and reasonable steps taken to bring it to the attention of those affected by them so that it will be clear how the law has been modified.
215. It is therefore proposed to be appropriate to delegate the process of disapplying or modifying in general or in particular circumstances in light of the developing health emergency: it would not be possible for provision in the Bill to reflect all the circumstances which might arise in practice and this might lead to modifications or

disapplications being applied when not necessary (or for longer than needed). As the need for consequential amendment will be linked to the terms of the particular disapplication or modification it is considered appropriate to make such provision in the notice.

#### *Justification for the procedure*

216. Notices under this power are not subject to parliamentary scrutiny. It is recognised that this is unusual to modify the effect of primary legislation without parliamentary scrutiny. However, as mentioned above, it is important for the power to be able to be exercised quickly and flexibly in response to developing (including local) circumstances. An example of this would include the requirement for parents to secure children's regular attendance at school. A further such instance may be to modify the definition of a "pupil", where a person is attending a school temporarily because of the coronavirus. Another could be to lower the duty on local authorities in relation to their obligations for cooperating with each other in respect of post-16 education and training. Such flexibility would not be possible to achieve were the power to be exercisable by Statutory Instrument and subject to parliamentary scrutiny. In addition, as mentioned above, this approach allows considerable flexibility to ensure that modifications to the application of primary legislation are only in place when absolutely necessary and for the shortest possible time and that the power can be withdrawn quickly when it is no longer necessary.

217. In order to ensure that the law remains transparent to those affected the directions must be published; and reasonable steps taken to bring it to the notice of those affected by it.

#### **Clause 36 and Schedule 16: Notices temporarily removing or relaxing statutory provisions etc**

*Power conferred on:* Secretary of State

*Power exercisable by:* Regulations

*Henry VIII power:* Yes

*Parliamentary Procedure:* Made affirmative procedure

#### *Context and purpose*

218. Paragraph 6 in relation to the Secretary of State and paragraph 8 in relation to the Welsh Ministers of Schedule 16 gives powers to make regulations to add to the list of provisions which may be disapplied or modified by notice (but only where the enactment relates, directly or indirectly, to education, training or childcare) or to vary or remove a provision from the list. The regulations may make different provision for different purposes and contain transitional, transitory or saving provision. The purpose of the power is to ensure that the list of provisions which may be modified continues to reflect

the impact of the health emergency on educational establishments, training and childcare providers.

#### *Justification for taking the power*

219. Whilst every effort has been made to identify those provisions which are likely to need to be disapplied or modified during the health emergency it may be that unanticipated impacts on educational establishments, childcare providers and others are identified which it would be appropriate to mitigate through disapplication or modification of existing provisions. This power allows for such an eventuality. The power is limited to provisions which are relevant to education, training and childcare matters so as to ensure that it can only be used for the purposes anticipated in the power permitting notices to be given.

#### *Justification for the procedure*

220. It is important that the power to disapply or modify provisions is available, where it is needed, without delay. At the same time, it is recognised that Parliament will wish to give careful scrutiny to whether such a power is necessary. It is therefore proposed to balance these competing needs by use of the made affirmative procedure. This will ensure that there is full opportunity to debate (and revoke) the provisions whilst allowing the powers to be made available promptly where they are required, subject to the important constraints set out in paragraph 5 or 7 of Schedule 16 which are referred to above.

### **Clause 36 and schedule 16: Temporary continuity directions: education and childcare: Scotland**

*Power conferred on:* Scottish Ministers

*Power exercised by:* Direction

*Parliamentary Procedure:* None

#### *Context and Purpose*

221. Paragraph 11(1) of schedule 16 confers a power on the Scottish Ministers to give an “educational continuity direction” to the relevant operator of an educational establishment in Scotland. This will allow Ministers to give directions to those managing schools, early learning and childcare providers, out of school care providers, further education institutions, higher education institutions and Scottish Qualifications Authority-approved exam centres that are not any of those establishments relating to the continuing operation of educational establishments for a specified period.

222. This includes the power to confer additional functions on the relevant operator of an educational establishment relating to the provision of early learning and childcare, school education, further education or higher education; the provision of related services (such

as school transport services); and the use of the operator's premises for the purpose of protecting public health. Operators can be required to allow pupils or students from elsewhere to attend their premises or can provide for or require students to go elsewhere for their education. Ministers could also require operators to take measures to ensure safe standards of hygiene and other measures to protect health. Directions could also alter term dates, holiday dates or examination dates; require the taking of reasonable steps (whether general or specific) as are specified in the direction, and make any supplementary, transitional, transitory or saving provision as may be required.

223. An educational continuity direction may make different provision for different purposes, be framed with reference to whatever matters the Scottish Ministers consider appropriate and make such other provision as Ministers consider appropriate in connection with the giving of the direction. In terms of paragraph 12 of schedule 16 relevant operators will be under a duty to comply with educational continuity directions, and failure to do so is enforceable by Ministers obtaining a court order for interdict or specific implement.

224. While there is no statutory time limit on the duration of an educational continuity direction, the Scottish Ministers are clear that this is an emergency measure designed to take decisive action to protect public health, where doing so is necessary. The power has to be exercised within devolved competence of the Scottish Ministers, which includes that it must be exercised proportionately. The Bill expressly requires Ministers to be satisfied, before giving a direction, that it would be necessary and proportionate to do so, and to have regard to medical advice.

#### *Justification for taking the power*

225. As noted above, this power is an emergency measure whose purpose is to enable the Scottish Ministers to act quickly, decisively and proportionately in response to the substantial risk to public health in Scotland posed during the emergency period.

226. A wide-ranging power exercisable by direction is therefore considered necessary and appropriate. It should be noted that the power must be exercised within the devolved competence of the Scottish Ministers, which is circumscribed by a number of factors, including the need to act compatibly with the Convention rights. As such, Ministers must act proportionately in exercising these powers. The Bill expressly requires Ministers to be satisfied, before giving a direction, that it would be necessary and proportionate to do so, and to have regard to medical advice.

#### *Justification for the procedure*

227. This power is an emergency measure which is designed to be exercised at very short notice, to mitigate the educational impact of the spread of coronavirus infection, or imminent risk of spread of infection, on children and young people attending educational establishments in Scotland. As such, it is not considered practical for a parliamentary procedure to apply to such a direction. The effect of a temporary closure direction will be for a specified time only. Ministers are required by paragraph 13(1) of schedule 16 to publish any direction.

**Clause 36 and Schedule 16, paragraph 12(2): Temporary continuity directions: Compliance and enforcement**

*Power conferred on:* Scottish Ministers

*Power exercised by:* Guidance

*Parliamentary Procedure:* None

*Context and Purpose*

228. Ministers may issue guidance in relation to compliance with their functions under Part 2 of schedule 16 described above. A person to whom a direction is given must have regard to any such guidance.

*Justification for taking the power*

229. There is no existing power to issue guidance in the circumstances in which this new power to do so would be exercised. It is considered necessary and appropriate to support those who might be given a direction under this Part by way of up-to-date guidance which is based on the best evidence available to the Scottish Ministers.

*Justification for the procedure*

230. The purpose of any guidance as may be issued by the Scottish Ministers is to support those to whom a direction under Part 2 of schedule 16 has been given in complying with such a direction. Given the short notice at which such directions are envisaged to be given, and the fast-changing circumstances to which any guidance issued, and re-issued where the evidence warrants it, responds makes it impractical for a parliamentary procedure to apply. It should be noted that the duty imposed by this provision is to have regard to the guidance.

**Clause 36 and Schedule 16: Temporary Continuity Directions: Education and Childcare**

*Power conferred on:* Department of Education, Department for the Economy and Department of Health in Northern Ireland

*Power exercisable by:* Direction

*Assembly Procedure:* None

*Context and Purpose*

231. Clause 36 and Paragraph 14 of Schedule 16 allows the Department of Education in Northern Ireland to make directions in connection with the running of the education system in Northern Ireland (“a temporary continuity direction”). Paragraph 14(4) provides that a temporary continuity direction may require the taking of reasonable steps generally, or reasonable particular steps to secure the continued provision of education; a direction may require a school to stay open, re-open, or open at times when it would normally be closed; it may require a school to admit specified pupils (for example those affected by a temporary closure direction) for the purposes of receiving education or childcare or related services at that institution; it may require the alteration of term, holiday or examination dates; it may make different provision for different purposes (for example imposing different requirements on different persons) and it may include other provisions in connection with the direction as the Department considers appropriate.

232. The power provides that before giving a temporary continuity direction, the Department must have had regard to any advice from the Chief Medical Officer or their deputy and must be satisfied that the direction is a necessary and proportionate means of achieving the continued provision of education. Paragraph 15 to the Schedule makes similar provision giving a power to the Department for the Economy in respect of institutions of further education and higher education. Paragraph 15 to the Schedule makes similar provision giving power to the Department of Health in respect of registered child minders and providers of day care. In the following paragraphs references to “the Department” are to whichever Department is relevant in the circumstances.

#### *Justification for taking the power*

233. The delegated power is intended to cover a number of situations which may arise during the emergency period where schools and other educational institutions and childcare providers should continue to operate to support the continued education of children and students as well as enable parents to continue working for a temporary period and in line with advice from the Chief Medical Officer or their deputy and where it is necessary and proportionate. Where some educational institutions may have to close, these powers will support the continued functioning of others where education can continue to be provided. This will reduce the impact on children’s education and support the continued functioning of the economy by allowing parents to continue working.

234. There are no existing powers that could be used to ensure continuity of education or childcare provision in these circumstances. Delegating the power to the Department will ensure a joined-up and proportionate approach is taken across educational establishments and childcare providers and that any decisions are in line with expert advice from the Chief Medical Officer or his deputy. The Department is also delegated to provide guidance.

235. The Government considers that it has struck the right balance given the purpose of the provision; providing clarity on the face of the Bill as to when this power will be used whilst giving the appropriate amount of flexibility for the Department to respond during the emergency period.

