

TACKLING THE COVID-19 PANDEMIC IN SCOTLAND*

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* Text received 24.09.2020.

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Recommended citation: McCorkindale, Christopher, & McHarg, Aileen. (2020). Tackling the COVID-19 pandemic in Scotland. *Revista Catalana de Dret Públic*, (special issue), 256-265. <https://doi.org/10.2436/rcdp.i0.2020.3560>.

1 Introduction

Scotland is a quasi-autonomous territory within the United Kingdom. It has its own legal system and extensive powers of self-government under a system of legislative devolution. In other words, the powers of the Scottish Government and Scottish Parliament derive from an Act of the United Kingdom (UK) Parliament – the Scotland Act 1998 (as amended) – and are not constitutionally entrenched. Within the UK, there are also systems of legislative devolution in Wales and Northern Ireland, but not in England – the largest, by some measure, of the four UK territories.¹ The UK Government and Parliament therefore govern in some respects for the whole of the UK, but in other respects for England only.

The response to the Covid-19 pandemic in Scotland has largely mirrored that elsewhere in the UK, reflecting the enmeshed legal competences of Scottish and UK governmental institutions, the fact that the four UK administrations were, at least to begin with, receiving the same expert advice, and the desire, again at least initially, for a common UK-wide approach to a common public health threat that does not respect jurisdictional boundaries. However, there have from the outset been differences in the legal basis of some measures taken to tackle the pandemic in Scotland, and differences of detail and emphasis. Those differences have increased over time. While there remains significant commonality in the *types* of measures taken in response to the pandemic in all four UK territories, more differences in the detail, timing and tone of the response have emerged. Indeed, it has been claimed that the four-nation approach to the pandemic has effectively been abandoned.²

2 Main Measures to Address the Pandemic

2.1 Initial Response

The first case of Covid-19 was officially recorded in Scotland on 1 March 2020, with the first confirmed community transmission on 11 March and the first death on 13 March. On 22 February, Covid-19 had been designated a notifiable disease under the Public Health etc (Scotland) Act 2008,³ and on 3 March, all four UK Governments published a *Coronavirus Action Plan*.⁴ At this stage, various measures were taken to improve the preparedness of the National Health Service, to provide financial support for businesses, and to give guidance to particular sectors. The first restrictive measure was announced in Scotland – ahead of other parts of the UK – on 15 March, when the Scottish Government advised that all mass events, of 500 or more people, should be cancelled or postponed.⁵ On 19 March, the Scottish Government announced that all schools and nurseries would close at the end of the week, and on 20 March, the UK Government, with the agreement of the devolved governments, ordered pubs, restaurants and other leisure facilities to close immediately.⁶ Nevertheless, it was not until the enactment by the UK Parliament of the Coronavirus Act 2020 on 25 March that the Scottish Government secured the legal powers to enforce restrictive measures.⁷

1 Around 84% of the UK population resides in England.

2 See McKenny Stephen, “UK has diverged from a four nations approach to tackling coronavirus” claims professor’, *The Herald*, 13 September 2020.

3 The Public Health etc (Scotland) Act 2008 (Notifiable Diseases and Notifiable Organisms) (Amendment) Regulations 2020, SSI 2020/51.

4 UK Government, *Coronavirus (COVID-19) action plan*.

5 Scottish Government, *Large Gathering Guidance* (15 March 2020).

6 [Prime Minister’s statement on coronavirus](#) (COVID-19), 20 March 2020.

7 Coronavirus Act 2020, s 49 and Sch 19.

The Initial Lockdown

A UK-wide lockdown was announced on 23 March, to come into effect the following day.⁸ However, in a pattern that has been repeated in relation to subsequent measures, regulations to enforce the lockdown in Scotland were not made until 26 March and only published the following day.⁹ Again in a pattern found throughout the Covid-19 response, some restrictive measures were contained in government guidance rather than regulations, with the distinctions between legally-enforceable rules and mere guidance not always being made clear.

