POLICY NOTE

THE HEALTH PROTECTION (CORONAVIRUS) (PRE-DEPARTURE TESTING AND OPERATOR LIABILITY) (SCOTLAND) REGULATIONS 2021

SSI 2021/20

The above instrument was made in exercise of the powers conferred by sections 94(1)(b)(i) and 122(2)(b) of the Public Health etc. (Scotland) Act 2008 ("the 2008 Act"). Section 122(5) of the 2008 Act states that regulations under section 94(1) are subject to the affirmative procedure. However, section 122(6) provides that the affirmative procedure will not apply if the Scottish Ministers consider that the regulations need to be made urgently. In such situations, section 122(7) applies.

Summary Box

Part 1 of this instrument makes further amendments to the Health Protection (Coronavirus) (International Travel) (Scotland) Regulations 2020 (SSI 2020/169, "the principal Regulations"), which impose requirements on international travellers to reduce the public health risks posed by the spread of coronavirus (severe acute respiratory syndrome coronavirus 2, or SARS-CoV-2) in Scotland which causes the coronavirus disease (COVID-19). Part 1 of this instrument introduces a new scheme for pre-departure testing to apply to persons travelling to Scotland by placing duties on persons to obtain a negative test pre-departure underpinned by criminal offences. It also provides exemptions from pre-departure testing for certain limited categories of traveller.

Part 2 of the instrument places related duties upon operators to ensure persons do not arrive in Scotland without a negative test result. The instrument creates criminal offences in respect of failure to comply with these duties. Finally, the instrument creates a duty on operators to ensure that persons do not arrive without a completed Passenger Locator Form and it creates a criminal offence in respect of a failure by an operator to comply with said duty.

Background

1. The Health Protection (Coronavirus) (International Travel) (Scotland) Regulations 2020 (SSI 2020/169) ("the principal Regulations") were: made on 7 June; came into force on 8 June 2020; and were laid in the Scottish Parliament on 8 June 2020.

2. Amendments were made to the principal Regulations: by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment Regulations 2020 (SSI 2020/171); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 2) Regulations 2020 (SSI 2020/184); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 3) Regulations 2020 (SSI 2020/209); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 4) Regulations 2020 (SSI 2020/221); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 5) Regulations 2020 (SSI 2020/224); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 6) Regulations 2020 (SSI 2020/229); by the by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 7) Regulations 2020 (SSI 2020/233); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 8) Regulations 2020 (SSI 2020/235); by the Health

Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 9) Regulations 2020 (SSI 2020/242); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 10) Regulations 2020 (SSI 2020/252); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 11) Regulations 2020 (SSI 2020/263); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 12) Regulations 2020 (SSI 2020/271); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 13) Regulations 2020 (SSI 2020/274); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 14) Regulations 2020 (SSI 2020/280); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 15) Regulations 2020 (SSI 2020/288); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 16) Regulations 2020 (SSI 2020/301); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 17) Regulations 2020 (SSI 2020/307); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 18) Regulations 2020 (SSI 2020/326); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 19) Regulations 2020 (SSI 2020/330); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 20) Regulations 2020 (SSI 2020/343); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 21) Regulations 2020 (SSI 2020/354); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 22) Regulations 2020 (SSI 2020/358); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 23) Regulations 2020 (SSI 2020/378); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 24) Regulations 2020 (SSI 2020/404); by the Health Protection (Coronavirus, International Travel and Public Health Information) (Scotland) Regulations 2020 (SSI 2020/431); by the Health Protection (Coronavirus) (International Travel and Public Health Information) (Scotland) (No. 2) Regulations 2020 (SSI 2020/444); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 25) Regulations 2020 (SSI 2020/474); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment Regulations 2021 (SSI 2021/5); by the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 2) Regulations 2021 (SSI 2021/6); by the Health Protection Coronavirus) (International Travel) (Scotland) Amendment (No. 3) Regulations 2021 (SSI 2021/7); and by the Health Protection Coronavirus) (International Travel) (Scotland) Amendment (No. 4) Regulations 2021.

3. Part 1 of this instrument makes a further amendment to the principal Regulations to insert a new Part 2A (Pre-Departure Testing) which makes provisions for a system of pre-departure testing with duties on passengers. Part 2 of the instrument places duties on operators in connection with pre-departure testing and it also imposes also a duty on operators not to allow persons to travel to Scotland without a completed Passenger Locator Form.

Policy Objectives

4. The amendments made to the principal Regulations by Part 1 of this instrument provide that a person who arrives in Scotland from outwith the common travel area must possess a valid notification of a negative test result from a qualifying test taken by that person 3 days before a scheduled departure of a commercial service to Scotland. The standard of the test is specified in new Schedule 2A of the principal Regulations, being a test with a device that has a sensitivity of at least 80%, specificity of at least 97% and a limit of detection of less than or equal to 100,000 SARS-CoV-2 copies per millilitre. The test cannot be an NHS test, which is

to cover the position where a person leaves Scotland on a short trip and returns within a few days. Such a person would be unable to get a test and result within the period required, while they are outwith Scotland. In such circumstances a person would require to source and pay for a private test prior to departing Scotland and should not be able to rely on an NHS test.