#### *Justification for the procedure*

236. Directions issued by the Department are not subject to Assembly scrutiny. The government proposes that this is appropriate as the power applies for a limited amount of time and relates to directions that will only be a temporary measure. Furthermore, they will be applied in the context of a public health emergency where it is imperative that the Department is able to respond flexibly and at speed. In using this power, the Department will have regard to any advice from the Chief Medical Officer or his deputy and be necessary and proportionate.
237. It may also be noted that the directions must be published; and that the Department would endeavour to communicate directly with the relevant institutions and persons, as far as is practicable.
238. The guidance issued by the Department is not subject to Assembly scrutiny. The government considers this is appropriate as the guidance will apply for a limited amount of time and will deal with operational and administrative matters which it proposes are not appropriate for legislation.

**Clause 36 and Schedule 16: Temporary continuity directions: education and childcare, guidance**

*Power conferred on:* Department of Education, Department for the Economy and Department of Health in Northern Ireland

*Power exercised by:* Guidance

*Parliamentary Procedure:* None

*Context and Purpose*

239. The relevant Department may issue guidance under paragraphs 14(6), 15(6) or 16(6) of Schedule 16. A person to whom a direction is given must have regard to any such guidance.

*Justification for taking the power*

240. There is no existing power to issue guidance in the circumstances in which this new power to do so would be exercised. It is proposed to be necessary and appropriate to have such guidance to support those who might be given a direction to ensure that those following any direction do so based on the best evidence available to the Department.

*Justification for the procedure*

241. The guidance issued by the Department is not subject to Assembly scrutiny. This is proposed to be appropriate as the guidance will apply for a limited amount of time and will deal with operational and administrative matters that are not considered appropriate for legislation. Operational and administrative matters could include advice on managing

communications with parents or implementing arrangements for students to undertake learning from home.

### **Clause 36 and Schedule 16: Notices temporarily removing or relaxing statutory provisions**

*Power conferred on:* Department of Education in Northern Ireland

*Power exercisable by:* Notice

*Assembly Procedure:* None

#### *Context and Purpose*

242. Paragraph 17 of Schedule 16 allows the Department to disapply or modify such provisions set out in legislation and in other instruments as set out in paragraph 16 and specified in regulations passed through the made affirmative procedure. That procedure requires the regulations to be passed by the Assembly within 40 sitting days. If they are not passed within that period then the regulations cease to be law.

#### *Justification for taking the power*

243. The delegated power allows for the disapplication, variation or relaxation of duties in education law as set out in paragraph 17(2). The Department considers it necessary to be able to disapply the powers to provide clarity to parents, childcare providers, educational establishments and others, where duties have been relaxed to enable them to continue to operate during the emergency period.

244. In such circumstances, the Department wants to provide clarity and protection to prevent individuals and bodies from breaching duties that they cannot practicably discharge in the event of a coronavirus pandemic.

245. There will be specific protections in this power to provide that its use is necessary and proportionate. The Department must publish any notice.

#### *Justification for the procedure*

246. Notices issued by the Department are not subject to Assembly scrutiny, though the powers that are being disapplied have been included on the face of the primary legislation. This is proposed to be appropriate as the power applies for a limited amount of time and relates to directions that will only be a temporary measure.

247. It may also be noted that the notices must be published; and that the Department would endeavour to communicate directly with the persons affected as far as is practicable.

## **Statutory Sick Pay**

### **Clauses 37-39 – Statutory sick pay: funding of employers’ liabilities, power to disapply waiting period limitation and modification of regulation making powers**

<i>Power conferred on:</i>	<i>HMRC with concurrence of Secretary of State (Clause 37), Secretary of State (Clauses 38 and 39)</i>
<i>Power exercised by:</i>	<i>Regulations made by Statutory Instrument</i>
<i>Henry VIII power</i>	<i>Yes, the power in clause Clause 38 is to disapply provision in primary legislation</i>
<i>Parliamentary Procedure:</i>	<i>Negative resolution procedure</i>

#### *Context and Purpose*

248. Statutory Sick Pay (“SSP”) was introduced in 1983. It is paid by an employer to an employee who is absent from work due to sickness. SSP is paid at a flat weekly rate and may be paid for maximum of 28 weeks.

249. The legislative framework for SSP is set out in Part 11 of the Social Security Contributions and Benefits Act 1992 (“SSCBA”) and associated regulations.

#### Clause 37

250. Clause 37 inserts a new section 159B in the SSCBA. It provides for a power in relation to the funding of additional employer liabilities for SSP incurred as a result of the coronavirus outbreak and includes a regulation making power for HMRC, with the concurrence of the Secretary of State to make provision for payment of SSP in relation to coronavirus and for it to be funded by HMRC. Qualifying employers would therefore receive a specified rebate for SSP payments made for a specified period.

#### Clause 38

251. Section 155 of the SSCBA provides limitations on entitlement to SSP. In particular, section 155(1) provides that SSP is not payable for the first three qualifying days of any period of entitlement.

252. Clause 38 provides that the limitation on entitlement to SSP contained in section 155(1) of the SSCBA may be suspended by regulations made by the Secretary of State in relation to employees affected by coronavirus, meaning that those employees would receive SSP from the first day of sickness.

#### Clause 39

253. Section 175 of the SSCBA provides for general regulation powers. There is a general power for regulations to confer a discretion on any person, but not in relation to regulations about SSP.

254. Clause 39 enables regulations about when an employee is deemed incapable for work by reason of coronavirus to be made by reference to advice from Public Health England, NHS National Services Scotland and Public Health Wales, as amended from time to time, as well as power to exercise discretion in relation to any matters in regulations about SSP in relation to coronavirus.

*Justification for taking the power*

255. The power in clause 37 is exercisable by regulations in order that the HMRC, with the concurrence of the Secretary of State may in particular control the levels of rebate, to whom the rebate is paid, and the period for which the rebate will be available. If the provision was not delegated to the Secretary of State, all these aspects would be contained in the primary legislation, and any flexibility would be lost. Flexibility is required in this regard because, for example, at the start of the period covered by the regulations, only small and medium sized businesses might be able to receive a rebate. But, as the situation changes with regard to the virus, it might be considered appropriate to extend the rebate to larger businesses. Also, it might become necessary to increase, or decrease, the amount of the rebate payable.

256. The power in clause 38 is exercisable by regulations in order that the Secretary of State may control the period during which the limitation in section 155(1) is suspended. If the provision was not delegated to the Secretary of State, the period of suspension would be fixed. The regulation making power means the period during which the limitation is suspended can be set and kept under review and amended, depending on how the situation with regard to coronavirus disease develops.

257. The power in clause 39 enables the Secretary of State to make regulations referring to guidance issued by Public Health England, NHS National Services Scotland and Public Health Wales in determining whether an employee should be deemed to be incapable of work by reason of coronavirus, for example because the employee is self-isolating. Flexibility is required because it is anticipated that the guidance will change frequently. For the protection of public health it is considered necessary to ensure that employees who self-isolate in accordance with whatever is the current guidance are deemed incapable for work and entitled to SSP from day 1.

258. There is also a power for regulations about SSP relating to coronavirus to confer a discretion on any person. This flexibility is provided for in relation to other regulation making powers under the SSCBA, but expressly excluded in connection with regulations made about SSP. It is sought, in particular, because the HMRC rebate scheme is still under development and flexibility is required as to how it will work. It is not anticipated at the stage that it will be required for other regulation making powers about SSP, but it is considered prudent not to restrict the provision to regulations made under clause 31 (SSP1) to provide flexibility as the situation on coronavirus develops.

*Justification for the procedure*

259. In giving consideration to provide SSP in a timely manner during the emergency period, the government proposes that this procedure would be appropriate. It is anticipated that Regulations made under clauses 37-39 will not be complex. The government's intention is to use regulations to create a rebate scheme. Regulations

made under clause 38 will simply disapply section 155(1) SSCBA in relation to a defined category of employees, who have been affected by coronavirus and are expected to incorporate references to current guidance from the public health bodies referred to above. Draft regulations will be made available during the passage of the Bill. The government proposes negative resolution scrutiny of the nature and detail of these arrangements would therefore be appropriate.

#### **Clauses 40-42: Statutory sick pay (Northern Ireland)**

*Power conferred on:* HMRC with concurrence of Secretary of State (Clause 40), Secretary of State (Clauses 41 and 42)

*Power exercised by:* Regulations made by Statutory Rule

*Henry VIII power* Yes, the power in clause 41 is to disapply provision in primary legislation

*Parliamentary Procedure:* Negative resolution procedure

#### *Context and Purpose*

260. These provisions in relation to Statutory Sick Pay (“SSP”) are in effectively identical terms to the clauses for SSP for Great Britain. Statutory Sick Pay (“SSP”) was introduced in 1983. It is paid by an employer to an employee who is absent from work due to sickness. SSP is paid at a flat weekly rate and may be paid for maximum of 28 weeks.

261. The legislative framework for SSP is set out in Part X1 of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (“SSCBANI”) and associated regulations.

#### Clause 40

262. Clause 40 inserts a new section 154B in the SSCBANI. It provides for a power in relation to the funding of additional employer liabilities for SSP incurred as a result of the coronavirus outbreak and includes a regulation making power for with the concurrence of the Secretary of State to make provision for payment of SSP in relation to coronavirus and for it to be funded by HMRC. Qualifying employers would therefore receive a specified rebate for SSP payments made for a specified period.

#### Clause 41

263. Section 151 of the SSCBA provides limitations on entitlement to SSP. In particular, section 151(1) provides that SSP is not payable for the first three qualifying days of any period of entitlement.

264. Clause 41 provides that the limitation on entitlement to SSP contained in section 151(1) of the SSCBANI may be suspended by regulations made by the Secretary of State in relation to employees affected by coronavirus, meaning that those employees would receive SSP from the first day of sickness.

## Clause 42

265. Section 171 of the SSCBANI provides for general regulation powers. There is a general power for regulations to confer a discretion on any person, but not in relation to regulations about SSP.
266. Clause 42 enables regulations about when an employee is deemed incapable for work by reason of coronavirus to be made by reference to guidance from the Regional Agency for Public Health and Social Well-being, Public Health England, NHS National Services Scotland and Public Health Wales, as amended from time to time, as well as power to exercise discretion in relation to any matters in regulations about SSP in relation to coronavirus.

