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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Coronavirus (Recovery and Reform) (Scotland) Bill: Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meetings on the 22nd of February and the 8th, 22nd and 29th March 2022, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the Coronavirus (Recovery and Reform) (Scotland) Bill (“the Bill”) at Stage 1.ⁱ
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

ⁱ The Bill as introduced is available [here](#).

Overview of the Bill

3. The Scottish Government Bill was introduced by John Swinney MSP, Deputy First Minister and Cabinet Secretary for Covid Recovery on 25 January 2022. The Lead Committee is the Covid-19 Recovery Committee.
4. The Policy Memorandumⁱⁱ states that the purpose of the Bill is to embed reforms in Scotland's public services and justice system that, though necessitated by the Covid-19 pandemic, are considered to have delivered improvements for service users and improved efficiency. It also states that the Bill will help build resilience against future public health threats. Furthermore, the Bill will continue certain temporary justice system provisions on a longer extension basis as part of the Recover, Renew, Transform programme and as a response to the impact of Covid on Scotland's justice system, most particularly where backlogs have built up.

ii The Policy Memorandum is available [here](#).

Delegated Powers

5. The Bill confers 16 delegated powers to make subordinate legislation on the Scottish Ministers. The Scottish Government has prepared a Delegated Powers Memorandum which sets out the reasoning for taking the delegated powers in the Bill and the procedures chosen.ⁱⁱⁱ
6. At its meeting on 22 February 2022, the Committee agreed to take evidence from the Deputy First Minister on the delegated powers in the Bill. The Deputy First Minister attended the Committee's meeting on 8 March 2022.
7. The report is split into three parts. Given the Bill contains 5 powers which can be exercised subject to the made affirmative procedure, the first part highlights the Committee's recent inquiry into the use of the made affirmative procedure during the coronavirus pandemic. The Committee also makes overarching recommendations on the 5 powers based on the findings of that inquiry.
8. The second part focuses on each of the powers with separate recommendations for each provision.
9. The third part of the report deals with the 11 remaining powers in the Bill, which are subject to either the negative or draft affirmative procedures.

ⁱⁱⁱ The Delegated Powers Memorandum is available [here](#).

The Committee's previous consideration of the made affirmative procedure

10. Given the rapid increase in the use of the made affirmative procedure since March 2020, the Committee agreed at its meeting on 9 November 2021 to hold a short and focused inquiry into the use of the made affirmative procedure during the coronavirus pandemic ("the inquiry"). The Committee's objective for this work was to:
 - help inform the Parliament's consideration of the made affirmative procedure in future legislation; and
 - help ensure there is an appropriate balance between flexibility for the Government in responding to an emergency situation while still ensuring appropriate parliamentary scrutiny and oversight.
11. This is the first Bill the Committee has considered since it published its report on the inquiry on 10 February 2022. The Committee has therefore used its findings from the inquiry to help inform its scrutiny of proposed delegated powers in this Bill.

What is the made affirmative procedure?

12. Firstly, it is worth providing some background to the made affirmative procedure compared to the affirmative procedure.
13. The made affirmative procedure allows an SSI to be made and come into force even though it has not yet been approved by the Parliament. However, it cannot remain in force beyond a specified period of time (often 28 days in the case of coronavirus instruments) unless it is subsequently approved by the Parliament.
14. The primary difference between the made affirmative and affirmative procedures is that an SSI laid under the affirmative procedure cannot be made and come into force unless and until the Parliament has voted to approve it. The lead committee has up to 40 days from when an affirmative instrument is laid to publish its report.
15. Made affirmative SSIs were not, until 2020, very common. These are only used for time-limited situations because they can make changes to the law immediately before the Parliament has looked at an SSI that would otherwise be subject to the affirmative procedure.
16. Since the start of the coronavirus pandemic, over 140 made affirmatives have been laid by the Scottish Government. The vast majority of these have been made using the provisions in schedule 19 of the UK Coronavirus Act 2020 Act (restrictions, local levels and current requirements) and sections 94(1) and 122 of the Public Health etc. (Scotland) Act 2008 (International Travel Regulations).
17. Both a made affirmative and affirmative instrument will firstly be considered by the Delegated Powers and Law Reform Committee as a matter of law. It will then be considered by the relevant subject committee (known as the lead committee) as a matter of policy before being voted on in the Chamber.