The initial lockdown consisted of four categories of measures:

1. Restrictions on freedom of movement:

People living in Scotland were required to stay at home, and were permitted to leave their home only with a reasonable excuse. A non-exhaustive list of reasonable excuses included, *inter alia*: to obtain essential supplies; for exercise; to seek medical treatment; to attend the funeral of a close family member; and to travel for the purposes of work where this could not reasonably be done from home (so called ‘key workers’). Reasonable excuses for leaving home were more fully glossed in guidance which, for instance, recommended exercising no more than once per day and only in one’s local area, although these limitations were never included in the lockdown regulations. Guidance also advised people with underlying health conditions which made them particularly vulnerable to Covid-19 were advised not to leave home for any reason (‘shielding’), and people with Coronavirus symptoms, or who had come into contact with someone with symptoms, were asked to self-isolate. Schedule 21 of the Coronavirus Act 2020 gave police, public health officers and immigration officers powers to require potentially infectious persons to undergo assessment and testing, and to self-isolate if they test positive. However, these powers do not appear to have been used extensively.¹⁰

2. Restrictions on freedom of association:

Subject to limited exceptions, people were not permitted to gather in a public place in groups of two or more, other than members of the same household.

3. Restrictions on economic liberty:

All businesses, except a limited list of essential businesses (such as food retailers, pharmacies, banks and so on) were required to close. Businesses that were permitted to remain open were required to take reasonable measures to ensure the maintenance of two metres social distancing. Other businesses were permitted to continue operating on a delivery-only basis.

4. Restrictions on access to public services:

Schools, colleges, universities, nurseries and other childcare providers (both public and private) were ordered to close, with exceptions for the children of key workers. Schools and universities shifted to online teaching, but national examinations in schools were cancelled. The close of business premises under the lockdown regulations also extended to a range of public services, such as libraries, museums and leisure centres. Other public services, such as medical and social care services, remained in operation, but with restrictions on the provision of non-essential services. Courts and tribunals also closed, again with exceptions for urgent business, which was conducted remotely where possible.

8 [Prime Minister’s address to the nation on coronavirus](#) (COVID-19), 23 March 2020.

9 The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, SSI 2020/103.

10 Brown Jennifer, *Coronavirus: the Lockdown Laws*, House of Commons Library Briefing Paper No 8875, 4 September 2020, p 7.

Breach of the restrictions contained in the lockdown regulations constituted a criminal offence. The police were given enforcement powers, including powers to break up unlawful gatherings and to return people to their homes if they were considered to be out without a reasonable excuse. The police could also issue Fixed Penalty Notices (FPN). The penalty for a first offence was £60, reduced to £30 if paid within 28 days. The penalty for a second or subsequent FPN doubled on each occasion, up to a maximum of £960.

2.2 Easing of the Lockdown and Social Distancing

The initial lockdown was maintained in Scotland, with only minor modifications, until the end of May – later than in the rest of the UK. On 21 May, the Scottish Government published its four phase ‘route map’ for the easing of restrictions.¹¹ On 28 May, the First Minister, Nicola Sturgeon, announced that Scotland would move to Phase One, beginning the following day. Along with the reopening of some businesses, and relaxation of guidance on travel for recreation, the major change was to rules on gatherings, to allow households to meet with one other household outdoors. Over the following weeks, restrictions were further eased to allow people to meet in larger groups outdoors and indoors, to enable single parents or adults living alone to form an ‘extended household’ with one other household, and to allow further businesses to reopen. By 10 July, the initial phase of the lockdown was effectively ended, with the move to Phase Three of the route map. Restrictions on leaving home were lifted; most businesses and services were allowed to reopen, and restrictions on travel and overnight stays away from home were ended. Shielding was ended at the beginning of August and in mid-August, at the end of the official summer vacation, schools and nurseries reopened. However, restrictions on both indoor and outdoor gatherings remained in place, although for gatherings in private homes and gardens, rather than public places, this was until recently a matter of guidance rather than law – a distinction not widely publicised or understood.