### *Justification for taking the power*

267. The power in clause 40 is exercisable by regulations in order that the HMRC, with the concurrence of the Secretary of State may in particular control the levels of rebate, to whom the rebate is paid, and the period for which the rebate will be available. If the provision was not delegated to the Secretary of State, all these aspects would be contained in the primary legislation, and any flexibility would be lost. Flexibility is required in this regard because, for example, at the start of the period covered by the regulations, only small and medium sized businesses might be able to receive a rebate. But, as the situation changes with regard to the virus, it might be considered appropriate to extend the rebate to larger businesses. Also, it might become necessary to increase, or decrease, the amount of the rebate payable.
268. The power in clause 41 is exercisable by regulations in order that the Secretary of State may control the period during which the limitation in section 151(1) is suspended. If the provision was not delegated to the Secretary of State, the period of suspension would be fixed. The regulation making power means the period during which the limitation is suspended can be set and kept under review and amended, depending on how the situation with regard to coronavirus infection develops.
269. The power in clause 42 enables the Secretary of State to make regulations referring to guidance or any other document published by the Regional Agency for Public Health and Social Well-being, Public Health England, NHS National Services Scotland, Public Health Wales or any other person specified in the regulations as that guidance or other document is amended from time to time in determining whether an employee should be deemed to be incapable of work by reason of coronavirus, for example because the employee is self-isolating. Flexibility is required because it is anticipated that the guidance will change frequently. For the protection of public health it is considered necessary to ensure that employees who self-isolate in accordance with whatever is the current guidance are deemed incapable for work and entitled to SSP from day 1.
270. There is also a power for regulations about SSP relating to coronavirus to confer a discretion on any person. This flexibility is provided for in relation to other regulation making powers under the SSCBANI, but expressly excluded in connection with regulations made about SSP. It is sought, in particular, because the HMRC rebate scheme is still under development and flexibility is required as to how it will work. It is not anticipated at the stage that it will be required for other regulation making powers about SSP, but it is considered prudent not to restrict the provision to regulations made under clause 40 to provide flexibility as the situation as coronavirus develops.

### *Justification for the procedure*

271. In giving consideration to provide SSP in a timely manner during the emergency period, the government propose that this procedure would be appropriate. It is anticipated that Regulations made under these clauses will not be complex. The government's intention is to use regulations to create rebate scheme regulations made under clause 40 that will simply disapply section 151(1) SSCBA in relation to a defined category of employees, who have been affected by coronavirus and are expected to incorporate references to current guidance from the public health bodies referred to above. Draft regulations will be made available during the passage of the Bill. The government proposes negative resolution scrutiny of the nature and detail of these arrangements would therefore be appropriate.

### ***Protection of Public Health***

#### **Schedule 17: Powers to Act for the Protection of Public Health: Northern Ireland Section 25B – Health protection regulations, international travel, etc**

*Power conferred on:*                    *The Department of Health in Northern Ireland*

*Power exercisable by:*                *Regulations*

*Parliamentary Procedure:*        *Negative resolution procedure before the Northern Ireland Assembly*

### *Context and Purpose*

272. Paragraph 25B of Schedule 17 enables the Department of Health in Northern Ireland to make regulations for preventing danger to public health from conveyances (or the persons or articles on those conveyances) arriving at any place or for preventing the spread of infection by conveyances leaving any place. It also provides a power to make regulations to give effect to international agreements or arrangements, for example World Health Organisation recommendations. It gives examples of particular measures the regulations might include.

### *Justification for taking the power*

273. On 10th February 2020, the Secretary of State for Health made the Health Protection (Coronavirus) Regulations 2020 allowing for restrictions to be imposed for the isolation of persons suspected to be infected with coronavirus and for the detention of persons in isolation where deemed to be necessary. The Regulations do not apply to Northern Ireland.

274. In particular, those Regulations allow for further restrictions and requirements relating to the isolation of persons suspected to be infected with coronavirus and for the detention of persons in isolation where that is deemed to be necessary.

275. The Department of Health has responsibility for responding to the risk of a serious and imminent threat to public health in Northern Ireland. The primary public health legislation in Northern Ireland is the Public Health Act (Northern Ireland) 1967. The Department of Health in Northern Ireland does not have powers to draft equivalent regulations.

276. These provisions would allow the Department of Health in Northern Ireland to bring forward proposals for regulations to the Northern Ireland Assembly that would allow for additional measures to be introduced to help delay or prevent further transmission of an infectious agent which constitutes a serious imminent threat to public health.

#### *Justification for the procedure*

277. Given the current risk of a serious and imminent threat to public health it is considered that the negative resolution procedure before the Northern Ireland Assembly is appropriate in this case. In the case of 25B, the option of negative resolution balances the need for greater parliamentary scrutiny with the potential need to respond urgently to the serious, and potentially immediate, public health threats posed by the spread of coronavirus disease.

### **Schedule 17: Powers to Act for the Protection of Public Health: Northern Ireland** **Section 25C – Health protection regulations: domestic**

*Power conferred on:* Department of Health in Northern Ireland

*Power exercisable by:* Regulations

*Parliamentary Procedure:* Affirmative resolution procedure before the Northern Ireland Assembly, or negative resolution procedure if the Regulations do not have a significant effect on a person's rights.

#### *Context and Purpose*

278. Section 25C provides a power for the Department of Health to make regulations to prevent, protect against, control or provide a public health response during the emergency period in Northern Ireland. The threat can come from outside Northern Ireland. The section gives examples of particular provisions which might be made, for example, to set out requirements for notification of cases of specified diseases by registered medical practitioners to the Public Health Agency; to impose restrictions or requirements directly on persons, or in relation to things or premises; or to enable another body, such as a district council, to do so. The section also provides examples of the restrictions or requirements that might be imposed, and includes a list of things that are "special restrictions or requirements". The following measures, however, are not regarded as special restrictions or requirements: a requirement to keep a child away from school; a restriction on the holding of an event or gathering; or a restriction or requirement relating to the handling, transport, burial or cremation of dead bodies or the handling, transport or disposal of human remains.

*Justification for taking the power*

279. On 10th February 2020, the Secretary of State for Health made the Health Protection (Coronavirus) Regulations 2020. The regulations do not apply to Northern Ireland.
280. In particular, those Regulations allow for further restrictions and requirements relating to the isolation of persons suspected to be infected with coronavirus, and for the detention of persons in isolation where that is deemed to be necessary.
281. The Department of Health in Northern Ireland has responsibility for responding to the risk of a serious and imminent threat to public health in Northern Ireland. The primary public health legislation in Northern Ireland is the Public Health Act (Northern Ireland) 1967. The Department does not have powers to draft equivalent regulations.
282. These provisions would allow the Department of Health to bring forward proposals for regulations to the Northern Ireland Assembly that would allow for additional measures to be introduced to help delay or prevent further transmission of an infectious agent which constitutes a serious imminent threat to public health. These proposals are being expedited in the context of the current global spread of coronavirus.

*Justification for the procedure*

283. Regulations to which section 25C apply will be subject to the affirmative resolution procedure before the Northern Ireland Assembly, unless the regulations contain a declaration that the Department is of the opinion that the regulations do not include any provision which imposes or enables the imposition of a special restriction or requirement, or any other restriction or requirement which has or would have, a significant effect on a person's rights. In that case, the regulations would be subject to negative resolution.
284. Section 25D contains restrictions on the exercise of the power under section 25C, for example, that consideration be given when making the regulations that the measures are proportionate, that regulations should not directly impose a special restriction or requirement and that a special restriction or requirement may only be imposed if there is a serious and imminent threat to public health when the regulations are made or is contingent on this being the case when they are imposed.

**Schedule 17: Powers to Act for the Protection of Public Health: Northern Ireland**  
**Section 25F – Health protection regulations: supplementary**

<i>Power conferred on:</i>	<i>Department of Health in Northern Ireland</i>
<i>Power exercisable by:</i>	<i>Regulations</i>
<i>Henry VIII power:</i>	<i>Yes, the power to make Health protection regulations includes a power for the purpose of giving effect to an international agreement or arrangement to amend any statutory provision.</i>
<i>Parliamentary Procedure:</i>	<i>Negative resolution procedure before the Northern Ireland Assembly, but affirmative if they seek to amend any statutory provision.</i>

### *Context and Purpose*

285. Section 25F makes further provision about regulations under section 25B or 25C. This includes details of when the regulations may be used to amend primary or secondary legislation for the purpose of giving effect to an international agreement or arrangement to amend any statutory provision.
286. The section outlines the penalties for the offences that can be created using the regulations. These are a fine not exceeding £10,000 and a daily penalty not exceeding an amount equal to 2% of level 5 on the standard scale (which equates to £100) for continuing to commit an offence after initial conviction. Where the regulations provide for the imposition of a daily penalty, the court may allow a period for compliance with requirements before the daily penalty applies.
287. Regulations may permit or prohibit the levy of charges. It is intended that where charges are levied, the level of those charges will not exceed the costs incurred in exercising the function to which the charges relate.
288. The section makes provision about reviews and appeals in relation to special restrictions or requirements imposed by virtue of a decision taken under regulations made under section 25C. Where a special restriction or requirement is imposed on or in relation to a person, thing or premises the regulations must include provision for an individual (or business) to have a right of appeal to a court of summary jurisdiction against the decision. The regulations also make available a right of review at specified intervals to specified persons for special restrictions or requirements which continue in force in relation to any person, thing or premises for more than a specified period. Furthermore, where the restriction or requirement imposed is detention, isolation or quarantine, the period prior to review and the interval between reviews must not exceed 28 days, and the regulations must require the continuation to be reviewed without the need for an application.

### *Justification for taking the power*

289. On 10th February 2020, the Secretary of State for Health made the Health Protection (Coronavirus) Regulations 2020. The Department of Health in Northern Ireland considers there is no power to make equivalent regulations for Northern Ireland.
290. These provisions would allow the Department of Health to bring forward proposals for regulations to the Northern Ireland Assembly that would allow for additional measures to be introduced to help delay or prevent further transmission of an infectious agent which constitutes a serious imminent threat to public health. These proposals are being expedited in the context of the current global spread of coronavirus.

