What are the implications of COVID-19 law and regulation for health professionals in Scotland?

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Aims of this report

This report provides health professionals with an overview of key legal and regulatory responses to COVID-19, and how they affect important areas of health and social care, in Scotland. It explains the laws and other sources related to professionals' rights and duties to help guide their decision-making. The overview of legal measures aims to be of ongoing relevance, but laws may change, and this document is representative of the situation on 7th July 2020. The report also provides guidance to assist reflective practice underpinned by a human rights-based approach.

COVID-19: The UK's legal response

In March 2020, the UK Parliament enacted the Coronavirus Act 2020. This Act will be in force for up to two years; albeit that some of its provisions have not been given immediate effect—and may never take effect. The Act operates alongside existing legislation enacted for all of the UK, as well as measures that apply only to England, Northern Ireland, Scotland, and Wales, or just some of these. The legal and policy situation for health and social care is complex, with regulation and guidance coming from the UK government and the devolved administrations. Local government also has a crucial role to play, as do health professionals and their representative organisations and regulators.

Rights and duties are at the core of being a health professional. Health professionals owe general duties to the public, underwritten by law and professional ethics. It is important to take a holistic, culturally congruent stance on the provision of health and social care in light of people's needs and rights.

The legal and regulatory context in Scotland

Responsibilities for legal and practical responses to infectious diseases are divided across the UK jurisdictions, with responsibility in Scotland falling to Health Protection Scotland, part of the newly created Public Health Scotland. The Coronavirus (Scotland) Act 2020 (as amended by the Coronavirus (Scotland) (No.2) Act 2020) complements and regulates the use of the emergency powers conferred to Scottish Ministers under the UK's Act. Whilst similar in scope, the Scottish legislation increases protections in a number of areas, and, arguably, adopts a stronger focus on advancing equality, non-discrimination, and human rights obligations when exercising powers of the Act.

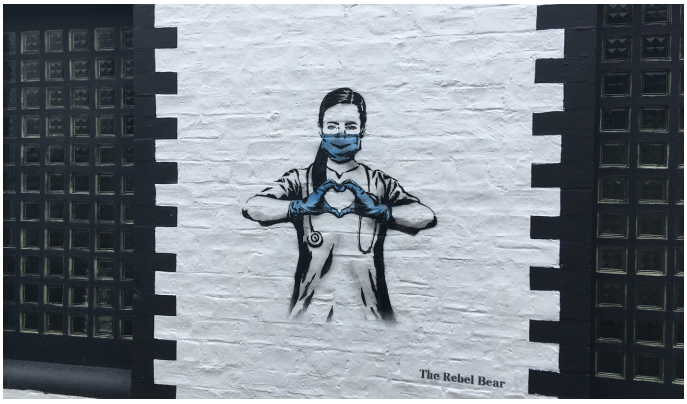

Photo by Colin D on Unsplash

The following diagram illustrates how legislative, regulatory and advisory sources interact in Scotland:

Overarching law

Human Rights Act 1998 and Equality Act 2010

These Acts respectively codify fundamental rights and prohibit discrimination. Both remain in force throughout the pandemic, requiring all measures enacted to be proportionate and necessary to their aims, and for consideration to be afforded to unequal effects.

The Coronavirus Act 2020

This Act introduces novel powers and amends (or provides the power to amend) existing legislation, aiming to slow the spread of the virus, reduce the resourcing and administrative burden on public bodies, and limit the impact of potential staffing shortages.

Scottish public health laws

Public Health etc. (Scotland) Act 2008

Allows for wide-ranging measures to be taken for the purpose of preventing, protecting against or controlling the spread of infection. Powers under this Act are of a broad nature, necessitating specific legislation to address the pandemic.

The Coronavirus Act (Scotland) 2020 (amended by the No.2 Act)

This Act complements and regulates the use of emergency powers conferred to Scottish Ministers by Schedule 19 of the Coronavirus Act 2020. The No.2 Act introduces further changes to how essential public services operate, and increases support for businesses and individuals.

The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (amended by the No.2 Regulations)

Gives legal effect to the 'lockdown' in Scotland, requiring individuals to remain at their living place, unless they have a reasonable excuse not to, and for most premises and businesses to close. It grants police powers to enforce these measures. Amendments clarify terms from the prior Regulation.

Professional regulation and governance for public health

Statutory Regulators for Health Professionals

Bodies which license and discipline health professionals, including the General Medical Council and the Nursing and Midwifery Council, have general codes of conduct and have also issued specific COVID-19 related guidance.

Public Health Scotland

Established in April 2020, this governmental body supports the management of the pandemic in Scotland, producing guidance and reports.

Professional Associations

Bodies including the Academy of Medical Royal Colleges, the Royal College of Nursing, the Faculty of Public Health, and the British Medical Association are providing guidance and support to their members in responding to COVID-19.

Advisory guidance

Advisory and Expert Ethics Bodies

Bodies such as the World Health Organization, Equality and Human Rights Commission Scotland, Scottish Human Rights Commission, and Nuffield Council on Bioethics are issuing guidance addressing ethical and legal concerns.

Effects of COVID-19 measures on key health and social care areas

The measures adopted in response to COVID-19 make significant changes to health and social care. When exercising duties, it is important to maintain a high standard of practice and continue to respect human rights and equality obligations.

1. Health professionals: workforce and employment

The pandemic has placed an unprecedented burden on the NHS. As such, the General Medical Council (GMC) and the Health & Care Professions Council, have introduced a temporary register, increasing the number of available healthcare professionals.