Future made affirmative powers

18. During the inquiry, the Committee heard views from a number of witnesses indicating that the trends in the use of the made affirmative procedure should be seen as part of a broader context with a shift in the balance of power between Parliament and the Government over generations. This trend is reflected in an increased use and reliance on subordinate legislation to bring about changes in the law.
19. On the role of the Parliament when scrutinising primary legislation, Stephen Tierney, Professor of Constitutional Theory at the University of Edinburgh School of Law, spoke of the importance of scrutinising proposed powers in primary legislation:

” *It seems to me that the job of the Scottish Parliament, as it is for any Parliament, is threefold: first, to be rigorous – indeed, to be reluctant in conceding those powers in the first place; secondly, to check that the powers are framed very closely and that their exercise is tightly limited; and, finally, to ensure that mechanisms for scrutiny are very robust.*^{iv}
20. The Committee therefore recognised in its inquiry the need for effective and robust scrutiny of primary legislation which creates future delegated powers which may be exercised subject to the made affirmative procedure.
21. While the Committee said that it will consider each proposed delegation of such a power on a case by case basis, it developed the following four principles as the basis of its scrutiny where legislation includes such provision, such as this Bill. These are:
 1. Given the lack of prior parliamentary scrutiny and risks to legislative clarity and transparency in the made affirmative procedure, use of the affirmative procedure should be the default position in all but exceptional and urgent circumstances. Legislation making provision for the made affirmative procedure must be very closely framed and its exercise tightly limited.
 2. The Parliament will require an assurance that a situation is urgent. Provision in primary legislation will need to encompass a requirement to provide an explanation and evidence for the reasons for urgency in each case where the procedure is being used. There should be an opportunity for debate in a timely fashion and open to Members to seek to contribute.
 3. Any explanation provided by Scottish Ministers should also include an assessment of the impact of the instrument on those affected by it and Ministers’ plans to publicise its contents and implications. This could include details of the relevant Scottish Government website where links to the instrument, including where relevant any consolidated version of the instrument it amends, as well as any associated guidance, can be found.
 4. There will be a general expectation that legislation containing provision for the made affirmative procedure will include provision for sunset clauses to the

^{iv} Official Report. Delegated Powers and Law Reform Committee, 14 December 2021, Col 3. Retrieved from: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13474>

effect that (a) Ministers' ability to use the power will expire at a specified date and that (b) any instrument made under the power will be time-limited.

22. Based on these principles, and notwithstanding the Committees specific recommendations on each of the 5 powers which can be exercised subject to the made affirmative procedure, the Committee makes the following recommendations for each of the relevant powers in the Bill.

23. The Committee recommends that the Scottish Government brings forward amendments on each power which can be exercised subject to the made affirmative provision so that they include the following statutory requirements:

- that Scottish Ministers provide a written statement prior to the instrument coming into force providing an explanation and evidence as to why the Scottish Ministers consider the regulations need to be made urgently when using the made affirmative procedure;
- that Scottish Ministers include an assessment of the impact of the instrument on those affected by it; and
- that statutory instruments made under the powers are subject to a sunset provision.

24. The Committee nevertheless restates that it would expect the default position to be that the Scottish Government use the affirmative procedure in all but exceptional and urgent circumstances.

Expedited affirmative procedure

25. As the Committee recommended in its inquiry, it will consider with the Scottish Government, alongside the COVID-19 Committee (or relevant lead committee) and the Parliamentary Bureau (which manages the business in the Chamber), on a case-by-case basis for when the use of an expedited affirmative procedure as an alternative to the use of the made affirmative procedure might be appropriate. This would also include the parliamentary timescales for such scrutiny report.

26. In evidence with John Swinney MSP, Deputy First Minister and Cabinet Secretary for Covid Recovery, he said that that he was “wholly committed” to exploring such a process.^v

27. The Committee will continue to explore how such a protocol will work with the Scottish Government so that it might be in place before this Bill, subject to Parliamentary approval, is enacted. This will ensure that it is ready for use to deal

^v Official Report. Delegated Powers and Law Reform Committee, 8 March 2022, Col 10. Retrieved from: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13627>

with emergency legislation stemming from this Bill and any other relevant Act.