### *Justification for the procedure*

291. Regulations to which this section 25F applies will be subject to the negative resolution procedure before the Northern Ireland Assembly, unless the regulations seek to amend any statutory provision (25F(3)). In that case, the regulations would be subject to the affirmative resolution procedure. The government considers that the option of negative resolution procedure balances the need for greater parliamentary scrutiny with

the potential need to respond urgently to the serious, and potentially immediate, public health threats posed by the spread of coronavirus disease.

**Schedule 17: Powers to Act for the Protection of Public Health: Northern Ireland**

**Section 25G – Power to order health measures in relation to persons**

**Section 25H - Power to order health measures in relation to things**

**Section 25I - Power to order health measures in relation to premises**

**Section 25K – Part 1A orders: supplementary**

**Section 25L - Period for which a Part 1A order may be in force**

**Section 25M- Procedure for making, varying and revoking Part 1A orders**

**Section 25N - Power to make further provision by regulations**

*Power conferred on:*                    *The Department of Health in Northern Ireland*

*Power exercisable by:*                *Regulations and directions*

*Parliamentary Procedure:*        *Subject to negative resolution procedure, or affirmative resolution procedure in certain urgent circumstances, before the Northern Ireland Assembly*

*Context and Purpose*

292. Schedule 17 of the Bill gives the Department of Health in Northern Ireland the power to make regulations for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Northern Ireland. This may come from inside or outside Northern Ireland.

293. The Public Health Act (Northern Ireland) 1967 does not provide regulation making powers equivalent to the main provisions of Part 2A of the Public Health (Control of Disease) Act 1984 (as added by the Health and Social Care Act 2008 (c. 14)) for England and Wales. These provisions amend the Public Health Act (Northern Ireland) 1967 and allow the Department of Health to bring forward proposals for regulations to the Northern Ireland Assembly that would allow for additional measures to be introduced to help delay or prevent further transmission of coronavirus disease.

294. The powers can be used to impose requirements and restrictions on persons, including (amongst other things) provisions relating to medical examination, detention, quarantine or isolation, and the seizure and disinfection of things and the closing of premises. A judge can include in an order, directions as to any action that might be appropriate to give effect to the order. The Department of Health in Northern Ireland proposes they are able to provide for such measures, as are these are key to controlling the spread of an outbreak of coronavirus.

295. The regulation making powers are necessarily broad, given the wide range of responses that may be required to control an outbreak. However, it is considered that the Bill puts in place important and appropriate restrictions on the use of the powers. These include provisions to ensure that restrictions and requirements authorised by the regulations can only be imposed where it would be proportionate to do so. They also include a requirement that regulations enabling the imposition of a special restriction or requirement cannot be made unless they are in response to a serious and imminent threat to public health, or the imposition of the restriction or requirement is expressed as

being contingent on such a threat. There are further provisions to ensure that the regulations include suitable provisions with regard to appeals and review periods.

#### *Justification for taking the power*

296. Due to the need to be able to act quickly to prevent or control the spread of coronavirus infection, the Department of Health in Northern Ireland proposes that these are appropriate powers to take. The situation could change quickly and the Department of Health in Northern Ireland needs to be able to respond effectively and flexibly should further unforeseen provision be required. The powers are also necessary to ensure that the Department of Health in Northern Ireland can make provision which is consistent with any provision that may be made in the rest of the UK under existing equivalent powers.

297. Whilst the Department of Health in Northern Ireland already have some powers which could potentially be used to help prevent the spread of coronavirus infection (under the Public Health Act (Northern Ireland) 1967) the powers in the Bill will ensure that the Department of Health in Northern Ireland has regulation making powers which are more consistent with existing equivalent powers in England and Wales.

#### *Justification for the procedure*

298. Regulations to which sections 25G, 25H, 25I, 25L, 25M and 25N apply will be subject to negative resolution procedure before the Northern Ireland Assembly, unless the regulations are the first regulations to be made under sections 25G(7), 25L(5), and/or 25N. In this case, the regulations would be subject to affirmative resolution, unless the emergency procedure under section 25Q is invoked and the regulations contain a declaration that the Department is of the opinion that, by reason of urgency, it is necessary to make the regulations without a draft being so laid and approved. After regulations are made they must be laid before the Assembly. The Department of Health in Northern Ireland propose that this balances the need for greater parliamentary scrutiny with the potential need to respond urgently to the serious, and potentially immediate, public health threats posed by a coronavirus infection.

### **Schedule 18: Health Protection Regulations: Scotland**

*Power conferred on:* Scottish Ministers

*Power exercised by:* Scottish Statutory Instrument

*Parliamentary Procedure:* Affirmative (with option of an expedited procedure)

#### *Context and Purpose*

299. Schedule 18 of the Bill gives Scottish Ministers the power to make regulations for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination (from coronavirus) in Scotland. This may come from inside or outside Scotland. The power is designed to

supplement the power in section 94 of the Public Health etc. (Scotland) Act 2008 which already allows the Scottish Ministers to make provision in order to implement international agreements, including the International Health Regulations 2005, and to protect against public health risks arising from vehicles arriving in and leaving Scotland.

300. The provisions will ensure that Scottish Ministers have powers equivalent to those that the Secretary of State already has in relation to England and Wales under section 45C of the Public Health (Control of Disease) Act 1984 (as added by the Health and Social Care Act 2008 (c. 14)). The power is necessary to ensure Scottish Ministers can make regulations to prevent or control the spread of coronavirus should it be necessary to supplement the existing powers in the Bill or in the Public Health (Scotland) Act 2008.

301. The power is necessarily broad, given the wide range of responses that may be required to control an outbreak. However, it is considered that the Bill puts in place important and appropriate restrictions on the use of the power. These include provisions to ensure that certain restrictions and requirements authorised by the regulations can only be imposed where it would be proportionate to do so. They also include a requirement that regulations enabling the imposition of a special restriction or requirement cannot be made unless they are in response to a serious and imminent threat to public health, or the imposition of the restriction or requirement is expressed as being contingent on such a threat. There is further provision to ensure that regulations include suitable provisions with regard to appeals and review periods.

#### *Justification for taking the power*

302. Due to the need to be able to act quickly to prevent or control spread of coronavirus, Scottish Ministers propose that this is an appropriate power to take. In particular, it is necessary to ensure that the Scottish Ministers can supplement existing provisions in the Bill or in the Public Health etc. (Scotland) Act 2008 should that be necessary. The situation could change quickly and the Scottish Ministers need to be able to respond effectively and flexibly should further unforeseen provision be required. The power is also necessary to ensure that Scottish Ministers can make provision which is consistent with any provision that may be made in the rest of the UK under existing equivalent powers.

#### *Justification for the procedure*

303. Regulations made under schedule will be subject to the affirmative procedure in the Scottish Parliament. Scottish Ministers propose that, given the wide-ranging nature of the power, it is appropriate that an increased level of scrutiny and opportunity for debate be afforded to the Scottish Parliament.

304. Given the potential need for the Scottish Ministers to make regulations as a matter of urgency to contain the spread of coronavirus, the schedule also provides for an expedited procedure. In recognition of the role of the Scottish Parliament in scrutinising measures taken using these powers, any regulations made using the expedited procedure will cease to have effect at the expiry of the period of 28 days beginning with the date on which the regulations were made unless, before the expiry of that period, the regulations have been approved by a resolution of the Scottish Parliament. Scottish Ministers propose that this balances the need for greater parliamentary scrutiny with the

potential need for Scottish Ministers to respond urgently to the serious, and potentially immediate, public health threats posed by a coronavirus outbreak.

### ***Powers to direct suspension of port operations***

#### **Clause 48 and Schedule 19: Powers to suspend relevant port operations**

*Power conferred on:* Secretary of State

*Power exercised by:* Directions

*Parliamentary Procedure:* None

#### *Context and Purpose*

305. This is a power for the Secretary of State to direct the operator of a port of arrival in the UK to suspend such relevant port operations as the Secretary of State may specify in the direction.

306. Such a direction may take effect for up to six hours in the first instance, although that period is capable of being extended by written notice. While the first such extension can be for a period of up to 6 hours, subsequent extensions may last for a period of up to 12 hours.

307. The Secretary of State, when making or having made a primary direction, may also give a consequential written direction to other parties, specified in that consequential direction, if the Secretary of State considers it appropriate in consequence of that primary direction.

308. A consequential written direction may (but need not):

- be in a separate direction or part of the same direction as the original direction given;
- make different provisions for different cases or different people;
- require the directed parties to co-ordinate or take specified actions to secure the safe arrival of the relevant conveyance at an alternative port, having due regard to such considerations as the Secretary of State may specify; and
- specify a period of time for which the direction is to remain in effect.

309. The power to make a direction (or notice) under this provision is only exercisable in circumstances in which the Secretary of State considers that there is a real and significant risk that there will be insufficient Border Force officers to maintain adequate border security at one or more ports as a direct or indirect result of the incidence or transmission of coronavirus.

310. Failure to comply with a port direction or consequential direction made under this provision without reasonable excuse constitutes a criminal offence. The Bill will be in

force for a limited time and we anticipate ports will comply; directions are only anticipated to be used on rare occasions.

*Justification for taking the power*

311. In the event that Border Force resources are depleted as a direct or indirect result of the incidence of coronavirus to such an extent that it creates a real and significant risk that there will be insufficient Border Force officers to maintain adequate border security, a power is needed to ensure that government can respond proportionately, dynamically and in a timely fashion to direct arrivals to ports of arrival in the UK where there will be sufficient Border Force officers to carry out the necessary border security checks.
312. The direction making power is regarded as necessary to provide the Secretary of State, or a senior Home Office official exercising the power on the Secretary of State's behalf, with the flexibility to specify which port operations need to be suspended on a case by case basis. Depending on the operational circumstances, the specific operations that need to be suspended may differ from location to location. In some cases it may be necessary to prevent all services from arriving at a port; in other instances government may only need to prevent certain types of arrival (for example, to stop passenger arrivals at a particular port but be content for airfreight services to land). In respect of the consequential direction, the relevant parties may differ depending on the nature and content of the primary direction.

