

## OFFICIAL - SENSITIVE

From: Rachel Sunderland  
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First Minister

**CHECKS AT THE BORDER PROPOSALS: UPDATE****Purpose**

1. To seek the First Minister's view on how to handle UK Government proposals on possible checks at the border in the light of potentially significant legal issues arising from the overall package of proposals, specifically the imposition of self-isolation measures for persons who are asymptomatic.

**Priority**

2. **Immediate** – the UK Government propose to seek ministerial agreement to the detail of their proposals at GPSMIG on 18 May and to announce publicly on 20 May. **Cabinet Office have indicated that Michael Gove may try to speak to the First Minister on Saturday afternoon.**

**Background**

3. NR s minute of 15 May (attached at **Annex A**) to the Cabinet Secretary for Health and Sport updates on officials' discussions with UKG and the Welsh Government and NI Executive. The UKG postponed consideration of the proposal at a planned GPSMIG on 15 May because of continuing concerns among the Devolved Administrations (and we suspect DHSC lawyers, although we understand the Attorney General is broadly content with the proposal).

**Discussion**

5. As noted in the attachment there are significant legal issues arising from these proposals. Specifically the imposition of isolation measures for persons who are asymptomatic will require clear evidence in order to demonstrate that the measures proposed are necessary, justified and proportionate to ensure that they meet ECHR requirements and are lawful. The isolation measures proposed would be far more stringent than the rest of the population is subject to, under the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 ("the existing lockdown Regulations"), and which would otherwise apply to incoming travellers. In addition there are flaws in the way in which the proposals have been designed which calls into question the efficacy of the measures and their enforceability– for example symptomatic individuals will be permitted to travel to their place of isolation by public transport and there are serious concerns around the enforceability of the measures.

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6. Despite pressing UK officials for a week for more robust evidence that the proposals will have a material impact on the infection rate, the sole evidence base offered continues to be the joint statement from the CMOs (attached at **Annex B**). This highlights the potential for a risk around future transmission of the virus from those entering at the border. However the timing of the introduction of these measures is critical. The CMOs' statement makes it clear that in order to have a meaningful impact, the measures should be introduced at a point when the infection rate in Scotland is sufficiently low and when incoming travellers present a genuinely higher risk. It also suggests a tailored approach depending on the infection rates in different countries.

7. Officials have explained to Cabinet Office that Scottish Ministers share the UKG's policy objective. However there is insufficient evidence currently to support the measures. The Lord Advocate has expressed the following view-

The key issue here seems to be the justification for imposing on persons who arrive at the Border restrictions which are more stringent and onerous than those which would apply to them along with the domestic population in any event. The Lord Advocate agrees with the SGLD analysis that the CMO statement does not provide an evidence base for such provisions. He notes that paragraph 2) does identify a benefit, which would arise when the UK has a low rate of infection, in quarantining individuals who come from countries with a higher rate of infection. Insofar as that statement is relied on, the measure would require to distinguish between those countries which have a higher rate of infection, and others which do not.

The Lord Advocate notes the point made by the CMOs in para 3): they acknowledge that there may be other reasons for proposing this measure. Any alternative justification would require to be assessed from an ECHR perspective, and would, accordingly, itself have to have a reasonable basis.

8. The UK Government's proposals comprise three key measures: individuals providing contact information prior to embarking on their journey to the UK which will be gathered by Home Office/Border Force and shared with public health; the provision of information and guidance to travellers and mandatory self-quarantine on arrival into the UK (although there will be some exemptions). While there are some operational challenges with the first two proposals the legal, and practical issues are predominantly with the third element – self quarantine.

9. SG officials have considered possible alternative approaches which may be considered and would go at least some way towards achieving the policy objective of the proposal. It should be noted that these proposals will also require to be justified and required to protect public health:

(a) Voluntary approach

10. The SG could agree the proposal on the understanding that the quarantine element of the proposal could only be on a voluntary basis in Scotland for those who are asymptomatic. Some other nations, for example Ireland, have introduced voluntary quarantine measures.

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**Pros:** The other elements of the new borders package would be in place so contact details for all those travellers whose final destination is in Scotland would be available to public health officials facilitating contact-tracing in the event of an infection. Travellers would also have received information on restrictions in force in Scotland and been encouraged during their flight, train or boat journey and to self-isolate for 14 days on arrival at their destination. This would not prevent the introduction of the requirement to quarantine in England (and Wales and Northern Ireland should their Governments conclude they can act lawfully). Social pressure could encourage travellers to self-isolate.

**Cons:** Some (possibly many) travellers would choose not to self-isolate, increasing the risk of transmission via asymptomatic individuals. There is a risk that if the measures were statutory requirements in other parts of the UK that this may prompt concern about travellers adapting their behaviour accordingly. It is, however, notable that under the UK Government's existing proposals travellers entering the UK via the republic of Ireland will not be caught by the measures and there are questions about the extent to which any scheme could be enforced. Under a voluntary system it would not be possible to attach the proposed conditions to the Seasonal Workers exemption which would have the effect of legally restricting the workers to their place of work although work is in-hand with employers to agree voluntary measures. It could be difficult to explain why the Scottish Government was unable to act in the same way as the UKG to reduce the risk of imported infections. UK Ministers could try to suggest SG Ministers were seeking to undermine a 4 Nations approach for political reasons.