Nevertheless, the route out of lockdown has been neither linear nor uniform. As infection rates began to rise again at the beginning of August, a series of local lockdowns were put in place for particular local authority areas, albeit the restrictions were in no case as severe as during the initial lockdown. General rules on gatherings have also been progressively tightened again. On 28 August, the lockdown regulations were amended to make it an offence, not merely a matter of guidance, to hold a large house party (defined as more than 15 people from more than one household), thereby giving the police powers to enter premises and disperse such parties. From 14 September, the regulations were amended across all settings – public and private, indoor and outdoor – to limit (with some exceptions) gatherings to no more than six people from no more than two households (‘the rule of six’). As from 25 September, all household visits (again with some exceptions) have been prohibited, and new restrictions imposed on hospitality businesses, including mandatory closure at 10pm. At the time of writing, Scotland remains in Phase Three of the Scottish Government’s route map, with current restrictions likely to remain in place for some time.

In addition, the relaxation of lockdown has been accompanied by new measures aimed at suppressing transmission of the virus. At the end of April, the Scottish Government was the first in the UK to issue guidance recommending the wearing of face coverings in settings where social distancing is difficult. From 13 July, face coverings became mandatory for anyone aged five or over (subject to some exemptions) on public transport, in shops, in some cultural institutions, such as museums or libraries. From 8 June, a 14 day quarantine requirement was put in place for travellers returning to Scotland from a (frequently changing) list of countries.¹² A contact tracing app was launched by the Scottish Government on 10 September, and people resident in, or visiting, Scotland were urged to download it.

11 Scottish Government, *Coronavirus (COVID-19): Scotland’s Route Map Through and Out of the Crisis*.

12 The Health Protection (Coronavirus) (International Travel) (Scotland) Regulations 2020, SSI 2020/169.

2.3 Supporting Measures

As well as these restrictive measures aimed at preventing or containing the spread of the virus, the UK and Scottish Governments have put in place a very wide range of supporting measures to deal with the consequences of the pandemic and the lockdown. Space precludes outlining these additional measures in detail. Broadly speaking, however, they fall into three categories:

1. Measures to support the public health response, for example, by permitting the registration of retired medical staff, building a new hospital for Covid-19 patients, or procuring personal protective equipment;
2. Relaxation of duties and burdens on public authorities, for instance, by easing duties to assess care needs and, in particular, by extending time limits for the discharge of duties;
3. Responses to the financial impact of lockdown, such as financial support for businesses and furloughed workers, or those required to self-isolate, and a temporary moratorium on evictions.

3 The Legal Basis of the Decisions

The lockdown and related measures affecting Scotland are contained in a mixture of primary and secondary legislation, using new and existing statutory powers, and made by both UK and Scottish Parliaments and Governments (see further below).

Although comprehensive emergency legislation does exist – the Civil Contingencies Act 2004 – which is available for use in public health emergencies,¹³ this has *not* been used as the legal basis for the Covid-19 response. The reasons for this are not entirely clear.¹⁴ However, the Act appears to be envisaged for use only in the most extreme circumstances, for instance where it is necessary to deploy the armed forces.¹⁵ In addition, since use of the Act would centralise decision-making in the hands of the UK Government (subject to a duty to consult the devolved administrations), this may be thought particularly inappropriate for a public health emergency where the key legislative competences, and associated administrative capacity, rest at the devolved level.

As far as the lockdown measures *per se* are concerned, therefore, the key underpinning legislation is the Coronavirus Act 2020, enacted by the UK Parliament with the consent of the Scottish Parliament so far as it affects devolved matters. *Inter alia*, this conferred wide-ranging powers on the Scottish Government to make regulations to ‘make provision 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 (whether from risks originating there or elsewhere)’,¹⁶ as well as powers to order closure of educational establishments.¹⁷ In addition, the Scottish Parliament has enacted two pieces of Covid-19-related primary legislation – the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No 2) Act 2020 – which deal with a range of issues within devolved competence.