Powers which may be exercised subject to the made affirmative procedure

28. As noted above, there are 5 powers in this Bill which may be exercised subject to the made affirmative procedure. The Bill proposes that four of these powers will be permanently available to Scottish Ministers whereas the fifth power, which makes provision for the early release of prisoners, is time limited until 30 November 2023 with the option to extend this date by regulations for a further year at a time until 30 November 2025. The fifth power is an extension of a power initially introduced by the Coronavirus (Scotland) Act 2020.
29. The four permanent powers are capable of being exercised by Scottish Ministers for the purpose of protecting public health. The temporary power is capable of being exercised by Scottish Ministers for the purpose of responding to the effects of coronavirus on prisons only. The four permanent powers are grouped together below as the Committee may wish to make similar recommendations on these powers.

Possible consequences should the option that the powers may be exercised subject to the made affirmative procedure be removed

30. The Committee noted that in relation to this Bill, if the made affirmative procedure is not included as an option in the provisions containing emergency powers, the Scottish Ministers would likely be unable to use those emergency powers to bring measures into force immediately in the most urgent circumstances.

Summary of evidence with the Deputy First Minister

31. At its meeting on 8 March 2022, the Committee took evidence from the Deputy First Minister and Cabinet Secretary for Covid Recovery, John Swinney MSP, on the delegated powers in the Bill.
32. The Deputy First Minister was asked about the delegation of the four permanent powers in principle. He was asked why it was considered necessary that the Scottish Ministers had such powers available. In response he said:

” *the rationale is to recognise the necessity of us taking sufficiently comprehensive action should we face the challenges of an intensification of the coronavirus pandemic or another comparable incident of similar style and scale. Existing provisions in the Public Health etc (Scotland) Act 2008 give some limited localised powers to deal with what I would describe as localised outbreaks of concern, but when it comes to dealing with a situation of the magnitude that we have been dealing with around Covid, the statute book is ill equipped for such measures. We are trying to complete the statute book to ensure that adequate powers are available and that there is a scheme of delegation in place that is appropriate to deal both with the necessity of parliamentary scrutiny and with the necessity of urgent action, should that be required.*^{vi}

^{vi} Official Report. Delegated Powers and Law Reform Committee, 8 March 2022, Col 3.

33. As the Bill covers a number of policy areas, such as education, tenancy rights, justice and health matters, the Committee asked the Deputy First Minister whether these should be split into separate pieces of legislation. In his answer, Mr Swinney said:

” *Essentially, the purpose of the bill is to equip the statute book, across a range of legislative questions, with the capacity to handle a pandemic, should one come our way again.*

There is an arguable case for either point. We could either compartmentalise and do it in a number of pieces of legislation, or take the consolidation route. I opted to take the consolidation route, because I felt that, in the aftermath of the pandemic, there was a rational basis for us to update the statute book to learn the lessons from our experience and put in place the changes that are required.^{vii}

34. The Deputy First Minister was also asked about the extension of the power to release early prison or young offenders institution on a temporary basis. The Committee asked why this power, in contrast to the abovementioned powers, is limited in that it may only be exercised in relation to coronavirus and not in response to a public health threat generally. In response to that question, the Deputy First Minister responded:

” *We did that because of the necessity of the situation in relation to Covid, which might require us to take particular steps, as we had to do during the Covid pandemic. As a general rule of thumb, that was not envisaged as a power that was appropriate to be included in legislation of this type on a long-term basis.*^{viii}

35. The Committee also questioned the Deputy First Minister on how the powers which may be exercised by the made affirmative procedure fit with the Committee’s recommendations in its inquiry into the made affirmative procedure (as highlighted earlier in this report). Specifically, whether:

- the legislation making provision for the made affirmative procedure is **very closely framed and its exercise tightly limited** (given the use of the affirmative procedure should be the default position in all but exceptional and urgent circumstances);
- there should be a statutory requirement that Scottish Ministers **provide a written statement prior to the instrument coming into force** providing an explanation and evidence as to why the Scottish Ministers consider the regulations need to be **made urgently** when using the made affirmative procedure;

