

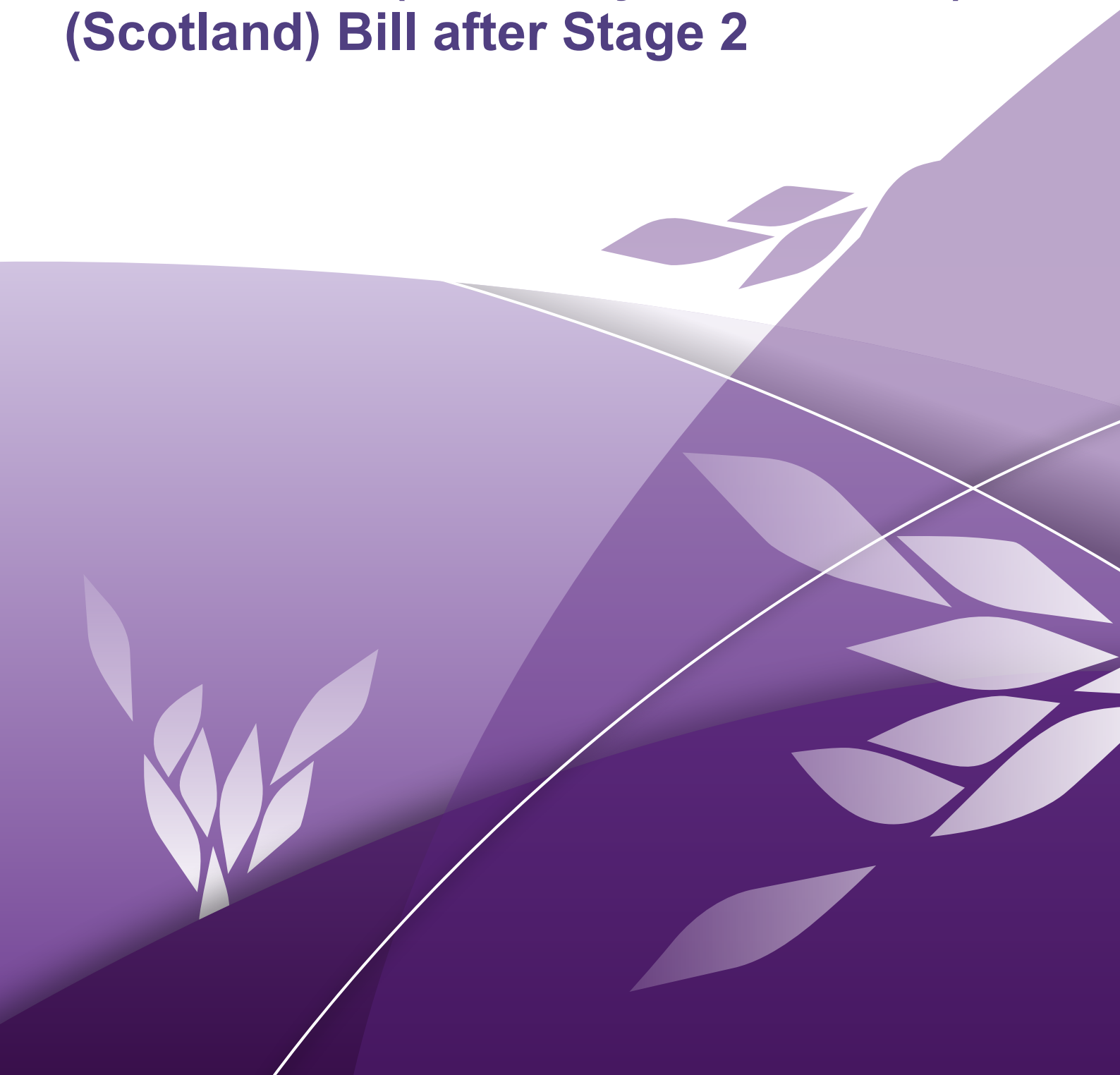


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Delegated Powers and Law Reform Committee

Coronavirus (Recovery and Reform) (Scotland) Bill after Stage 2



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Delegated Powers and Law Reform Committee

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;

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

(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 meeting on 21 June 2022, the Delegated Powers and Law Reform Committee ("the Committee") considered the revised delegated powers provisions in the Coronavirus (Recovery and Reform) (Scotland) Bill ("the Bill") [as amended at Stage 2](#). The Committee submits this report to the Parliament under Rule 9.7.9(b) of the Standing Orders.
2. The Bill was introduced by John Swinney MSP, Deputy First Minister and Cabinet Secretary for Covid Recovery on 25 January 2022. The COVID-19 Recovery Committee is the lead committee for the Bill.
3. The Committee considered the delegated powers in the Bill at Stage 1 at its meetings on 22 February and 8, 22 and 26 March 2022. It took evidence from the Deputy First Minister on the delegated powers in the Bill on 8 March 2022. The Committee published its [Stage 1 Report on the Bill](#) on 2 February 2022.