5. Children are exempt from the requirement to possess a negative test result although the accompanying adult of a child aged between 11 and 18 must possess valid notification of a negative result from a test taken by the child.

6. It is an offence to fail to possess the valid notification. This is subject to a Fixed Penalty Notice of £480. Repeat or serious offences could lead to a maximum fine of £5000 on summary conviction. A defence is available where a person has, in the circumstances, a reasonable excuse. The regulations sets out a non-exhaustive list of reasonable excuses including:- (a) the person is medically unfit to provide a sample for a qualifying test and possesses documentation, in English, to verify that; (b) it is not reasonably practicable for a person to obtain a qualifying test owing to a disability; (c) the person required medical treatment with such urgency that obtaining a qualifying test was not reasonably practicable; and (d) the person contracted coronavirus and required emergency medical treatment. The instrument also provides that a person accompanying a person mentioned in (c) or (d) and who is providing support to that person has a reasonable excuse where it was not reasonably practicable for the accompanying person to obtain a qualifying test.

7. Further examples of reasonable excuses include where the person began their journey in a place where a test was not available or where it was not reasonably practicable for the person to obtain a qualifying test due to lack of reasonable access to a qualifying test or testing facility and it was not reasonably practicable for them to obtain a test in their last point of departure if that was different to where they began their journey. An exemption is also available if the time it has taken a person to travel from the start point of their journey to their last point of departure before arriving in Scotland meant that the person could not get the test within the 3 days specified and it was not reasonably practicable for them to get the test in their last point of departure. A person does not commit an offence if they contravene the requirement to possess a negative test result if they reasonably believed at the time of the contravention that the notification of a negative result was valid and from a qualifying test.

The instrument requires persons who do not possess valid notification of a negative test on arrival to stay in specified premises in accordance with regulation 6(2) of the Principal Regulations. Persons with a reasonable excuse for not possessing a valid notification of a negative test are not excluded from the requirement to stay in a specified premises.

8. The instrument also provides for limited exemptions from the requirement to possess notification of a negative test result. These exemptions apply to:- Crown servants; Government contractors; seamen, masters and pilot of ships; inspectors and surveyors of ships; air crew; road hauliers; civil aviation inspectors; those transporting human cells or blood; those certified as returning from conducting essential state business outside the UK; those returning from undertaking essential or emergency work outside of the UK; representatives of a foreign country or territory or the government of a British overseas territory travelling to the UK to conduct official business with the UK where appropriate certification is in place; and workers with specialist technical skills where those specialist technical skills are required for emergency works or service (including commissioning, maintenance and repairs and safety checks) to ensure the continued production, supply, movement, manufacture, storage or preservation of

goods or services where they have travelled to the UK in the course of their work or otherwise to commence of resume their work.

9. Part 2 of the instrument places duties upon operators to ensure that a passenger who arrives in Scotland is in possession of the required notification of a negative test in accordance with the principal Regulations as amended by Part 1. The duty does not apply in relation to a passenger whom the operator reasonably believes to be exempt from the requirement to possess the required notification. Breach of this duty is a criminal offence prosecutable either on summary complaint (where the maximum fine is £10,000) or on indictment (where an unlimited fine can be imposed). A defence is available for the operator to show that the relevant passenger presented a document purporting to be a required notification which the operator, or a person acting on behalf of the operator, could not reasonably have been expected to know was not a required notification.

10. Part 2 of the instrument also places a duty upon operators to ensure that a passenger who arrives in Scotland is in possession of a completed Passenger Locator Form, in accordance with the requirements of regulation 3 of the principal Regulations. This is punishable either on summary complaint (where maximum fine would be £10,000) or on indictment (where an unlimited fine can be imposed).

11. Scottish Ministers must review the need for the requirements in regulations 6 and 7 at least once every 28 days. Part 2 of this instrument expires on 8 June 2021.

Consultation

12. This instrument is being made urgently in Scotland to make a further amendment to the public health measures in respect of international arrivals to the UK that were brought in on a UK-wide basis from 8 June 2020. The purpose of the principal Regulations is, as above, to help prevent further spread of the coronavirus, including new and emerging strains which may be more highly transmissible and effect vaccine efficacy by providing for persons to possess a negative test result prior to travelling to Scotland with related offences. All Four Nations of the UK are seeking to align on this.

13. The continued pace of the work on this and changing circumstances both in Scotland and other countries has meant limited consultation with external stakeholders in Scotland, but there has been ongoing discussion and dialogue by Scottish Government with Police Scotland, COPFS, Border Force in Scotland, Public Health Scotland and key airports in Scotland as the policy and implementation of the policy in Scotland has continued to be shaped.

Impact Assessments

14. No further impact assessments have been undertaken.

Scottish Government
COVID-19 Public Health Directorate
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