Retrieved from: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13627>

vii Official Report. Delegated Powers and Law Reform Committee, 8 March 2022, Col 6.
Retrieved from: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13627>

viii Official Report. Delegated Powers and Law Reform Committee, 8 March 2022, Col 3.
Retrieved from: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13627>

- there should be a statutory requirement that Scottish Ministers **include an assessment of the impact of the instrument on those affected by it** when using the made affirmative procedure; and
 - there should be a statutory requirement that any instrument made using the made affirmative procedure **must contain a sunset provision**.
36. On the statutory requirement on a statement of urgency, the Committee noted that the five powers as drafted in the Bill do not clearly provide for such a statement. It therefore asked the Deputy First Minister whether the Scottish Government might consider including a clear, incontrovertible and explicit requirement to provide such a statement. In response, Mr Swinney said:
- ” *We can consider that adjustment and would be likely to move towards it. The recent Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill took an approach in which we took explicit responsibility for setting out the rationale for the necessity of acting with urgency. I am therefore happy to consider what you suggest. It strikes me as a change that the Government would be likely to embrace, given what we did in that bill.*^{ix}
37. The Committee also noted that there does not appear to be any requirement in the Bill for any assessment to take place of the impact of an instrument made under the powers that may be exercised through the made affirmative procedure, for example for education and educational establishments. The Deputy First Minister was asked whether it was important that those affected by changes to the law understand the impact of the relevant regulations and that the information is accessible, clear and published in a timely manner. And, if so, would the Scottish Government consider amending the bill so that a requirement for such a process is included?
38. The Deputy First Minister said that he would *“take that point away and reflect on it”*, but that his first reaction would be that he would have judged such requirements for such assessments would already be covered by a variety of impact assessments covered by existing statutes. Mr Swinney nevertheless assured the Committee that:
- ” *I will take that point away to satisfy myself that no gap exists there, because I accept the sentiment unreservedly.*^x
39. In relation to sunset provisions, the Committee highlighted to Mr Swinney its principle that there should be a statutory requirement that any instrument that is made using the made affirmative procedure must contain a sunset provision. It asked the Deputy First Minister whether he could outline the Scottish Government’s approach in setting such review requirements it decides what the sunset provision should be. Mr Swinney said:

^{ix} Official Report. *Delegated Powers and Law Reform Committee, 8 March 2022, Col 9.*
Retrieved from: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13627>

^x Official Report. *Delegated Powers and Law Reform Committee, 8 March 2022, Cols 13-14.*
Retrieved from: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13627>

” Obviously, there is an argument for sunset provisions. The difficulty is that we cannot, for example, predict the moment at which we might face a pandemic, how long it will go on for, or whether—to be blunt—it will coincide with the intricacies of parliamentary sitting arrangements. We could find ourselves in a situation in which we have a gap in the statute book because Parliament is not sitting, but there would be a necessity for us to undertake particular provisions. It is about taking an orderly approach to ensuring that the statute book is in a fit state to respond to different challenges.^{xi}

40. On whether a sunset provision is provided for in secondary legislation, Mr Swinney added:

” It would have to be considered at that time. Obviously, there are certain arrangements in the bill that mean that if, for example, the made affirmative procedure is applied but the Parliament does not support or endorse the provision, it will lapse after a given period of time. Those provisions are built into legislation at the time of its design. However, there is the provision for ministers to consider any other provisions of that nature that might come forward and which members might wish to add to the bill during its passage.^{xii}

Permanent powers in the Bill which can be exercised subject to the made affirmative procedure

Section 1 (inserts section 86A(1) into the Public Health etc.

(Scotland) Act 2008) – Public health protection regulations

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative or made affirmative

Provision

41. Section 1 of the Bill inserts section 86A(1) into the Public Health etc. (Scotland) Act 2008. Section 86A provides that Scottish Ministers may by regulations 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). Such regulations may only be made in relation to infection or contamination which presents or could

^{xi} Official Report. Delegated Powers and Law Reform Committee, 8 March 2022, Col 16. Retrieved from: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13627>

^{xii} Official Report. Delegated Powers and Law Reform Committee, 8 March 2022, Col 16. Retrieved from: <https://www.parliament.scot/api/sitecore/CustomMedia/OfficialReport?meetingId=13627>

present significant harm to human health.