Both the UK and Scottish Coronavirus Acts were passed quickly with only limited Parliamentary scrutiny. Accordingly, they are temporary measures. Most provisions in the UK Act expire two years after enactment

13 S1(1)(a) defines an emergency, *inter alia*, as ‘an event or situation which threatens serious damage to human welfare in a place in the UK’. ‘Serious damage to human welfare’ is further defined as including ‘loss of human life’, ‘human illness’, ‘disruption of a supply of money, food, water, energy or fuel’, and ‘disruption of services relating to health’ (s1(2)(a),(b), (e) and (h), all of which were potentially satisfied in relation to the Covid-19 pandemic.

14 See House of Commons Public Administration and Constitutional Affairs Committee, *Parliamentary Scrutiny of the Government’s Handling of Covid-19*, 4th Report, 2019 – 21, HC 377, paras 19 – 35.

15 See HM Government, *Emergency Response and Recovery: Non-Statutory Guidance Accompanying the Civil Contingencies Act 2004* (London: Cabinet Office, 2013), ch 14.

16 Coronavirus Act 2020, Sch 19, para 1(1).

17 Coronavirus Act 2020, Sch 16, Pt 2.

(subject to powers for UK Ministers or devolved ministers to bring forward or extend the expiry date, and to suspend and revive particular provisions), and are also subject to Parliamentary confirmation after six months.¹⁸ The Scottish legislation expires on 30 September 2020, subject to a power for the Scottish Ministers (with the approval of the Scottish Parliament) to extend it until 31 March 2021.¹⁹ Under both sets of legislation, the UK and Scottish Ministers must prepare two-monthly reports on the use that has been made of the provisions.²⁰

The lockdown regulations are also subject to a requirement for review at least every 21 day, and particular restrictions or requirements must be revoked as soon as the Scottish Government considers that they are no longer necessary to respond to the virus.²¹ As time has gone on, these formal review periods have lost their significance, with changes being made on an *ad hoc* basis.²² The original regulations were amended 13 times, but have now been repealed and replaced with new consolidated regulations.

To date, all regulations have been made under urgent procedure, which means that they may come into force without Parliamentary approval (although they cease to have effect unless approved within 28 sitting days).²³ There has been persistent criticism of the limited notice given of changes in the law, with new regulations published only shortly before – or even, in the case of the initial regulations, after – they come into force. While this may be unavoidable, frequent changes to rules at short notice, having different rules in force in different parts of the country, and a failure to clearly distinguish between legal rules and government guidance, make it difficult for people to understand the obligations which apply to them.

4 Who Makes and Manages the Decisions

As already noted, once the decision was taken not to use the Civil Contingencies Act, legal powers to address the pandemic engaged a mixture of devolved and reserved (UK level) competences. In addition to powers over health, devolved institutions in Scotland have control over education, social care, policing and the justice system. However, many of the economic levers necessary to address the financial consequences of the pandemic – and crucially, the ability to borrow money to pay for them – rest at UK level, as do a range of more specific competences, such as registration of medical professionals. Administrative responsibilities in relation to various aspects of the pandemic response also lie with a range of other agencies, such as local authorities (notably in respect of primary and secondary education and social care) and independent health boards.

Initially, the approach to handling the pandemic appears to have been a pragmatic one, with an emphasis on governments and agencies working together without paying too close attention to formal divisions of responsibility. Hence, for reasons of speed, the Scottish Government agreed to the use of UK legislation to create the necessary lockdown powers, although it could almost certainly have procured legislative authority from the Scottish Parliament instead. Similarly, in the early stages of the pandemic, devolved ministers attended meetings of the UK Government's Civil Contingencies Committee (COBR) and sent representatives to SAGE – the UK Government's Scientific Advisory Group for Emergencies.

