

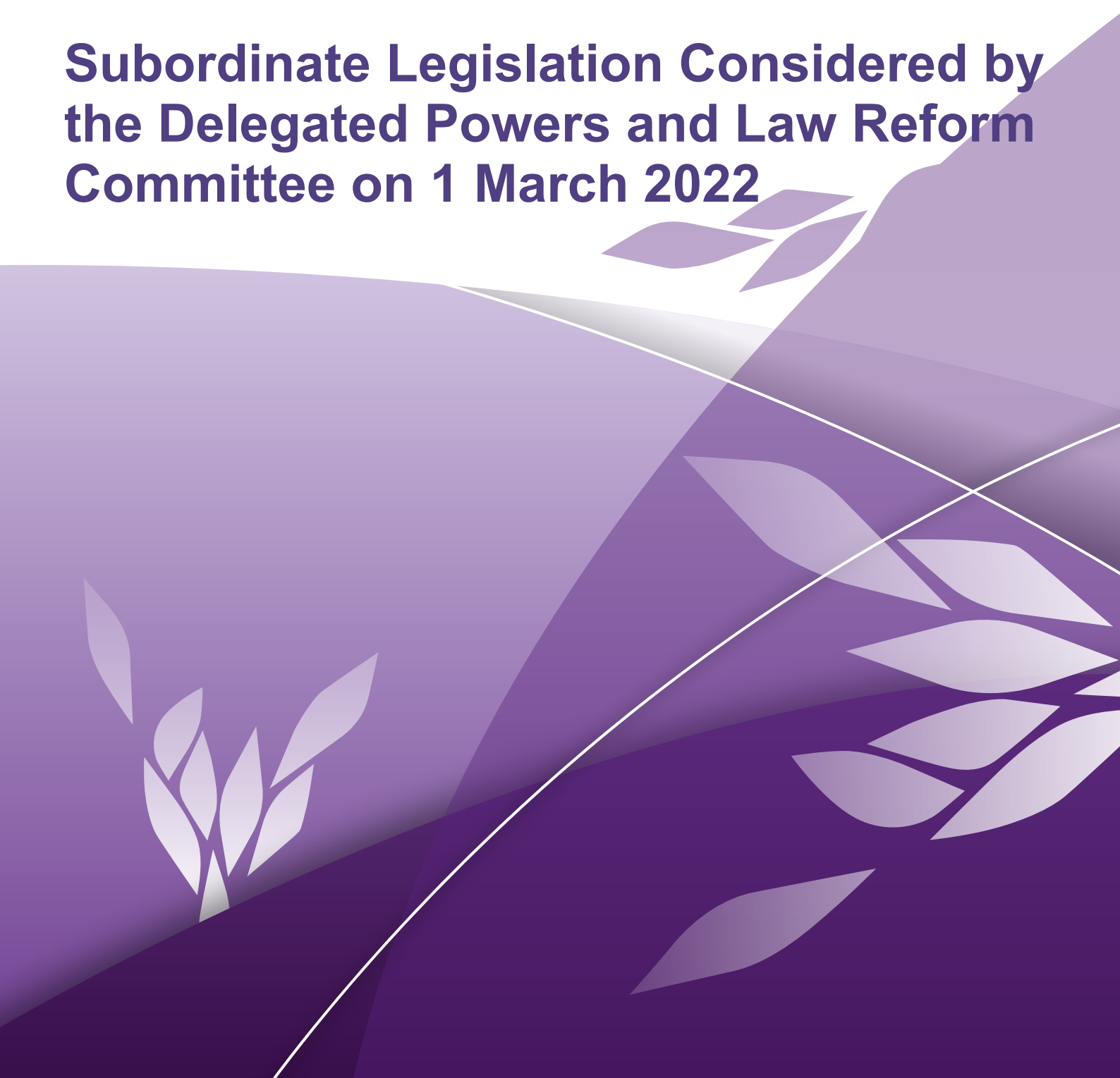


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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Subordinate Legislation Considered by the Delegated Powers and Law Reform Committee on 1 March 2022



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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.



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Stuart McMillan
Scottish National Party



Bill Kidd
Scottish National Party



Convener
Graham Simpson
Scottish Conservative
and Unionist Party



Craig Hoy
Scottish Conservative
and Unionist Party



Paul Sweeney
Scottish Labour

Introduction

1. At its meeting on 1 March, the Committee considered 10 instruments under its remit.
2. The Committee determined that it did not need to draw the Parliament's attention to the instruments considered. These are listed in the next section of the report. Additional details are provided for the COVID-19 Recovery Committee's consideration in relation to:
 - the Coronavirus Act 2020 (Alteration of Expiry Date) (Scotland) Regulations 2022 (SSI 2022/40); and
 - The Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Amendment Regulations 2022 (SSI 2022/Draft).