42. Regulations made under this power may include provision directly or indirectly imposing restrictions or requirements on or in relation to persons, things or premises.
43. There are limits on the use of the power: such regulations should not be made to impose restrictions or requirements unless the Scottish Ministers consider, when making the regulations, that the restriction or requirement is proportionate to what is sought to be achieved by imposing it. Further, regulations made under this power are subject to review requirements, meaning they require to be reviewed every 21 days.
44. Regulations made under new section 86A(1) are subject to the affirmative procedure unless the Scottish Ministers consider that the regulations need to be made urgently, in which case they may be made subject to the made affirmative procedure. If regulations are made to revoke or partially revoke measures contained in regulations made under new section 86A(1), those regulations must be laid before the Parliament but are not subject to any further procedure. This is consistent with the approach taken in respect of the revocation of International Travel Regulations in the Public Health etc. (Scotland) Act 2008.

Committee consideration

45. The Committee noted that the Bill is amending the primary legislation, the Public Health etc. (Scotland) Act 2008, which has been used throughout the pandemic to make regulations which have imposed rules regarding international travel. Although the 2008 Act provides powers to make such regulations regarding international travel, it does not currently have powers which enable the Scottish Ministers to make regulations imposing domestic restrictions and requirements in response to a public health threat. Therefore, the Scottish Ministers have relied on powers conferred by the Coronavirus Act 2020 (“the 2020 Act”) to make regulations imposing domestic restrictions and requirements throughout the pandemic.
46. New section 86A(1) is in largely the same terms as the regulation making power contained in the 2020 Act. One notable difference is that the power may be exercised in relation to any public health threat, whereas the power in the 2020 Act can only be exercised in relation to coronavirus.
47. The Scottish Government note in their Delegated Powers Memorandum that the Secretary of State was able to exercise existing powers under the Public Health (Control of Disease) Act 1984 to make regulations imposing requirements and restrictions in relation to England and Wales. It therefore states that it is appropriate that the Scottish Ministers have equivalent powers in statute in order that the Scottish Government can respond to future public health threats, without the need for emergency primary legislation.
48. The regulation making power may implement significant policy measures and therefore it is appropriate that such a power is subject to the affirmative procedure, which provides the best opportunity for parliamentary scrutiny of subordinate legislation.

49. Some Members^{xiii} consider that the Scottish Government has not made a sufficient case for why this power should be delegated and instead consider that such powers could be brought forward quickly under primary legislation if required in future. The majority of the Committee^{xiv} was however content with the delegation of the power in principle.
50. Nevertheless, the Committee restates its consistent and strongly held opinion that it expects the default position to be that the Scottish Government use the affirmative procedure in all but exceptional and urgent circumstances. The made affirmative procedure should therefore only be used in extremis when exercising this power.
51. Where in those exceptional circumstances, the made affirmative procedure is used, the Committee emphasises the importance of sufficient checks and balances. It therefore recommends that the Scottish Government brings forward amendments to this section as highlighted earlier in this report in paragraph 23.

Section 8(1) – Regulations on continuing operation of educational establishments

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative or made affirmative

Provision

52. Section 8(1) of the Bill provides that Scottish Ministers may make regulations relating to the continuing operation of an education establishment for a specified period. Such regulations may make provision, for example:
 - requiring an educational establishment to open, to stay open, to re-open or to open at times when it would not usually be open;
 - requiring the alteration of term dates, holiday dates or examination dates;
 - requiring measures to ensure hygiene standards to be put in place; or
 - restricting or prohibiting access in respect of the whole or a specified part of an educational establishment.
53. Before making such regulations, the Scottish Ministers must have regard to any advice from the Chief Medical Officer of the Scottish Administration and must be satisfied that making the regulations is a necessary and proportionate action for or in connection with the continued provision of education.
54. Regulations made under section 8(1) are subject to the affirmative procedure unless the Scottish Ministers consider that the regulations need to be made urgently, in which case they may be made subject to the made affirmative

^{xiii} Craig Hoy MSP and Graham Simpson MSP

^{xiv} Bill Kidd MSP, Stuart McMillan MSP and Paul Sweeney MSP

procedure. Where Scottish Ministers consider that the regulations need to be made urgently, the instrument containing the regulations must include a declaration that the Scottish Ministers are of the opinion that, by reason of urgency, it is necessary to make the regulations without their being subject to the affirmative procedure.