Health professionals continue to have a duty to raise concerns about unsafe workplace practices (e.g. patient safety, malpractice or unsafe working conditions). Professional regulators have recognised, however, that during the pandemic it may be not be possible or ideal to comply with established good practice when caring for patients and providing health and social care services. As such the regulatory standards are designed to be flexible and to provide a framework for decision-making in a wide range of situations. If departing from established procedures, however, professionals still must have regard to legal, regulatory, and ethical factors.

It is important that despite the pandemic, work environments can be made safe. Therefore, Public Health Scotland guidelines recommend frontline care workers use Personal Protective Equipment (PPE), including face masks, face shields, and gloves. The Scottish Government is providing PPE to all those operating in health and social care sectors.

2. Resource allocation

Although measures have been taken to increase capacity, the Scottish Government has also published guidance to support decision making during the pandemic. This should be read alongside the ethical advice and support framework, emphasising considerations of equal and fair distribution.

As part of the national Test and Protect approach, the Scottish Government is taking a targeted approach to testing, guidance for which may be found here. Although, key workers have been divided into 5 priority groups, as of June 2020, increased testing capacity has extended testing availability not only to all health and social care workers but also to high risk individuals and persons who may have come in contact with the virus.

3. Social care

The 2020 UK Act relaxes Scottish local authorities' duties to carry out health assessments and provide community care where it is impractical, or causes an unnecessary delay in the provision of care, to do so. This affects their duties relating to adult social care, carer support and children's services. Statutory guidance may be found here. The only exception to these powers is where it would constitute a human rights breach. This may be difficult to establish without going to court; it seems implicit that some form of assessment will remain necessary.

Whilst it is important to avoid harm through the spread of infection, this must be balanced against indirect harms. Certain groups are disproportionately at risk by the novel legislative measures. These have been recognised to include individuals from particular ethnic minorities, lower socio-economic environments or with support needs, women, young people, children, older and disabled people.

4. Mental health care

Changes to mental health legislation are premised on an anticipated shortage of doctors. Schedule 9 of the Coronavirus (Scotland) Act 2020 contains temporary modifications to duties under the Mental Health (Care and Treatment) (Scotland) Act 2003 and Adults with Incapacity (Scotland) Act 2000. The effects of these changes, summarised here, afford greater powers to health professionals, lower levels of scrutiny, and allow for increased periods of detention and restriction of autonomy, having significant implications for the safeguarding of the human rights of individuals with mental disorders. As of July 2020, these changes are *not* in effect and all practice should continue to comply with existing legislation. Although the measures may become necessary during this emergency period, they are a last resort, and rights of disabled individuals and those lacking capacity must continue to be upheld equally to all others.

5. Managing death and bereavement

During the pandemic efficient processing of death certificates and disposal of the deceased is essential. Ordinarily, deaths from infectious diseases must be reported. Although it is a notifiable disease, doctors do not need to advise of COVID-19-related deaths during

the pandemic period, unless the death was within a category defined by Part 3 of the Public Health (Scotland) Act 2008, such as deaths in prison. In addition, the Act contains provision for the suspension of the selection of medical certificate of cause of death (MCCDs) for review.

At present, burial and cremation services are operating as normal, albeit with limited opening to the public. Guidance for cremation and burial authorities may be found here, and for religious organisations, faith and cultural groups, here. In exercising this guidance, every effort must be made to preserve the dignity of the deceased, and where possible, to respect their personal wishes, religion, and beliefs.

Reflective practice: a human rights-based approach

The law on COVID-19 is complex, controversial, and subject to change. It will not always make clear what is required, or fit easily with other types of rules and guidance operating in the workplace. But decision-makers in a clinic or hospital, in public health, or in social care still need to make informed judgements. Human rights standards, which are part of UK and international law, can help.

Human rights standards resonate with ethics, equity and other ways of thinking with which health professionals should be familiar. They offer key prompts in the face of challenging or apparently everyday decisions. They enable health professionals to identify the fundamental values at stake, how they conflict, and the way in which such conflicts can be resolved, while never losing sight of the interests of the person receiving care.

What are the key features of a human rights-based approach?

• **Mobilise social rights.** The right to health obliges states to combat pandemics, through disease control measures, but also preparedness planning, adequate resourcing of the health system (including public health) and removing obstacles to treatments and vaccines.

• **Adopt fair processes.** Valuable resources, like tests, ventilators, and PPE, should be allocated on the basis of public criteria, with transparent decision-making and wide participation where feasible. Accountability should be promoted by regular monitoring and review, with remedies available where standards are breached.

• **Respect civil and political rights**. The right to life and the right not to be subject to inhuman or degrading treatment must be respected. Government has a positive obligation to take appropriate steps to safeguard people's lives; this includes making regulations that require public and private facilities to adopt measures for the protection of the lives of people in their care. Liberty and privacy, the ability to sustain important relationships and to accept or reject professional advice, are integral to ethical health care and to individual dignity. They continue to be fundamental in a time of pandemic emergency, though they may be limited.

• **Justify restrictions**. Limitations can only be imposed if they are necessary, the least restrictive means needed to protect the public's health, justified by scientific evidence, and laid down in law. Independent review after a fixed time-period is essential.

• **Embed equality and non-discrimination**. Decisions should not exacerbate existing inequalities or create new ones. Planning at all levels should take account of the needs of people from BAME communities, older people and other marginalised groups, as well as women, who are disproportionately burdened with caring responsibilities in the health and social care sector and domestically.

Further information and resources

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For further briefings and resources on the law and regulation in all four UK nations, please see the project website: https://bit.ly/3eaM1Sg

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