Subsequently, however, (and against a background of already poor relations between the UK and Scottish Governments) tensions began to emerge,²⁴ with the Scottish Government taking a noticeably more cautious line on the easing of the restrictions than the UK Government, particularly following the establishment of its

18 Coronavirus Act 2020, ss 88, 89, 90, and 98.

19 Coronavirus (Scotland) Act 2020, s 12.

20 Coronavirus Act 2020, s 97; Coronavirus (Scotland) Act 2020, s15. Reports by UK Ministers only apply to the non-devolved provisions in the Coronavirus Act.

21 The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020, SSI 2020/279, reg 3.

22 Brown, above n 10, p 25.

23 Coronavirus Act 2020, Sch 19, para 6.

24 See Evans Gareth, 'Devolution and Covid-19: Towards a "New Normal" in the Territorial Constitution' [2021] *Public Law* (forthcoming).

own expert advisory group towards the end of March 2020. UK Government sources expressed frustration with what they saw as the pursuit of difference for its own sake by the devolved governments, with some supporters suggesting that devolution should have been overridden or even suspended in order to ensure a consistent UK-wide approach. In fact, though, it was the UK Government which first diverged from the UK-wide approach, announcing a shift in the key public health message of ‘Stay at Home’ to a new instruction to ‘Stay Alert’, but to return to work if possible, on 10 May, without prior consultation with the devolved governments. For their part, the devolved governments were frustrated by the UK Government’s failure to properly distinguish its roles as the government of England and as a government for the whole of the UK. This concerned both the communication of the territorial extent of particular measures, and the substance of some decisions – for example, the decision to end the so-called ‘furlough’ scheme, whereby employers could claim 80% of the wages of workers temporarily laid off as a result of the lockdown, when restrictions on businesses had been eased in England, but remained in place elsewhere in the UK. By June, the informal arrangements for inter-governmental working on Covid-19 appeared to have broken down: COBR had not met between early May and late September, and ministerial implementation groups had been disbanded.

5 Areas of Controversy

5.1 Law, rights and coronavirus

Legality and rights compliance have been important features of the Covid-19 debate in Scotland, both in terms of how the pandemic response has been framed and implemented and in terms of political and legal pushback against aspects of that response. Both the Scottish Parliament and Scottish Government are constrained by the the devolution settlement to act compatibly with the European Convention on Human Rights,²⁵ as are public authorities in Scotland more generally.²⁶ In addition, as a minority administration, the Scottish Government is sensitive to the potential for its legislation to be defeated or for ministers to face parliamentary censure where it is unable to command cross-party support. More particularly, the Scottish Government has, inter alia, set out its commitment to the Rule of Law (which, it says, means ensuring any restrictions are ‘justified, necessary and proportionate’) and to ‘uphold the principles of human dignity, autonomy, respect and equality’ as key principles within its framework for Covid-19 decision-making.²⁷ Equality Impact Assessments (EIA) and Child Rights and Wellbeing Impact Assessments (CRWIA) were conducted in relation to both the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No 2) Act 2020, whilst section 9 of the Coronavirus (Scotland) Act 2020 places a duty on Scottish Ministers to ‘have regard’ both to ‘the importance of communicating in an inclusive way’²⁸ and to ‘opportunities to advance equality and non-discrimination’.

In Scotland, we have not seen the kind of pushback against lockdown itself that has been a feature of public debate elsewhere. However, on several occasions the Scottish Government has had to amend its position in light of concerns about the legal validity or rights compatibility of specific policies in the implementation of its response. For instance, a provision to allow trials of serious criminal offences to be presided over by a judge sitting alone with no jury contained in the Coronavirus (Scotland) Bill provoked strong political and legal backlash. In the view of the Faculty of Advocates, this was a ‘premature, disproportionate and ill-advised’ erosion of the fundamental right of those accused of serious criminal offences to be tried by a jury of their peers, exacerbated by the absence in the statute of any right of appeal from those trials.²⁹ In the face of that opposition, the Scottish Government removed the offending provision in order to secure the Bill’s safe legislative passage, and in July 2020 the first socially-distanced jury trials took place in Scotland.