(b) Delay and tailored approach

11. The SG could agree the proposal subject to: introduction of the requirement being delayed until the infection rate in the UK and Scotland has reduced to the point where the testing and contact-tracing system is capable of suppressing new infections; and a 4 Nation process to identify countries where the infection rate means the risk of imported infection is a real threat.

**Pros:** This approach is very clearly in line with the evidence base and reflects the CMO's advice. If the UK Government were to agree to such an approach it would deliver a 4 Nation approach. As with the voluntary option (a) we consider that it may be possible for the elements of the proposal relating to the provision of contact details and information to travellers to be introduced immediately. It also avoids the need to explain the quarantine requirement when infection rates in the UK are comparatively higher than many countries from where travellers will be arriving.

**Cons:** It could be suggested that a delay in introducing quarantine could increase the risk of imported infections, although the CMO advice is clear that when domestic transmission is very high imported cases are such a small amount of the total that they make no significant difference to the epidemic. There will be a communications challenge in explaining the delay to the public. There is also a strong risk that the UK Government will not wish to proceed on this basis both because of the element of delay and a concern that only applying the measures to certain countries with a higher infection rate may result in measures being applied to close allies. There is a risk that the UK Government blames Scottish Ministers for delay in introduction.

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12. In the case of both options travellers would still be subject to the existing lockdown Regulations, in common with everyone else in Scotland, such that they would be required to stay at home other than in the prescribed circumstances. However were the existing lockdown Regulations to be eased in the weeks to come the protections afforded by those existing Regulations will lessen in relation to incoming travellers.

13. It would also be possible to adopt both options and move to introducing the measures on a voluntary basis immediately with the option to adopt a mandatory approach once the infection rate reduces focused on nations with higher transmission rates.

**Other issues**

14. Progress has been made in resolving most of our concerns in relation to the Exemption List and we do not judge that the outstanding issues would represent obstacles to agreeing the proposal. The same applies to some of the practical issues around implementation, including sharing of personal data. Should Ministers agree a mandatory system, we continue to recommend self-enforcement with sanctions for non-compliance as opposed to an enforcement regime which lacks credibility.

15. The UK Government has still to share its thinking on an exit strategy. Discussions at an official level suggest that they see this as a secondary issue to be considered once the arrangements have been introduced. However, since this is likely to be a focus for media and other questioning as, and when, the UK Government makes an announcement we will continue to press on this point. The UK Government is that the legislation will last for 6 months but that there will be 3 weekly review points throughout that 6 month period. The obvious question will focus on what evidence will be considered at those 3 week review points and what will be the trigger points for any changes.

**Position of Wales and Northern Ireland**

16. We know that colleagues in Wales and Northern Ireland share some of our concerns in particular around the lack of an evidence base and would prefer that the UK Government allow more time for these to be adequately addressed. They may be prepared to support the Scottish Government. However, we now judge it likely that they will be prepared to agree the current UK Government proposal should the UK Government refuse to further delay.

**Next Steps**

17. Cabinet Office officials have suggested that Michael Gove may wish to speak to the First Minister on the afternoon of 16 May. The UK Government are clearly finding it difficult to clearly understand the challenges that we are facing. They seem to believe that the key issue is about management of, and willingness to tolerate, risk of legal challenge. They consider that Scottish Ministers should be willing to take some risks with the legal basis for the proposal, failing to understand that if the proposal is considered to be incompatible with the ECHR Scottish Ministers cannot exercise the powers at the outset where UK Ministers can still do so. Proposing an alternative approach that will lead to implementation of the proposal but either on a modified basis or slower timetable could go some way to demonstrate that the problem is real not political.

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**Conclusion**

18. We would therefore propose that :

- The First Minister note the legal and practical challenges in agreeing to rapid implementation of the UKG proposals to establish health checks at the border;
- Consider the possible alternative options that might be proposed to the UKG.

19. The First Minister may wish to speak to the Lord Advocate in advance a possible call with Mr Gove.

**Rachel Sunderland**

Population and Migration Division

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**ANNEX A**

PROVIDED IN SEPARATE ATTACHMENT

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**ANNEX B****CHECKS AT THE BORDER PROPOSALS: UPDATE - JOINT CMO POSITION**

1. Imported cases matter most when the UK has a low level of infection. When domestic transmission is very high imported cases are such a small amount of total that they make no significant difference to the epidemic. As the UK moves to a situation where local incidence and prevalence is much lower, imported cases could become a higher proportion of the overall number of infections and so preventing them can have some benefit. This is a gradual process, so there is not a 'threshold'. It is however the case that once rates of domestic transmission are low it is potentially a material issue.
2. That benefit only exists to a significant degree when people are coming in from a country with a higher rate of infection (chance of being infected) than the UK, and so the person being asked to self-isolate has a higher probability that they have the disease than the UK population, therefore adding to the risk. Quarantining for 14 days those people who come from a country with a higher rate than the UK may have a useful impact on the epidemic once the UK is at low levels, but quarantining those from countries with a lower rate than the UK will not.
3. However, quarantining is not only, or even mostly, about the epidemiology at this stage of the COVID-19 epidemic. Wider public confidence in the response, impact on travel and trade among other issues should be considered when making policy on quarantining at the border and may be more important in policy terms. This is not for the UK CMO's to offer advice on, as it is not where their expertise lies. Points 1) and 2) they are agreed on.