Committee consideration

55. The Scottish Government states in its DPM that the power “enables them to take necessary and appropriate action to protect public health and ensure the continuity of educational provision and mitigate against some of the wider harms that can be caused by threats to public health.”
56. The regulation making power may implement significant public policy measures and therefore it is appropriate that such a power is subject to the affirmative procedure, which provides the best opportunity for parliamentary scrutiny of subordinate legislation.

57. Some Members^{xv} consider that the Scottish Government has not made a sufficient case for why this power should be delegated and instead consider that such powers could be brought forward quickly under primary legislation if required in future. The majority of the Committee^{xvi} was however content with the delegation of the power in principle.
58. Nevertheless, the Committee restates its consistent and strongly held opinion that it expects the default position to be that the Scottish Government use the affirmative procedure in all but exceptional and urgent circumstances. The made affirmative procedure should therefore only be used in extremis when exercising this power.
59. Where in those exceptional circumstances, the made affirmative procedure is used, the Committee emphasises the importance of sufficient checks and balances. It therefore recommends that the Scottish Government brings forward amendments to this section as highlighted earlier in this report in paragraph 23.

Section 9(1) – Regulations on school boarding accommodation

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative or made affirmative

Provision

60. Section 9(1) of the Bill provides that Scottish Ministers may make regulations requiring a relevant manager of a school boarding establishment to take steps to restrict or prohibit access to the establishment for a specified period. Such regulations may make provision, for example:

xv Craig Hoy MSP and Graham Simpson MSP

xvi Bill Kidd MSP, Stuart McMillan MSP and Paul Sweeney MSP

- restricting or prohibiting access in respect of the whole or a specified part of premises in which school boarding accommodation is provided;
 - restricting or prohibiting access in respect of the carrying on of all activities or in respect of the carrying on of specified activities; or
 - requiring the taking of actions that the Scottish Ministers consider appropriate.
61. Before making such regulations, the Scottish Ministers must have regard to any advice from the Chief Medical Officer of the Scottish Administration and must be satisfied that making the regulations is a necessary and proportionate action for or in connection with the continued provision of education.
62. Regulations made under section 9(1) are subject to the affirmative procedure unless the Scottish Ministers consider that the regulations need to be made urgently, in which case they may be made subject to the made affirmative procedure. Where Scottish Ministers consider that the regulations need to be made urgently, the instrument containing the regulations must include a declaration that the Scottish Ministers are of the opinion that, by reason of urgency, it is necessary to make the regulations without their being subject to the affirmative procedure.

Committee consideration

63. The Scottish Government states in its DPM that the power is required in order to allow the Scottish Ministers to respond appropriately to future public health threats in relation to school boarding establishments. It notes that pupils in boarding school accommodation may have travelled from other parts of the United Kingdom or from abroad, and therefore different approaches regarding public health requirements and welfare considerations to those taken in relation to non-residential educational establishments may be appropriate.
64. The regulation making power may implement significant public policy measures and therefore it is appropriate that such a power is subject to the affirmative procedure, which provides the best opportunity for parliamentary scrutiny of subordinate legislation.

65. Some Members^{xvii} consider that the Scottish Government has not made a sufficient case for why this power should be delegated and instead consider that such powers could be brought forward quickly under primary legislation if required in future. The majority of the Committee^{xviii} was however content with the delegation of the power in principle.
66. While some Members^{xix} are content with the parliamentary procedure in the Bill, the majority of the Committee^{xx} do not consider that the option for the power to be exercised subject to the made affirmative procedure is appropriate in this case and instead should only be subject to the affirmative procedure.