25 Scotland Act 1998, ss 29(2)(d) and 57.

26 Human Rights Act 1998, s 6.

27 Scottish Government, *Coronavirus (COVID-19): framework for decision making*.

28 Hence, for example, a BSL interpreter has been a feature of the Scottish Government’s daily coronavirus press briefings from an early stage whereas it took threats of legal action for UK Government to make [similar provision](#) at its press briefings.

29 See the Faculty of Advocates’ response to consultation on the proposal [here](#).

Similarly, an instruction by the Scottish Government to the Scottish Qualifications Authority (SQA) to substitute cancelled school exams with an alternative method of assessment that was reliable and comparable with results achieved in previous years was reversed when the statistical modelling used to do so caused teachers' estimated grades to be downgraded in 125,000 cases, with a disproportionate impact on pupils from deprived backgrounds. Although the decision to restore the original estimated grade was primarily a political one – a response both to media backlash and public protests by those affected, as well as to a vote of no-confidence in the Education Secretary (and Deputy First Minister), John Swinney, tabled by opposition politicians – there were also important equality and rights considerations in play that were pre-empted by the policy change. One concern was about transparency: the methodology that underpinned the model, and the related EIA, were not published until the day that the results themselves were released and so could not be subject to advance public scrutiny. Another (albeit questionable) concern was about legality: that algorithmic decision-making of this kind was contrary to Article 22 of the General Data Protection Regulations, according to which individuals have the right not to be subject to a wholly automated decision where that decision produces legal effects or has a significant effect on their lives.

The nature of the pandemic response has – explicitly or implicitly – engaged legality and rights-compatibility issues in other ways. First, the First Minister has admitted that the speed with which the 'rule of six' was introduced meant that no CRWIA was made before it came into force.³⁰ Second, the Scottish Government was heavily criticised for provisions in the Coronavirus (Scotland) Act 2020 that extended (five-fold) the time limits for public bodies to respond to requests for information made under the Freedom of Information (Scotland) Act 2002.³¹ Following advice from the Scottish Information Commissioner³² that those provisions would weaken public scrutiny they were quickly repealed by the Coronavirus (Scotland) (No 2) Act 2020. Third, the gradual approach to re-opening non-essential sectors of the economy – whereby the Scottish Government works with relevant sectoral bodies to devise guidelines for their safe operation – has been attacked, implicitly, on procedural rights grounds with some sectors (for example, gyms) which were late to re-open arguing that they were denied the opportunity to be heard by the government and to engage in that process.³³ Fourth, the Government has amended the lockdown measures to respond to those who argued that the initial rules prevented them from forming or enjoying intimate relationships (with exceptions to the ban on household interaction now applying to couples who do not live together), or exacerbated loneliness or issues around mental health (leading to the exceptions for 'extended households' noted above). Finally, the Scottish Government has responded to concerns about the impact of lockdown on women and children who suffer domestic violence by providing additional funding to women's and children's aid groups.³⁴

5.2 Coronavirus litigation in the Scottish courts

Whilst Covid-19 has been a feature of litigation in Scotland, at the time of writing, we have not seen the volume and intensity of challenges to coronavirus restrictions that have been raised in England and Wales,³⁵ nor have there been (as we have seen in England and beyond) challenges raised against the legitimacy of lockdown itself, or which directly and explicitly engage rights.³⁶ Rather, recourse to the courts – actual or potential – has sought to draw attention to, or to remedy, specific impacts of the pandemic response. The highest profile case to date has been *Sharp v Scottish Ministers*.³⁷ Here, the owner and operator of six Ed-

30 See the response by the First Minister to the journalist Chris Musson [here](#).

31 Coronavirus (Scotland) Act 2020, Sch 6, part 2.

32 <https://theferret.scot/coronavirus-bill-scottish-information-commissioner>.

33 Stafford Indigo, *Frustrated Edinburgh Gym Owner Hits Out: Why is Sturgeon Ignoring Us*, *The Scotsman*, 19 August 2020.