No points raised

COVID-19 Recovery Committee

3. The Committee took evidence from John Swinney MSP, Deputy First Minister and Cabinet Secretary for Covid Recovery, on the following two instruments:
 - the Coronavirus Act 2020 (Alteration of Expiry Date) (Scotland) Regulations 2022 (SSI 2022/40); and
 - the Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Amendment Regulations 2022 (SSI 2022/Draft).
4. The Committee's evidence with the Deputy First Minister can be read in full in the [Official Report](#).
5. The Coronavirus Act 2020 (Alteration of Expiry Date) (Scotland) Regulations 2022 (SSI 2022/40) is made under section 90(2) of the Coronavirus Act 2020. The instrument extends the expiry date of certain provisions of the Coronavirus Act 2020 ("the 2020 Act") that apply in Scotland from the end of 24 March 2022 to 24 September 2022. Specifically:
 - Section 18(2) and Part 2 of schedule 13 – permitting remote registration of deaths and still-births;
 - Section 36 – removing the requirement for vaccinations and immunisations of persons against any disease to be delivered only by or under the direction or control of a medical practitioner;
 - Section 37(2) and certain provisions of Part 2 of schedule 16 – permitting Scottish Ministers to give a "boarding accommodation closure direction" to the relevant manager of a school boarding establishment or a "student accommodation closure direction" to the relevant manager of student accommodation, as well as related duties to have regard to any advice relating to the incidence or transmission of coronavirus from the Chief Medical Officer;
 - Section 38(2) and Part 2 of schedule 17 – powers for Scottish Ministers to give "educational continuity directions" relating to the continuity of education and childcare; and
 - Section 49 and schedule 19 – the power to make health protection regulations 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.
6. The instrument is subject to the made affirmative procedure. It was laid on 3 February 2022 and, subject to parliamentary approval, will come into force on Thursday 24 March 2022.
7. In earlier correspondence with the Scottish Government, the Committee sought clarification on:
 - the statement in the [original accompanying Policy Note](#) that only the made

affirmative procedure was available for this instrument; and

- the extension of the expiry, by regulation 2(a) of the instrument of “Part 2 of schedule 13” of the 2020 Act.
8. The full text of the Committee’s questions, and the Scottish Government’s response, can be read in the **Annex**.
 9. Following the Committee’s questions and as outlined in the Scottish Government’s response, a [revised Policy Note](#) for the instrument was subsequently published.
 10. Some Members expressed concerns. Graham Simpson MSP and Craig Hoy MSP noted that they had wider concerns about the justification to extend certain powers, citing the powers to close student accommodation and boarding accommodation. Mr Simpson noted that by collating all powers into one instrument it was not possible to separate out support for those powers where he felt extension was justified and those he did not and asked for this point to be highlighted to the lead Committee.
 11. The Committee agreed, by division, that no points arose on the instrument and was content not to draw the Regulations to the attention of the Parliament:

For 3 (Stuart McMillan MSP, Bill Kidd MSP and Paul Sweeney MSP)

Against 2 (Graham Simpson MSP and Craig Hoy MSP)

Abstentions 0
 12. The Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Amendment Regulations 2022 (SSI 2022/Draft) is made under paragraph 1(1) of schedule 19 of the Coronavirus Act 2020. The instrument amends the Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Regulations 2020 by extending the date on which they expire from 25 March 2022 to 24 September 2022. Those Regulations make provision for a local authority to give directions relating to specified premises, events and public outdoor places in its area.
 13. The instrument is subject to the affirmative procedure. The instrument was laid in draft on 9 February 2022 and, if approved by the Parliament, will also come into force on Thursday 24 March 2022.
 14. Again, several Members expressed wider concerns about the justification to extend the powers.
 15. The Committee agreed, by division, that no points arose on the instrument and was content not to draw the Regulations to the attention of the Parliament:

For 3 (Stuart McMillan MSP, Bill Kidd MSP and Paul Sweeney MSP)

Against 2 (Graham Simpson MSP and Craig Hoy MSP)

Abstentions 0

Additional instruments which the Committee determined it did not need to draw to

the attention of the COVID-19 Recovery Committee

Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No.5) Regulations 2022 (SSI 2022/74)

Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2022 (SSI 2022/Draft)

Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2022 (SSI 2022/64)

Equalities, Human Rights and Civil Justice Committee

Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2022 (SSI 2022/Draft)

Local Government, Housing and Planning Committee

Local Government Finance (Scotland) Order 2022 (SSI 2022/Draft)

Non-Domestic Rates (Coronavirus Reliefs) (Scotland) Regulations 2022 (SSI 2022/47)

Non-Domestic Rates (Relief for New and Improved Properties) (Scotland) Regulations 2022 (SSI 2022/49)

Social Justice and Social Security Committee

Council Tax Reduction (Scotland) Amendment Regulations 2022 (SSI 2022/52)

Annex

Coronavirus Act 2020 (Alteration of Expiry Date) (Scotland) Regulations 2022 (SSI 2022/40)

On 8 February 2022, the Committee asked the Scottish Government:

1. The instrument is laid under made affirmative procedure in terms of section 95(2) and (6) of the Coronavirus Act 2020. The Policy Note states that “provisions in the Act (section 95) only allow this procedure to be used and not the use of the draft affirmative procedure”.