*Justification for the procedure*

313. The government proposes that this is an appropriate level of scrutiny to enable quick action, while applying appropriate safeguards.
314. This power may need to be exercised with relatively little notice in response to emerging information regarding the spread of the coronavirus infection. As such, it is not considered practical for a parliamentary procedure to apply to such a direction. However, the government considers that appropriate procedural safeguards have been included in the drafting of the provision, including:
- that the direction making power only becomes available where the Secretary of State has taken such other measures as are reasonably practicable to mitigate the risk to border security;
  - that a port operator or other relevant person will not commit any offence under this provision if they can show they had a reasonable excuse for not complying with a direction; and
  - the inclusion of limits on the maximum period that a direction to suspend operations can remain in effect.
315. Additionally, the Secretary of State must notify the Scottish Ministers, the Welsh Ministers and the Department for Infrastructure in Northern Ireland of any direction or notice given in connection with this provision.

## ***Powers relating to events, gatherings and premises***

### **Clause 50 and Schedule 21: Powers to give directions relating to events, gatherings and premises**

*Power conferred on:* Secretary of State, Scottish Ministers, Welsh Ministers and the Executive Office in Northern Ireland

*Power exercisable by:* Direction

*Parliamentary Procedure:* None

## England

### *Context and purpose*

316. Clause 50 and Part 2 of Schedule 21 provides that the Secretary of State has the power to make a direction:

- Restricting or prohibiting events or gatherings; and/or
- Close premises or impose restrictions on persons entering or remaining inside them

317. Any direction can only be made for the purpose of:

- preventing, protecting against or controlling the incidence or spread of infection or contamination, or
- facilitating the most appropriate deployment of medical or emergency personnel and resources.

318. The exercise of this power will be conditional on the Secretary of State having declared that the incidence or transmission of coronavirus constitutes a serious and imminent threat to public health in England and that the powers in Part 2 of the Schedule will be an effective means of:

- preventing, protecting against or controlling the incidence or transmission of coronavirus in England; or
- facilitating the most appropriate deployment of medical or emergency personnel and resources in England.

The Secretary of State must revoke the declaration if they cease to be of this view. The declaration begins a 'public health response period.' The powers have effect during this period, which ends when the declaration is revoked. The Secretary of State must consult the Chief Medical Officer or his deputy before making or revoking a declaration.

### *Justification for taking the power*

319. A power to regulate events, gatherings and premises is needed in the event that there is a serious and imminent threat to public health as a result of coronavirus. The power in Part 2 of Schedule 21 to make a direction means that the Secretary of State can act flexibly and swiftly to respond to this threat. Before issuing a direction under this power the Secretary of State is required to have regard to any relevant advice given to the Secretary of State by the Chief Medical Officer or any of the Deputy Chief Medical Officers of the Department of Health and Social Care.

*Justification for the procedure*

320. Any direction made by the Secretary of State under Part 2 of Schedule 21 will not be subject to any parliamentary scrutiny. This is proposed to be appropriate as the power is subject to the Bill's general sunset clause, and the powers are active only during the 'public health response period.' This allows the Secretary of State to respond swiftly and flexibly to a changing situation and changing scientific medical advice, and provides additional resilience if Parliament is unable to meet to debate regulations during a pandemic.

Scotland, Wales and Northern Ireland

321. Clause 50 and Parts 3, 4 and 5 of Schedule 21 confer equivalent powers on the Scottish Ministers (in relation to Scotland), the Welsh Ministers (in relation to Wales) and the Executive Office in Northern Ireland.

**Courts**

**and**

**Tribunals**

**Clause 51 and Schedule 22: Expansion of availability of live links in criminal proceedings - Live links in criminal proceedings: Rules of Court**

*Power conferred on:* The Criminal Procedure Rule Committee

*Power exercisable by:* Rules of Court made by statutory instrument

*Parliamentary Procedure:* Negative resolution procedure

*Context and Purpose*

322. In relation to certain criminal proceedings (a trial, for example), section 51 of the Criminal Justice Act 2003 (CJA 2003) enables the court to direct that a witness (other than the defendant) give evidence by live video link. Schedule 22 to the Bill expands this power to encompass, subject to various safeguards and restrictions, a wider range of

criminal proceedings (preliminary hearings in the course of an appeal against conviction, for example), any form of participation by any participant (other than a juror) in those proceedings (a defendant attending the proceedings by live link when not giving evidence, for example), and a wider range of technology, namely live audio links and 'video and audio hearings', where there is no courtroom as such and all participants take part through a live video or audio link. Safeguards include the satisfaction of an interests of justice test and a requirement to consider representations from the parties. There are also restrictions on the use of the expanded power, for example, a prohibition on audio-link participation in trials except for the purpose of giving evidence, and only then in tightly prescribed circumstances.

### *Justification for taking the power*

323. In relation to courts, the power to prescribe the practice and procedure in relation to any legislative change in court proceedings is commonly delegated by statute to procedural rules made by the relevant procedure rule committees which are independent of the Government<sup>1</sup>. The Criminal Procedure Rule Committee was established by the Courts Act 2003 (CA 2003) specifically to make and maintain Rules governing the practice and procedure to be followed by the criminal courts.

324. Rules of Court are often extensive (the Criminal Procedure Rules currently comprise 50 Parts) and are ill-suited to being contained in primary legislation and have not been since the first Rules of the Supreme Court which formed a Schedule to the Supreme Court of Judicature Act 1873. Therefore, the delegation of powers to Criminal Procedure Rules in this Bill is not novel but established practice. Such rules are made by statutory instrument, subject to the negative resolution procedure. It would be a novel departure, raising issues in relation to the division of responsibilities between the judiciary and executive arising out of the reform of the office of Lord Chancellor, for Rules of Court to be contained in primary legislation.

325. The Government considers that there is no reason to make an exception in relation to the supplemental practice and procedure (with the most significant matters of procedure set out on the face of the Bill) to be followed with respect to the expanded live link powers under section 51 of the CJA 2003. Enabling the experienced and knowledgeable Committee to make Rules, which can be amended more straightforwardly than primary legislation and are regularly reviewed and updated, will ensure that the supplemental practice and procedure in relation to this live link power is reflective of operational experience, and thereby remains fair and efficient. It will also ensure that these Rules are consistent with other aspects of criminal practice and procedure, in particular Rules relating to other live link powers and the use of technology in general.

326. The Lord Chancellor has the power under section 73 CA 2003 by order to (after consulting the Lord Chief Justice) amend, repeal or revoke any enactment to the extent that he considers necessary or desirable (a) in order to facilitate the making of Criminal Procedure Rules, or (b) in consequence of the power to make rules under section 69 CA

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<sup>1</sup> The essential scope of the power, in relation to "practice and procedure" is cast in identical terms to the corresponding power to make Criminal Procedure Rules (section 69 of the Courts Act 2003)) and also, for example, Family Procedure Rules (section 75 of the Courts Act 2003), Civil Procedure Rules (in section 1 of the Civil Procedure Act 1997) Court of Protection Rules (section 51 of the Mental Capacity Act 2005), Magistrates' Court Rules (section 144 of the Magistrates' Courts Act 1980) and Crown Court Rules (section 84 of the Senior Courts Act 1981).

2003 or the procedure to make rules under section 72 CA 2003, or in consequence of the rules themselves. Any such order which amends primary legislation is subject to the affirmative resolution procedure.

#### *Justification for the procedure*

327. Section 72 of the Courts Act 2003 requires Rules to be agreed by the Lord Chancellor before being made and to be contained in a statutory instrument subject to the negative resolution procedure. Given that Rules pursuant to section 55 of the CJA 2003 will be concerned with criminal practice and procedure, and require scrutiny by a committee including the Lord Chief Justice and leading figures in the legal system, the government does not believe a departure from the usual parliamentary procedure is justified.

#### ***Powers in relation to bodies***

#### **Clause 56 and Schedule 27: Transport, Storage and Disposal of Dead Bodies Power to give Directions to address lack of capacity**

*Power conferred on:* Local Authorities as designated by the Appropriate National Authority (for England the Secretary of State or the Minister for the Cabinet Office; for Wales the Welsh Ministers; for Scotland the Scottish Ministers; and for Northern Ireland a Northern Ireland department); Appropriate National Authorities to direct Local Authorities on the performance of their functions or give directions in their place or where a regional or national direction would be more appropriate.

*Power exercised by:* Direction

*Parliamentary Procedure:* None

#### *Context and purpose*

328. Part 2 of Schedule 27, paragraph 4 provides that the appropriate national authority may designate a local authority where it is of the view that:

- As a result of coronavirus disease there is, or is likely to be, insufficient capacity within a local authority area to transport store or dispose of dead bodies or human remain; and
- The powers of direction in Part 2 of the schedule are likely to be an effective means of addressing the lack of capacity.

329. Where a local authority has been designated it can give a private company or corporation a direction requiring the person to do anything calculated to facilitate the

transportation, storage or disposal of dead bodies or human remains. The types of directions that may be made for that purpose are set out in the Bill but are not exhaustive (paragraph 6(1), Part 2, Schedule 27).

330. The government recognise this will place a burden on companies and businesses but sees it as a necessary measure to impose given the anticipated number of deaths could exceed local capacity.
331. In order to be proportionate, the exercise of this power is conditional on a designation being made in the limited circumstances set out above and is specifically limited to excess deaths leading to a lack of capacity as a result of coronavirus.
332. The directions themselves can be varied or revoked but can be the power to direct falls away if a designation for a local authority area is revoked which has the effect of causing any direction given by a designated local authority.
333. The Appropriate National Authority is also given power to step in and direct the local authority on how to perform its own direction function if it is failing to do so properly or may step in and give directions in its place.
334. The Appropriate National Authority is also given power to direct private companies or corporations where it considers that a regional or national response is more appropriate to meet needs instead of enabling a number of local authorities to make multiple directions (paragraph 6(2), Part 2, Schedule 27). In addition, where a national authority is of the view that a designated local authority is failing to operate its directing power appropriately it can step in and make and directions a local authority could have made (paragraph 7, Part 2, Schedule 27).
335. The Appropriate National Authority also has powers to direct the local authority as to the exercise of its functions as a burial or cremation authority or in relation to any of its functions in connection with the transport, storage and disposal of dead bodies or human remains where of the view that the local authority has failed to properly exercise these functions (paragraph 13, Part 3, Schedule 27).

