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## **COVID-19 Committee**

# **Subordinate Legislation considered by the Covid-19 Committee at its meeting on 18 November 2020**



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# COVID-19 Committee

Remit: To consider and report on the Scottish Government's response to COVID-19 including the operation of powers under the Coronavirus (Scotland) Act, the Coronavirus Act and any other legislation in relation to the response to COVID-19 and any secondary legislation arising from the Coronavirus (Scotland) Act and any other legislation in relation to the response to COVID-19.



<https://www.parliament.scot/parliamentarybusiness/CurrentCommittees/114991.aspx>



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**Mark Ruskell**  
Scottish Green Party



**Beatrice Wishart**  
Scottish Liberal  
Democrats

# Introduction

1. This report sets out the Covid-19 Committee's consideration of the following Scottish Statutory Instruments ('SSIs') at its meeting on 18 November 2020—
  - The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 (SSI 2020/344); and
  - The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment Regulations 2020 (SSI 2020/347).
2. The Committee also took evidence on the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 2) Regulations 2020 ('SSI 2020/374') from the Cabinet Secretary for the Constitution, Europe and External Affairs at this meeting. The Committee will consider a motion on SSI 2020/374 at a future meeting once the Delegated Powers and Law Reform ('DPLR') Committee has reported on the instrument under Standing Orders Rule 10.6.4.
3. The minutes of the meeting have been published on the [Committee's webpages](#). The Official Report of the meeting will be published by 6pm on Monday, 23 November 2020 on the [Committee's webpages](#).
4. The Committee also took evidence from the First Minister on SSIs within the scope of this report at its meeting on 4 November 2020 and the [Official Report](#) and [minutes](#) of that meeting have been published on the [Committee's webpages](#).

# The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Alert Levels) (Scotland) Regulations 2020 (SSI 2020/344)

5. The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Alert Levels) (Scotland) Regulations 2020 ('SSI 2020/344') were laid on 30 October 2020.
6. The [Policy Note](#) states that—
  - ” These Regulations implement a levels-based approach across Scotland, as set out in the Covid-19 Strategic Framework. The Regulations set the restrictions and requirements for five different levels and set out which levels apply to different geographical areas across Scotland allowing targeted action to be taken.
7. The DPLR Committee considered SSI 2020/344 at its meeting on 10 November 2020. It had the following points to raise in its report published on [12 November 2020](#)—

## ” “Purpose

The purpose of this instrument is to implement a levels-based approach to the Coronavirus related restrictions and requirements across Scotland. These are numbered from level 0 to level 4. It also sets out which levels apply to different geographical areas across Scotland. The instrument revokes the instruments which previously implemented such restrictions and requirements.

### Committee Consideration

The Committee wrote to the Scottish Government asking a number of questions on the instrument (see the [Annex](#) ).

### Regulation 5

It is intended that regulation 5(1) provides that it is an offence for a person to contravene any of the restrictions or requirements in schedules 1 to 5 and 7 other than the requirement to “take all other measures which are reasonably practicable to minimise the risk of the incident and spread of coronavirus on the premises” and the requirement to “have regard to guidance by the Scottish Ministers on minimizing exposure to coronavirus”. However, cross-referencing errors in regulations 5(1)(c) and 5(1)(d) mean that this intention is not achieved in respect of level 2 and level 3 areas.

The Committee considers that the effect of these cross-referencing errors in regulations 5(1)(c) and 5(1)(d), acknowledged by the Scottish Government, mean that it could be interpreted that it is not an offence under these regulations for those responsible for a place of worship, carrying on a business or providing a service in a level 2 or level 3 area to fail to take measures to ensure that a distance of 2 metres can be maintained by any persons on its premises or waiting to enter its premises. The Scottish Government confirmed that an amending instrument will be brought forward in early course.