Section 95(2) provides that regulations made by the Scottish Ministers under section 90(2) must be laid before the Scottish Parliament as soon as reasonably practicable after being made. However, section 95(5) provides that subsection (2) [of section 95] does not apply “*if the regulations have been subject to the affirmative procedure* (see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010)”.

It would appear that this provision is similar to the choices of procedure provided for in section 5(3) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 and paragraph 1 of schedule 7 of the European Union (Withdrawal) Act 2018. Notably, in cases where affirmative procedure is not mandated to apply in respect of the relevant powers, there is a choice of negative or affirmative procedure applying to those powers, which in both cases is expressed as “(if they have not been subject to the affirmative procedure) subject to the negative procedure”. It would appear that these references to affirmative procedure are not to the mandatory application of the affirmative procedure, but instead to a choice of affirmative procedure in circumstances where the negative procedure is not otherwise applied.

It is also to be noted that the [UK Delegated Powers Memorandum](#) for the clause containing the power that came to be contained in section 90 of the 2020 Act indicates that the intention was for there to be a choice of procedure between made affirmative and affirmative procedure applying to the power to extend the expiry date exercised by the Minister of the Crown or the devolved authorities (the Scottish Ministers in Scotland) – see the foot of page 84 and paragraphs 413 to 415 on page 85.

In light of the above, please explain why it is considered that section 95 only allows made affirmative procedure to be used and not affirmative procedure.

2. Regulation 2(a) of the instrument extends the expiry of section 18(2) and Part 2 of schedule 13 of the UK 2020 Act to 24 September 2022. Part 2 of schedule 13 is made up of paragraphs 10 to 16. Section 89(1) provides that the 2020 Act expires at the end of the period of 2 years beginning with the day on which it is passed, subject to subsection (2) and section 90. Section 89(2)(s) excludes “paragraphs 8, 9, 15, 16 and 30 of Schedule 13, and section 18 and paragraphs 1, 10 and 17 of that Schedule so far as relating to those paragraphs.”

(a) Is there an error insofar as regulation 2(a) of the instrument refers generically to Part 2 of schedule 13 of the 2020 Act, given that paragraphs 10, 15 and 16 in Part 2 of schedule 13 are excluded from the expiry provisions in section 89?

(b) While it would appear that regulation 2(a) would meaningfully extend the expiry of

paragraphs 11, 12, 13 and 14 of schedule 13 to 24 September 2024, what is considered to be the effect of the provision insofar as it extends the expiry of paragraphs 10 (definition of “1965 Act”), 15 (transitional provision) and 16 (direction on deadline for delivery of a relevant document) to 24 September 2022?

On 11 February 2022, the Scottish Government responded :

1. Having considered the wording of the legislation again, the Scottish Government acknowledges that section 95(5) does give us a choice of procedure, between the affirmative and made affirmative procedures.

We accept that we misunderstood the provision and erred in taking the view that only the made affirmative procedure was available to us for these Regulations. Given that we were working on the basis that the only procedure that was available was made affirmative, we sought to give Parliament as much time as possible and in particular to allow the 40 days in the standing orders that applies to committee reporting on an affirmative instrument, prior to the instrument coming into force.

Given that there is a choice of procedure offered by section 95(5), and there is no precondition attached to the use of either procedure, the use of made affirmative procedure does not affect the validity of this instrument.

We will amend the policy note for the Regulations accordingly.

2(a). We agree regulation 2(a) read on its own implies that the transitional provisions in paragraphs 15 and 16 of schedule 13, and section 18(2) and paragraph 10 of that schedule so far as relating to those paragraphs 15 and 16 are also extended to 24th September. The Scottish Government thanks the Committee for drawing this matter to their attention.

(b) It is agreed that regulation 2(a) extends the expiry of paragraphs 11, 12, 13 and 14 of schedule 13 to 24 September 2022, in accordance with the policy intention. (There appears to be a typographical error in the question referring to 2024.) We do not, however, consider that the instrument has a wider effect than intended or that there is a concern with its effect or vires. The lead-in to regulation 2 makes clear explicitly that the instrument (and so regulation 2(a)) only extends the relevant provisions “when they would otherwise expire by virtue of section 89 of the Act”. As those provisions do not have an expiry date, in accordance with section 89(2)(s) of the 2020 Act, regulation 2(a) has no effect on the duration of paragraphs 15 and 16 of schedule 13, and section 18 and paragraph 10 of that schedule so far as relating to those paragraphs.

We would propose nonetheless to amend the policy note for the instrument to add an explanation of the effect of regulation 2(a) and section 89(2)(s).