34 Paterson Kirsteen, *Millions to be spent protecting women after lockdown spikes in domestic violence*, *The National*, 20 September 2020.

35 Tomlinson Joe et al, *Judicial Review during the COVID-19 Pandemic (Part II)*, *The Admin Law Blog*, 28 May 2020.

36 *Dolan v Secretary for Health Care and Social Care* [2020] EWHC 1786 (Admin).

37 [2020] CSOH 74.

inburgh coffee shops sought to challenge the Scottish Government's policy of restricting grant funding for businesses in respect of their second and subsequent retail, hospitality and leisure premises that had to close temporarily due to the pandemic. The petitioner argued that various statements made by the Chancellor and by Scottish Ministers had created a legitimate expectation that each of his premises would receive the maximum award. The challenge was unsuccessful, since the court considered that none of the statements relied upon amounted to a clear, unambiguous and unconditional promise to pay multiple grants to businesses operating from multiple properties.

A different set of issues arise in challenges currently being prepared by the families of two individuals who died with Covid-19 as a result, it is claimed, of failures in the Scottish Government's care homes policies. The first challenge alleges that the Scottish Ministers were responsible for driving a (so-called) 'bed clearance' policy by which hospital patients were rapidly discharged into care homes even where it was known that the patient might carry the virus with them or where the virus was, or had been, present in the care home. Rodger Laing, 80, died 22 days after being moved from a hospital dementia ward into a care home where people had already died of the virus. His family claims that their power of attorney – and in that capacity their decision not to allow Mr Laing to be transferred from the hospital – had been unlawfully overturned.³⁸ The second challenge argues that a policy of testing no more than five care home residents at a time for Covid, as well as a policy of transferring infected patients into hospitals, caused a fatal delay in identifying a care home resident's need for hospital treatment. Yvonne Cullen, 75, died in hospital having been admitted twelve days after first showing symptoms.³⁹ Both challenges are at very early stages. However, given the devastating effect that Covid-19 has had in care homes one might reasonably expect more challenges to come in this area.

Finally, there is anecdotal evidence (due to the highly confidential and unreported nature of the cases) that Covid restrictions have featured in the family law context, where they have been relevant, inter alia, in relation to applications to vary or terminate Child Protection Orders or in decisions made by, or appeals against the decisions of, the Children's Panel (for example, in respect of managing direct contact between families).⁴⁰

6 Conclusion

The Scottish Government has struck a different tone in responding to Covid-19 to that of the UK Government – more cautious, more serious, and more compassionate. It has been rewarded with correspondingly high assessments of its competence in handling the pandemic, which appear to be fuelling broader political developments in terms of increased support for Scottish independence.⁴¹ Nevertheless, the *substance* of the Scottish Government's response has not differed dramatically from that in other parts of the UK – unsurprisingly, given its limited constitutional powers – and it is undeniable that overall outcomes, in terms of rates of infection and death, in Scotland so far have been relatively poor. At the time of writing, the Scottish Government has taken decisive action in an attempt to suppress the second wave of the pandemic, emphasising the importance of social solidarity and the need to support people to do comply with social distancing rules, rather than threatening harsh punishment to force them to do so.⁴² It remains to be seen whether these measures will be effective, or if further restrictions will be required, and if Scots will continue to tolerate greater constraints on their rights and freedoms compared with people in other parts of the UK.

38 Jeffay John, *Grieving family sue Scottish Government over hospital bed clearance virus policy*, *Daily Record*, 31 August 2020.

39 Scott Marion, *Second family to sue Scottish ministers over care home policy following death of mum from Covid-19*, *The Sunday Post*, 8 September 2020.

40 See [tweet](#) by the Scottish solicitor Jennifer Wallace.

41 See eg Andrews Kieran, *Poll predicts MSP landslide as most Scots back independence*, *The Times*, 12 August 2020.

42 [Speech](#) by First Minister to the Scottish Parliament, 22 September 2020.

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