#### *Justification for taking the power*

336. It is anticipated that the number of deaths during the period of a coronavirus pandemic could overwhelm the death management systems in place and different ways of operating crematoria, morgues and funerals may need to be directed to deal with the number of bodies in the time frame and still meet safe storage guidelines set out for health and safety.
337. Further, it may be necessary to direct companies and businesses not currently in the death management businesses to provide transport, facilities, premises or storage.
338. The power means that national authorities can react swiftly to differing needs across the UK and be flexible in only activating the power in areas where needed. Further the power of local authorities to make a direction means that they can act flexibly to needs in their areas. Further flexibility is built in by giving the national authority power to intervene and make directions in place of the local authority where it is not exercising its direction making powers properly or where a regional or national response would be more appropriate. There is also the flexibility for national authorities to local authorities more generally as to the exercise of their functions as set out above.

339. Due to the unpredictable nature of coronavirus and the risks of repeated outbreaks the Government proposes this power to be necessary and also that it should be capable of being exercised on more than one occasion to provide flexibility to meet the need which would not easily be met by a more inflexible form of power, for example regulations. It will give the power to respond to changing circumstances.

#### *Justification for the procedure*

340. Any direction made will not be subject to any parliamentary scrutiny. This is proposed to be appropriate as the power applies for a limited time (during the coronavirus pandemic), is restricted to where needed as determined at national level and arising at a point where there will be a pressing need to respond.

341. The power needs to be flexible and used on a case by case basis as dictated by the needs of any local area, or in a region, which are likely to vary significantly.

342. Further, using the directions power only where designated allows the direction to lapse where a designation is revoked. Where a regional or national response is required the direction making power of national authorities lapses when there are no designated local authorities. Given the potential for very different directions across the UK and the need to determine the level of response, i.e. locally or regionally a regulation making power would be onerous in the circumstances.

#### *Compensation to those who have been directed*

*Power conferred on:* National Authorities

*Power exercised by:* Published scheme

*Parliamentary Procedure:* None

#### *Context and purpose*

343. The need to make a scheme for compensation arises only if and when a national authority has designated a local authority as set out above. Where that happens, a national authority must publish a scheme for the making of payments to persons to whom directions are given by a designated local authority.

344. Paragraph 9, Part 2, Schedule 27 provides a minimum requirement for the compensation to be paid to persons to whom a direction has been given, as follows:

- A reasonable sum in respect of anything provided by the person in accordance with the direction; and
- Compensation in respect of any losses or liabilities incurred by the person as a result of the direction.

345. The provision provides that the scheme can also include provision for payments in respect of other matters, in case something is done that may not be covered by the above and for which the national authority considers compensation is needed.

346. The scheme can also include provision to ensure that the compensation scheme can be properly administered by preventing “double recovery”, the imposition of time limits and setting out calculation of amounts and methodology. For fairness, the clause also provides that the scheme may include review provisions to ensure that compensation is adequate.

#### *Justification for taking the power*

347. The reason for providing for a scheme is that at this stage of the coronavirus pandemic, it is not possible to accurately predict what directions may be actually needed and what that may require of someone either currently in the death management industry or another company with relevant assets that may be required to assist or manage the transport, storage or disposals of dead bodies.

348. Further, these provisions may not be needed at all as they only apply when an area is designated. This approach recognises that compensation is required but leaves flexibility to design a scheme that adequately compensates for the precise nature of the actions undertaken, including where companies have been required to give resources and undertake actions which may have caused them to incur losses and liabilities.

#### *Justification for procedure*

349. The purpose of the scheme is to allow for flexibility to compensate people appropriately in entirely novel and demanding circumstances. This approach allows maximum flexibility to design a scheme to meet compensation needs in an unpredictable set of circumstances given the many unknowns about way in which the pandemic will affect the country at this point in time.

350. There is no precedent for such a scheme and Government will need to assess what is required according to fast moving and novel circumstances. The scheme will need to cater to the different arrangements put in place by designated local authorities and different needs of the companies who have been required to undertake actions or give resources. This may need variation in ways which are not currently foreseeable. It is therefore appropriate to have a procedure which is able to respond to those changing circumstances and provide that flexibility, so that companies are not left in a position to bear their losses and liabilities for any longer than is necessary.

#### *Guidance to those who have been directed*

*Power conferred on:* National Authorities

*Power exercised by:* Guidance

*Parliamentary Procedure:* None

#### *Context and purpose*

351. National Authorities may issue guidance as to the exercise by designated local authorities in relation to their power to direct above. Designated local authorities must have regard to any such guidance (paragraph 10, Part 2, Schedule 27).

*Justification for taking the power*

352. There is no existing power to issue guidance in the circumstances in which this new power to do so would be exercised. It is considered necessary and appropriate to support those who might be given a direction under Part 2 of Schedule 27 by way of up-to-date guidance that is based on the best evidence available to national authorities in relation to excess deaths.

353. This will be based in part from the information gathered by virtue of Part 1 of Schedule 27 that will detail what the problems are at local level to enable an overview to be taken at national level about the type, scale, purpose, adequacy and reasonableness of any directions given. It will also allow the guidance to be flexible to Local authority needs and in part driven by their need for direction in the use of these unusual but necessary emergency powers.

*Justification for the procedure*

354. The purpose of any guidance is to support those to whom a direction under Part 2 of Schedule 27 has been given in complying with such a direction. Given the short notice at which such directions are envisaged to be given, and the fast-changing circumstances to which any guidance issued makes it impractical for a parliamentary procedure to apply. It should be noted that the duty imposed by this provision is to have regard to the guidance.

***Postponement of elections, referendums, recall petitions and canvass***

**Clauses 58-60: Power to postpone certain other elections and referendums, Power to postpone a recall petition under the Recall of MPs Act 2015, Power to make further supplementary etc provision**

*Power conferred on:*                    *The Secretary of State or the Minister for the Cabinet Office*

*Power exercised by:*                *Regulations*

*Henry VIII power:*                *Yes*

*Parliamentary Procedure:*        *Negative resolution procedure.*

*Context and Purpose*

355. Clause 58 provides for the Secretary of State, or for the Minister for the Cabinet Office, to make regulations in order to provide for the postponement of certain listed polls and referendums. The former includes by-elections in respect of vacancies arising in local authorities in England and Northern Ireland, and in the Greater London Assembly, together with vacancies arising in Mayoral offices in England and in the offices of Police & Crime Commissioners in England and Wales. It also provides for the postponement of Northern Ireland Assembly by-elections. In respect of referendums, the list consists of certain local authority referendums and referendums in relation to neighbourhood planning.
356. The power under clause 58 also enables the Secretary of State or the Minister for the Cabinet Office to push back any of the listed polls or referendums that fall within a period specified in the elections.
357. Clause 59 provides for the Secretary of State or the Minister for the Cabinet Office to make regulations postponing the ‘petition process’ arising under the Recall of MPs Act 2015. The Act provides for a ‘petition’ in a Westminster Parliamentary constituency to be established when one of three ‘recall conditions’ is met in relation to the constituency member. If the petition is successful, a by-election is triggered. The power does not extend to the latter (the timing of which is regulated by Parliament itself), but seeks to cater for the situation in which the (lengthy) petition process has commenced but needs to be postponed. As with the power to postpone elections and referendums, this is limited so that a postponement cannot be beyond 6th May 2021.
358. Clause 60 provides a power for the Secretary of State or the Minister for the Cabinet Office to make supplementary, consequential, incidental, transitional or saving provision in connection with the postponement of polls. Such matters may include (for example) the nomination of candidates, the treatment of incumbents, and election expenses.
359. The powers are to be exercised by way of negative instrument. Clauses 58 and 60 each contain Henry VIII powers, which may be exercised so as to amend primary legislation.

*Justification for taking the power*

360. These powers are necessary in order to enable relevant polls or the petition process for MP recall to be postponed, in the event that the prevailing medical situation is such as either to render such polls administratively undeliverable due to a range of workforce and other logistical issues; or risks compromising the democratic process, because a large proportion of the voting community is unable to vote due to illness or social isolation measures being in place.
361. The power to make consequential provision is necessary because postponement of polls will give rise to multifarious administrative difficulties, differing in respect of each poll (as a result of the different statutory regimes in play). Those impacts will also vary according to the point at which the relevant poll is postponed. For example, some regimes make detailed provision in respect of the timetable for nomination of candidates. The government needs to ensure that if a poll is postponed at the point at which the nomination period has closed, provision can be made for the re-opening of nominations at a later date, to reflect changing circumstances. Because these provisions are set out in both primary and secondary legislation, the power needs to be capable of operating on either.

362. The power to postpone relevant polls or the recall petition process might also require amendments to legislation (which may include primary legislation) setting out the date of a poll.

#### *Justification for the procedure*

363. The government is concerned to ensure that provision to postpone polls and to deal with ancillary matters can be made swiftly, and even if Parliament is not sitting. That is because polls arise, by operation of statute, and in response to circumstances outside government's control (for example, due to the incapacity or retirement of an individual holding a particular post). Polls for by-elections are often required by statute to be held within a relatively short period of time. Use of the negative resolution procedure is required in order to safeguard against an inability to act when Parliament is in recess or the inability to make postponing provision quickly enough to be effective, which is important for certainty and to remove the administrative burden from local authorities and returning officers, for example, who would otherwise be needing to take steps to comply with their statutory obligations.

364. The government acknowledges the breadth and reach of this power in a constitutionally sensitive area. However, there remain constraints on the exercise of the power.

365. The government notes the regulation-making power is designed to permit the flexibility to make less intrusive provision than might otherwise be in play. It will be noted that the Bill also contains a 12 month general postponement of those elections scheduled for 7 May 2020, until the next ordinary day of elections on 6 May 2021. This is a sensible and proportionate approach for those polls which always take place in May. However, the government want to permit a more flexible approach to be taken in respect of other elections and referendums. The regulation-making power will provide the flexibility to enable elections and referendums to take place over the next 14 months where the medical situation permits. That will support both the continued effective working of local government and the continuation of democratic engagement in such processes.