^{xvii} Craig Hoy MSP and Graham Simpson MSP

^{xviii} Bill Kidd MSP, Stuart McMillan MSP and Paul Sweeney MSP

^{xix} Bill Kidd MSP and Stuart McMillan MSP

Section 10(1) – Regulations on student accommodation

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative or made affirmative

Provision

67. Section 10(1) of the Bill provides that Scottish Ministers may make regulations requiring a relevant manager of student accommodation premises to take reasonable steps to restrict or prohibit access to the premises for a specified period. Such regulations may also require a relevant manager of student accommodation premises to provide support for students in order to assist:
- their compliance with any restriction or requirement relating to the protection of public health;
 - their following of any guidance or advice from a public authority relating to the protection of public health; and
 - their response to a particular request or recommendation from a public authority relating to the protection of public health.
68. Before making such regulations, the Scottish Ministers must have regard to any advice from the Chief Medical Officer of the Scottish Administration and must be satisfied that making the regulations is a necessary and proportionate action for or in connection with the continued provision of education.
69. Regulations made under section 10(1) are subject to the affirmative procedure unless the Scottish Ministers consider that the regulations need to be made urgently, in which case they may be made subject to the made affirmative procedure. Where Scottish Ministers consider that the regulations need to be made urgently, the instrument containing the regulations must include a declaration that the Scottish Ministers are of the opinion that, by reason of urgency, it is necessary to make the regulations without their being subject to the affirmative procedure.

Committee consideration

70. As is noted above in relation to school boarding accommodation, students living in student accommodation live communally, and may have travelled from other parts of the United Kingdom or from abroad. Therefore, different approaches regarding public health requirements and welfare considerations may be required. The Scottish Government states that the power to make regulations relating to student accommodation provides flexibility in responding to future public health threats.
71. The regulation making power may implement significant public policy measures and therefore it is appropriate that such a power is subject to the affirmative procedure, which provides the best opportunity for parliamentary scrutiny of subordinate legislation.

72. As with the previous power on school boarding accommodation, some Members^{xxi} consider that the Scottish Government has not made a sufficient case for why this power should be delegated and instead consider that such powers could be brought forward quickly under primary legislation if required in future. Again, the majority of the Committee^{xxii} was content with the delegation of the power in principle.
73. Again, while some Members^{xxiii} are content with the parliamentary procedure in the Bill, the majority of the Committee^{xxiv} do not consider that the option for the power to be exercised subject to the made affirmative procedure is appropriate in this case and instead should only be subject to the affirmative procedure.

A time limited power in the Bill which can be exercised subject to the made affirmative procedure

Paragraph 24(1) of the schedule – Power to release early from prison or young offenders institution

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative or made affirmative

Provision

74. Paragraph 24(1) of the schedule provides that Scottish Ministers may make regulations in order that a person may be released early from a prison or young offenders institution.
75. Such regulations may only be made if Scottish Ministers are satisfied that it is a necessary and proportionate response to the effects of coronavirus on prisons, and for the purpose of protecting the security and good order of prisons, or the health, safety and welfare of those accommodated or working in prisons.
76. The Bill provides that certain people are not to be released from prison by virtue of such regulations being made. Those people are:
- a person who is deemed to pose an immediate risk of harm to an identified person by the governor of the prison within which the person is detained;

^{xxi} Craig Hoy MSP and Graham Simpson MSP

^{xxii} Bill Kidd MSP, Stuart McMillan MSP and Paul Sweeney MSP

^{xxiii} Bill Kidd MSP and Stuart McMillan MSP

^{xxiv} Craig Hoy MSP, Graham Simpson MSP and Paul Sweeney MSP

- life prisoners;
 - untried prisoners;
 - terrorist prisoners;
 - prisoners subject to a supervised release order; and
 - prisoners serving extended sentences for violent and sex offences.
77. Regulations made under paragraph 24(1) are subject to the affirmative procedure unless the Scottish Ministers consider that the regulations need to be made urgently, in which case they may be made subject to the made affirmative procedure. Regulations made under the made affirmative procedure must not provide for the release of prisoners more than 180 earlier than Scottish Ministers would otherwise be required to release the person. Where Scottish Ministers consider that the regulations need to be made urgently, the instrument containing the regulations must include a declaration that the Scottish Ministers are of the opinion that, by reason of urgency, it is necessary to make the regulations without their being subject to the affirmative procedure.