### Regulation 6

The Committee asked the Scottish Government about cross-referencing issues within regulation 6. It is intended that regulation 6(5) provides that a constable must reasonably suspect that there is a gathering inside a private dwelling which consists of more than 6 persons before exercising the power to enter a private dwelling. However, cross-references in relation to level 2 and level 3 areas refer the reader to the “restrictions on public gatherings outdoors” provision in the schedule. The Committee considers that this is an error as a constable does not require powers of entry in relation to public outdoor gatherings. It could therefore be interpreted that a constable is not subject to the requirement that they must reasonably suspect that there is a gathering inside a private dwelling which consists of more than 6 persons before entering a private dwelling in level 2 and level 3 areas. However, given that the error is obvious and that the cross-references in relation to level 0, level 1 and level 4 areas achieve the policy intention, the Committee considers that this is less significant than the errors in regulations 6 and paragraph 8 of schedule 1. The Scottish Government has also confirmed that it will also address these errors in an amending instrument in early course.



### Paragraph 8 of schedule 1

The Scottish Government confirmed that it is the policy intention that paragraph 8 of schedule 1 provides that gathering outdoors in a private dwelling is permitted in level 0 areas. This is subject to a limit of 15 persons from no more than five households, with children under 12 years of age not counting towards the number of people or households attending a gathering. However, there is no provision in paragraph 8 of schedule 1 for outdoor gatherings in a private dwelling other than for those under 18. Therefore, the Committee considers that paragraph 8(1) does not achieve the policy intention. Further, the intention is that the maximum size of gathering permitted in respect of those aged of 12-17 is 15 persons in level 0 areas. Paragraph 8(1)(b)(i) currently states the maximum size of gathering permitted in respect of this age group is 8 persons. Therefore, the Committee considers that the policy intention is also not achieved in this respect. The Scottish Government agrees that these are errors and has confirmed that an amending instrument will be brought forward in early course.

The Committee agreed to draw this instrument to the attention of the Parliament under reporting ground (i) - that the instrument's drafting appears to be defective – in relation to regulation 5(1) and paragraph 8(1) of schedule 1.

The Committee also agreed to draw this instrument to the attention of the Parliament under the general reporting ground as there are drafting errors in regulation 6(5).

While acknowledging that mistakes happen, given the significance of these regulations in setting the restrictions that apply in the various levels around the country, the Committee agreed to call on the Scottish Government to bring forward an amending instrument as a matter of urgency.

The Committee noted the Scottish Government's commitment to bring forward an amending instrument in early course."

8. At the Covid-19 Committee's meeting on 18 November 2020, the Cabinet Secretary for the Constitution, Europe and External Affairs moved Motion [S5M-23215](#) in his name— That the COVID-19 Committee recommends that the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 (SSI 2020/344) be approved.
9. The motion was agreed to without division.
10. The Covid-19 Committee agreed Motion S5M-23215.

# The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment Regulations 2020 (SSI 2020/347)

11. The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment Regulations 2020 ('SSI 2020/347') were laid on 2 November 2020.
12. The [Policy Note](#) states that—
  - ” These Regulations implement a levels-based approach across Scotland, as set out in the Covid-19 Strategic Framework. The Regulations set the restrictions and requirements for five different levels and set out which levels apply to different geographical areas across Scotland allowing targeted action to be taken.
13. The Policy Note also explains under 'policy objectives' that—
  - ” These Regulations correct an error in the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020, by removing the requirement for amusement arcades to close at Level 2.
14. The DPLR Committee considered SSI 2020/347 at its meeting on [10 November 2020](#) and had no points to raise.
15. At the Covid-19 Committee's meeting on 18 November 2020, the Cabinet Secretary for the Constitution, Europe and External Affairs moved Motion [S5M-23366](#) in his name— That the COVID-19 Committee recommends that the Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment Regulations 2020 (SSI 2020/347) be approved.
16. The motion was agreed to without division.
17. The Covid-19 Committee agreed Motion S5M-23366.