366. However, in order to ensure that the period of a postponement is not longer than is currently foreseen to be necessary, the power cannot be used to postpone a poll until later than 6th May 2021. If further postponements are likely to be necessary, additional legislation would be required.

367. Finally, while the Henry VIII powers in these clauses would usually be subject to affirmative procedure, it is considered that any amendments to primary legislation that are required in connection with the exercise of the powers under these clauses would need to be made urgently. The government proposes that the departure from the usual affirmative procedure is justified in this case.

#### **Clauses 63 and 64: Power to postpone local authority elections in Wales; and Power to make further supplementary etc provision**

*Power conferred on:*

*Welsh Ministers*

<i>Power exercised by:</i>	<i>Regulations</i>
<i>Henry VIII power:</i>	<i>Yes in relation to clauses 63 and 64</i>
<i>National Assembly for Wales Procedure:</i>	<i>Negative resolution procedure.</i>

### *Context and Purpose*

368. Clause 63 provides for the Welsh Ministers to make regulations in order to provide for the postponement of an election that may arise as a result of a casual vacancy (also known as a by-election) within local authorities (defined for these purposes as county council, county borough council or community councils) in Wales where the date of the poll for that election would otherwise fall between the day on which this Act is passed and ending with 5th May 2021.
369. This power is limited so that a postponement cannot be beyond 6<sup>th</sup> May 2021.
370. Clause 64 provides a power for the Welsh Ministers to make supplementary, consequential, incidental, transitional or saving provision in connection with the postponement of polls under clauses 62 or 63. Such matters may include (for example) the nomination of candidates, the treatment of incumbents, and election expenses.
371. The powers relating to local authority elections in Wales are to be exercised by way of regulations made by the Welsh Ministers which will be subject to the negative procedure.

### *Justification for taking the power*

372. These powers are necessary in order to enable polls resulting from casual vacancies in local authorities in Wales to be postponed, in the event that the prevailing medical situation is such as either to render such polls administratively undeliverable due to a range of workforce and other logistical issues; or risks compromising the democratic process, because a large proportion of the voting community is unable to vote due to illness or social isolation measures being in place.
373. The power to make consequential provision is necessary because postponement of polls will give rise to multifarious administrative difficulties, differing in respect of each poll. Those impacts will also vary according to the point at which the relevant poll is postponed. Because these provisions are set out in both primary and secondary legislation, the power needs to be capable of operating on either.

### *Justification for the procedure*

374. The Welsh Ministers are concerned to ensure that provision to postpone polls and to deal with any relevant ancillary matters arising from a decision to do so can be made swiftly and coherently taking a whole Wales approach to delaying any casual vacancies that may arise at local authority level. That is because polls arise, by operation of statute, and in response to circumstances outside the Assembly's control (for example, due to the incapacity or retirement of an individual holding a particular post). Polls for by-elections are often required by statute to be held within a relatively short period of time. Use of the negative resolution procedure is required in order to safeguard against an

inability to act when the National Assembly for Wales is in recess or the inability to make postponing provision quickly enough to be effective, which is important for certainty and to remove the administrative burden from local authorities and returning officers, for example, who would otherwise be needing to take steps to comply with their statutory obligations.

375. The Welsh Ministers acknowledge the breadth and reach of these powers in a constitutionally sensitive area. However, there remain constraints on the exercise of the power and appropriate safeguards.

376. The regulation-making power will provide the flexibility to enable by-elections in Wales to take place over the next 14 months where the public health situation permits. That will support both the continued effective working of local government and the continuation of democratic engagement in such processes.

377. However, in order to ensure that the period of a postponement is not longer than is currently foreseen to be necessary, the power cannot be used to postpone a poll until later than 6th May 2021. If further postponements are likely to be necessary, additional legislation would be required.

#### **Clause 68: Exercise of section 143 of the Social Security Administration Act 1992**

*Power conferred on:* Treasury

*Power exercised by:* Regulations

*Parliamentary Procedure:* Negative resolution procedure

#### *Context and purpose*

378. This clause will allow the government to temporarily modify the existing procedure around altering the rates and thresholds of National Insurance contributions (NICs), in order to respond quickly to the COVID outbreak if required. The clause modifies the effect of section 143 of the Social Security Administration Act 1992. This temporary modification will be effective in relation to orders made on or after the day the bill is introduced but within 2 years of the date the Act is passed. The clause will remove the statutory requirement that a report from the Government Actuary Department accompany secondary legislation implementing rate changes and the need for the Treasury to consider the level of the National Insurance Fund and sums expected to be paid from it. The clause will also permit changes to be made any time as the restriction requiring an order to be made in advance of the tax year to which it applies is removed. The clause also provides for the secondary legislation to be subject to the negative procedure in Parliament rather than the affirmative procedure.

#### *Justification for taking the power*

379. Due to the unpredictable nature of the effect of coronavirus on the economy, the government considers that, should it be necessary, there is a need to be able to react

quickly through changes to the rates and thresholds of NICs. The modifications made by this clause will enable such changes to be made more quickly than would otherwise be possible.

#### *Justification for the procedure*

380. This temporary modification will be effective in relation to orders made on or after the day the bill is introduced but within 2 years of the Act being passed. The government proposes that the negative procedure would be appropriate. The procedure would be suited for the need to effect changes to the rates of NICs with some urgency. The alteration to the procedure is constrained as this temporary modification will be only be effective in relation to orders made on or after the day the bill is introduced but within 2 years of the Act being passed. The alteration is further constrained as it only applies to orders which do not increase contributions rates above the level of those rates on 6 April 2020.

### ***National Insurance Contributions***

#### **Clause 69: Exercise of section 145 of the Social Security Administration Act 1992**

*Power conferred on:* *The Treasury*

*Power exercised by:* *Order*

*Parliamentary Procedure:* *Negative resolution procedure*

#### *Context and purpose*

381. This clause will allow the government to temporarily modify the existing procedure around altering NICs rates, in order to respond quickly to the coronavirus outbreak if required. The clause modifies the effect of section 145 of the Social Security Administration Act 1992. This temporary modification will be effective in relation to orders made on or after the day the bill is introduced but within 2 years of the Act is passed. The clause will remove the statutory requirement that a report from the Government Actuary Department accompany secondary legislation implementing rate changes. The clauses also provide for an order in these circumstances to be subject to the negative procedure in Parliament rather than the affirmative procedure.

#### *Justification for taking the power*

382. Due to the unpredictable nature of the effect of coronavirus on the economy, the government considers that, should it be necessary, there is a need to be able to react quickly through changes to the rates of NICs. The modifications made by this clause will enable such changes to be made more quickly than would otherwise be possible.

### *Justification for the procedure*

383. This temporary modification will be effective in relation to orders made on or after the day the bill is introduced but within 2 years of the Act is passed. The government proposes that the negative procedure would be appropriate. The procedure would be suited for the need to effect changes to the rates of NICs with some urgency. The alteration to the procedure is constrained as this temporary modification will be only be effective in relation to orders made on or after the day the bill is introduced but within 2 years of the Act being passed. The alteration is further constrained as it only applies to orders which do not increase contributions rates above the level of those rates on 6 April 2020.

### **Clause 70: Exercise of section 5 of the National Insurance Contributions Act 2014**

*Power conferred on:* *The Treasury*

*Power exercised by:* *Regulations*

*Parliamentary Procedure:* *Negative resolution procedure*

### *Context and purpose*

384. This clause modifies the operation of section 5 of the National Insurance Act 2014 by temporarily altering the Parliamentary procedure for making regulations under it. If necessary, this will allow the government to alter the level of the Employment Allowance, which provides relief for employers NICs, in order to respond quickly to the COVID outbreak if required. The clause modifies the effect of section 5 of the National Insurance Act 2014. This temporary modification will be effective in relation to regulations made on or after the day the Bill is introduced but within 2 years of the Act is passed. The clause provides for the regulations in these circumstances to be subject to the negative procedure in Parliament rather than the affirmative procedure except where the regulations would decrease employment allowance below £4,000 for a tax year.

### *Justification for taking the power*

385. Due to the unpredictable nature of the effect of coronavirus on the economy, the government considers that, should it be necessary, there is a need to be able to react quickly through changes to the rates of NICs. The modifications made by this clause will enable such changes to be made more quickly than would otherwise be possible.

### *Justification for the procedure*

386. This temporary modification will be effective in relation to regulations made on or after the day the bill is introduced but within 2 years of the Act is passed. The government proposes that the negative procedure would be appropriate. The procedure would be suited for the need to effect changes to the level of the Employment Allowance with some urgency. The alteration to the procedure is constrained as this temporary

modification will be only be effective in relation to regulations made in that limited period and is further constrained as it only applies to regulations that do not reduce Employment Allowance below £4000 which is the amount applying on 6 April 2020.

## ***Final Provisions***

### **Clause 73: Power to make commencement provisions**

*Power conferred on:* Minister of the Crown Power and Devolved Authorities

*Exercised by:* Regulations made by statutory instrument

*Parliamentary Procedure:* No procedure

#### *Context and Purpose*

387. This clause contains a standard power for a Minister of the Crown (or a Devolved Authority) to bring provisions of the Bill into force by commencement regulations.

#### *Justification for taking the power*

388. As is usual, it may be sensible for parts of the Bill to commence at different times, where the commencement is not already stated. This power enables that.

#### *Justification for the procedure*

389. As is usual with commencement powers, regulations made under this clause are not subject to any parliamentary procedure. Parliament has approved the principle of the provisions to be commenced by enacting them; commencement by regulations enables the provisions to be brought into force at the appropriate time.

### **Clause 73: Power to make transitional provisions associated with commencement**

*Power conferred on:* Minister of the Crown Power and Devolved Authorities

*Exercised by:* Regulations made by statutory instrument

*Parliamentary Procedure:* No procedure

#### *Context and Purpose*

390. This clause contains a standard power for a Minister of the Crown to make transitional, provision in connection with the bringing into force of provisions of the Bill.

### *Justification for taking the power*

391. The power to make transitional provision is often needed when bringing legislative provisions into force – it enables a smooth commencement of, and transition to, the provision made by a Bill by allowing details to be given about how situations that straddle the change in the law are to be dealt with. While the government has endeavoured to include as much detail as possible about transitional arrangements on the face of the Bill, given the speed at which this legislation has been drafted to respond to the coronavirus emergency it is prudent to take this power so that any further transitional arrangements that are later identified can be provided for.