Committee consideration

78. The Scottish Government states in its DPM that risks to the operation of prisons, such as a significant reduction in available prison staff or a significant reduction in the space available on the prison estate, posed by coronavirus can be alleviated by the early release of prisoners.
79. This power differs from the previously four as it is a temporary power. The power was initially introduced by the Coronavirus (Scotland) Act 2020 and is being temporarily extended by this Bill. The power is also only capable of being exercised in relation to coronavirus, whereas the aforementioned powers may be used to respond to any future public health threat. The Bill provides the measure will be extended to 30 November 2023, with the option to extend this date by regulations for a further year at a time until 30 November 2025.
80. The power has been used once during the coronavirus pandemic. That instrument was made using the made affirmative procedure and provided for the early release of prisoners who were serving sentences of 18 months or less, and were due to be released within 90 days of the regulations being made, subject to the governor's veto and certain exemptions.
81. As the power specifically relates to the current coronavirus and is also time limited, as highlighted in the earlier summary of evidence section the Committee questioned the Deputy First Minister on why this was the case. In later questioning, the Committee asked Mr Swinney for some additional justification. The Deputy First Minister said that *"those measures are not ordinary elements of policy that we would want to have in place"* and that it differed from shutting an educational boarding facility as *"that might be a necessity of its time. However, we do not particularly want to release prisoners out of the necessity of the time."*
82. Questioned further on the logic of such a rationale, given that the Scottish Government is seeking to pass a law certain powers that it would like to keep in the

future should they be required while another would fall in 2025, Mr Swinney:

” Essentially, the matter of necessity kicks in on those questions. For example, we had to face the necessity to move to a situation in which our schools did not function in the way to which we were accustomed. We would want to avoid the necessity of releasing prisoners early, because courts have decided that prisoners must serve particular sentences. No particular rationale exists as to why that provision should be there in perpetuity, because it conflicts with fundamental elements of our legislative framework and the expectations of members of the public about the nature of those circumstances and how we handle them.

83. Some Members^{xxv} highlighted the unusual nature of this provision and that it undermines the Scottish Government's reasoning for the permanency of the other powers in the Bill which can be exercised subject to the made affirmative procedure. Again, the majority of the Committee^{xxvi} was content with the temporary nature of the power and the delegation of the power in principle.
84. Nevertheless, the Committee restates its consistent and strongly held opinion that it expects the default position to be that the Scottish Government use the affirmative procedure in all but exceptional and urgent circumstances. The made affirmative procedure should therefore only be used in extremis when exercising this power.
85. Where in those exceptional circumstances, the made affirmative procedure is used, the Committee emphasises the importance of sufficient checks and balances. It therefore recommends that the Scottish Government brings forward amendments to this section as highlighted earlier in this report in paragraph 23.

^{xxv} Craig Hoy MSP and Graham Simpson MSP

^{xxvi} Bill Kidd MSP, Stuart McMillan MSP and Paul Sweeney MSP

All other powers

86. There are a further 11 delegated powers in the Bill which are subject to either the negative or draft affirmative procedures. The Committee determined that it did not need to draw the attention of the Parliament to any of these powers. These are:
- Section 1 (inserts section 86H into the Public Health etc. (Scotland) Act 2008) – Public health monitoring measures
 - Section 7(1) – Guidance on public health measures
 - Section 11(2) – Guidance on compliance and enforcement
 - Section 14 (inserted section 11ZA of the Schools Consultation (Scotland) Act 2010) – School consultations: meetings and documents
 - Section 36 (inserted paragraph 12(4)(b) of schedule 3 of the Private Housing (Tenancies) (Scotland) Act 2016) – Private residential tenancies: pre-action protocol
 - Section 37 (inserted section 18(4A)(b) of the Housing (Scotland) Act 1988) – Assured tenancies: pre-action protocol
 - Section 39(1) – Power to suspend and revive
 - Section 40(3) – Expiry
 - Section 41 – Power to bring expiry forward
 - Section 45(1) – Ancillary provision
 - Section 46(2) – Commencement

87. The Committee is therefore content with each of these delegated powers provisions in the Bill.