### *Justification for the procedure*

392. This power is subject to no procedure. It is common practice for this type of power not to be subject to any parliamentary procedure.

## **Clause 74: Power to suspend and revive provisions**

*Power conferred on:* Minister of the Crown and Devolved Authorities

*Power exercised by:* Regulations made by Statutory Instrument

*Parliamentary Procedure:* No procedure

### *Context and Purpose*

393. This clause contains a power to suspend and revive provisions in the Bill during the two-year life of the Bill.

### *Justification for taking the power*

394. This power is designed to reflect the fact that the current pandemic might have multiple peaks, as others have done, which could involve significant periods (perhaps seasonally determined) of less severe pressure on the UK's response capability.

395. The nature of some of the substantive provisions in the Bill is that they achieve a balance between safeguards for the individual and the need to protect the public's health by reducing administrative burdens - to allow the response workforce to prioritise their efforts during the pandemic. While these substantive measures are certainly right and appropriate during peaks of the pandemic, the government should be looking to re-normalise the governance of individuals' safeguards in between those peaks if circumstances allow.

396. The ability to suspend the emergency measures in the Bill is the legal mechanism by which we can lift the emergency measures and restore normal safeguards in between peaks of the pandemic. If the government did not take this power, it would not be able to restore "normal" safeguards until certain the coronavirus pandemic was completely over.

397. The government has to do this via a power rather than by specifying in advance when provisions will need to be suspended and reactivated because we are unable to predict with certainty the course which this pandemic will follow. The government therefore needs to be able to adapt to a changing and uncertain situation. It is possible that the course of the outbreak means that the government might not need to use the power to reactivate provisions.

398. Powers to suspend and reactivate provisions have appeared in other legislation for example section 127A of the Criminal Justice and Public Order Act 1994.

#### *Justification for the procedure*

399. There is no procedure for this power in line with the procedure normally followed for commencement regulations which this power is analogous to. Parliament will have approved the principle of the provisions in the Bill as appropriate for dealing with the coronavirus emergency by enacting them so reactivating the provisions during the life of the Bill to deal with further peaks is within the principle Parliament or relevant national authority has already approved.

400. Adding a more onerous procedure would create delays in restoring normal safeguards and create risks that provisions could not be switched back on as quickly as might be needed during an outbreak. Even a formal laying requirement could potentially create practical difficulties if capability in Parliament and Government was itself significantly affected by the outbreak.

401. A reporting requirement has been included whereby the Secretary of State will have to report on a rolling 8-week basis as to how the powers to suspend and reactivate have been used to help ensure oversight and accountability of decisions taken.

### **Clause 73: Power to make transitional provisions associated with the suspension or revival of provisions**

*Power conferred on:* Minister of the Crown Power and Devolved Authorities

*Exercised by:* Regulations made by statutory instrument

*Parliamentary Procedure:* No procedure

#### *Context and Purpose*

402. This power allows transitional provisions to be made in relation to provisions in the Bill being suspended or revived due to the use of the suspend/revive power.

#### *Justification for taking the power*

403. Much as a transitional provisions power is normally needed in a Bill to deal with situations that straddle the change in the law when new provisions in a Bill are commenced similarly transitional provisions may be needed when those provisions are

suspended and we return to the normal legal framework that existed before the emergency provisions in this Bill or when provisions are reactivated.

*Justification for the procedure*

404. This power is subject to no procedure as is common practice for transitional provisions powers.

**Clause 75: Power to make transitional provisions associated with the sunset of provisions**

*Power conferred on:* Minister of the Crown Power and Devolved Authorities

*Exercised by:* Regulations made by statutory instrument

*Parliamentary Procedure:* No procedure

*Context and Purpose*

405. Clause 75(3) allows transitional provisions to be made in relation to provisions in the Bill ceasing to have effect due to the sunset of the provisions.

*Justification for taking the power*

406. Much as a transitional provisions power is normally needed in a Bill to deal with situations that straddle the change in the law when new provisions in a Bill are commenced similarly transitional provisions may be needed when those provisions are sunset and we return to the normal legal framework that existed before the emergency provisions in this Bill.

407. While the government has endeavoured to include as much detail as possible about transitional arrangements on the face of the Bill given the speed at which this legislation has been drafted to respond to the coronavirus emergency it is prudent to take this power so that any further transitional arrangements that are later identified can be provided for

*Justification for the procedure*

408. This power is subject to no procedure as is common practice for transitional provisions powers.

**Clause 76: Power to alter the expiry date**

*Power conferred on:* Minister of the Crown and Devolved Authorities

*Power exercised by:* Regulations Parliamentary

*Procedure:* Made affirmative or draft affirmative (if extending the expiry date) draft affirmative only (if sunseting provisions early)

### *Context and Purpose*

409. The Bill contains a sunset clause whereby nearly all provisions (other than indemnity provisions, transitional provisions and certain technical provisions about the operation of the Bill) are due to be sunset 2 years after Royal Assent. This power allows provisions in the Bill to be sunset earlier or for the sunset of provisions in the Bill to be delayed for up to 6 months at a time.

### *Justification for taking the power*

410. The Bill is designed to be a temporary piece of legislation, to enhance the UK's ability to respond to a disease outbreak of uncertain and as yet unpredictable extent, course and duration. It is right therefore that a sunset provision is included on the face of the Bill. However, the inherent uncertainty of a pandemic situation means that this power is required to alter that sunset in light of the changing circumstances of the pandemic as they arise.

411. The 2 year time-frame was designed to balance continuity for those using the powers with a degree of accountability for their use; and also to build in some certainty that their continued use (beyond a reasonable worst case prediction of the length of the outbreak) would require further Parliamentary approval. It could also be appropriate to sunset the Bill at earlier date; and it is also possible that the rate of spread might be slower but the situation still severe – meaning that we could need the provisions in this Bill to remain in place longer. The government therefore needs the flexibility to pursue either option.

412. The length of extensions to the time period are limited to 6-month periods at a time – after which we would need to come back to Parliament for a further debate on extending the Bill.

### *Justification for the procedure*

413. There is a choice of made affirmative or draft affirmative procedures if extending the Bill so that the relevant national authority can use whichever procedure is most appropriate at the time where the government needs to extend the Bill.

414. If Parliament or the relevant national authority are sitting as normal (and the need to extend doesn't come as surprise) the government would expect to follow the draft affirmative procedure so that Parliament can debate the extension before it comes into force.

415. However, it is proposed that the government may need the made affirmative as a back-up to ensure that the Bill can remain in force if Parliament or the relevant national authority are not sitting at the time regulations need to be made to extend the Bill or if the need to extend arises unexpectedly so that there is not sufficient time to complete the normal draft affirmative procedure before the provisions expire.

416. With regard to sunsetting provisions, only the draft affirmative procedure is available – this is because sunsetting the provisions early will not be an emergency scenario.

**Clause 78: Power to amend Act in consequence of amendments to subordinate and make associated transitional provisions**

*Power conferred on:* Minister of the Crown and Devolved Authorities

*Power exercised by:* Regulations made by Statutory Instrument

*Henry VIII power:* Yes

*Parliamentary Procedure* Made affirmative or draft affirmative

*Context and Purpose*

417. This power allows the Bill to be updated where the underlying secondary legislation which the Bill modifies is amended by another enactment.

*Justification for taking the power*

418. The Bill contains a large number of temporary modifications of various pieces of secondary legislation that change how that secondary legislation operates during the coronavirus emergency. If that underlying secondary legislation was to change during the life of the Bill the modifications in the Bill wouldn't work properly anymore and would need to be updated.

419. If the underlying secondary legislation was to change these changes would in all likelihood be made under existing secondary legislation making powers and these existing powers would be unlikely to be wide enough by themselves provide the vires to update the modification contained in this Act.

420. The power does not include, and does not need to include, the power to update the Bill in consequence of changes to underlying primary legislation modified by the Bill. This is because we would expect any changes to underlying primary legislation would most likely be made by primary legislation that could itself make the necessary consequential changes to this Bill.

421. The power includes the ability to make any transitional provisions that are necessary as a result of the change.

*Justification for the procedure*

422. It is proposed that either a draft affirmative or made affirmative can be used. If Parliament or the relevant national authority are sitting and the changes to the underlying legislation do not need to be made urgently the government or devolved administration would expect to be able to use the draft affirmative procedure. However, if Parliament or the relevant national authority are not sitting or the changes to the underlying legislation have to be made urgently the made affirmative procedure will be available so that the government or devolved administration can ensure that the necessary modifications in the Bill still work.

## **Clause 78: Power to make consequential modifications and amendments**

*Power conferred on:* Minister of the Crown and Devolved Authorities

*Power exercised by:* Regulations made by Statutory Instrument

*Henry VIII power:* Yes

*Parliamentary Procedure:* Negative if amending secondary legislation only, choice of made affirmative or draft affirmative if amending primary legislation

### *Context and Purpose*

423. This clause contains power to make such consequential provision as is considered appropriate in consequence of this Bill.

### *Justification for taking the power*

424. A power to make consequential provision is a power commonly taken in Bills to deal with any small additional changes that are necessary in consequence of the changes contained in that Bill.

425. While the government has endeavoured to include those consequential provisions identified so far on the face of the Bill given the speed at which the Bill has needed to be produced to respond to the coronavirus emergency it is only prudent that the government takes a power to deal with consequential amendments or modifications that are identified at a later date.

### *Justification for the procedure*

426. As is standard for a consequential power a negative procedure will be followed where amendments are being made to secondary legislation and an affirmative procedure where amendments are being made to primary legislation.

427. The government has opted to include the option of made affirmative as well as draft affirmative parliamentary procedure because: (a) depending on the speed at which the provisions are needed there may not be sufficient time to schedule debates before the consequential provisions would need to be in force and (b) there is a risk that parliament or the relevant national authority may not be sitting whether due to recess or the effects of the coronavirus pandemic at the time that the regulations would be needed.

**Department of Health and Social Care**

**19 March 2020**