Delegated powers provisions as amended at Stage 2

4. The Government lodged a [Supplementary Delegated Powers Memorandum](#) (supplementary DPM) after Stage 2. The Committee's consideration of each new or revised power is outlined below.

Future made affirmative process

5. In February 2022 the Committee published a [report on its inquiry into the use of the made affirmative procedure during the coronavirus pandemic](#). Based on the recommendations in that report, it made subsequent recommendations in its Stage 1 report on the Bill in relation to five delegated powers which can be exercised subject to the made affirmative procedure. These were:
 - section 1 (inserts section 86A(1) into the Public Health etc. (Scotland) Act 2008) – Public health protection regulations;
 - section 8(1) – Regulations on continuing operation of educational establishments;
 - section 9(1) – Regulations on school boarding accommodation;
 - section 10(1) – Regulations on student accommodation; and
 - paragraph 24(1) of the schedule – Power to release early from prison or young offenders institution
6. The Committee recommended at Stage 1 that the Scottish Government should bring 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.
7. The Scottish Government brought forward amendments, which have been approved at Stage 2, requiring that the Scottish Ministers explain why they consider regulations need to be made urgently when using the made affirmative procedure and that regulations made using the made affirmative procedure must contain a sunset provision. This is in line with the Committee's recommendations at Stage 1 and were made to the following sections of the Bill as amended at Stage 2:
 - section 1(3) –Amendments to section 122 of the Public Health etc. (Scotland) Act 2008;

- section 1(3) –Amendments to section 122 of the Public Health etc. (Scotland) Act 2008; and
 - paragraph 25 of the schedule – amendment to add paragraph 25(6).
8. However, provision has not been made to require the Scottish Government to include an assessment of the impact of the instrument on those affected by it. In the [Scottish Government's response to the Committee's Stage 1 report](#) it said:
- ” The Government considers that current scrutiny frameworks (per Standing Orders, existing statutory requirement or via Government procedures and internal guidance) are fit for purpose and that there is no need for such an amendment.

Committee consideration

9. The Committee welcomes the Scottish Government's amendments at Stage 2 to require a statement of urgency when using the made affirmative procedure and that they must also contain a sunset provision.
10. The Committee nevertheless considers that assurances should be provided in the Bill that any provisions using the made affirmative procedure will include an assessment of the impact of the instrument on those affected. It has therefore lodged amendments to the Bill at Stage 3 so that each relevant power includes such a provision.

Public Health Declarations

11. New sections 86AA and 12A provide that the powers in section 1 (health protection regulations), section 8 (regulations on continuing operation of educational establishments), section 9 (regulations on school boarding accommodation) and section 10 (regulations on student accommodation) must not be exercised unless a public health declaration is in place.
12. A public health declaration is a declaration by the Scottish Ministers that they consider that an infectious disease or contaminant constitutes or may constitute a danger to human health and the making of regulations may be a way of protecting against that danger. Scottish Ministers may only bring a public health declaration into force if a motion approving it has been passed by the Parliament.
13. Provision is made in order that the Scottish Ministers may bring a public health declaration into force and thereafter make regulations where it is not practicable for the Parliament to approve such a motion, for example when the Parliament is dissolved. Such a public health declaration must be approved by the Parliament within 28 days in order to remain in force.

Committee consideration

14. The Committee noted that this measure is a novel approach by the Scottish Government, in response to concerns raised by both the Committee and the COVID-19 Recovery Committee about the lack of opportunity for the Parliament to

scrutinise significant measures which may be implemented by such regulations prior to them coming into force using the made affirmative procedure. The Scottish Government states in its supplementary DPM that the approach will “preserve the ability for swift and effective action in the event of a future public health threat but balance this with proper parliamentary scrutiny.”

15. The Committee acknowledges that the public health declaration may provide the Parliament with an opportunity to express its view on whether a situation is severe enough to justify the making of these types of regulations in response to a public health threat.

Other powers

16. Finally, the Committee was content with the following amendments at Stage 2:
- section 1 – Amendment to new section 86G into the Public Health etc (Scotland) Act 2008 – review of regulations;
 - section 1(3) – Amendments to section 122 of the Public Health etc (Scotland) Act 2008 – power to amend enactments;
 - section 8(1) – Regulations on continuing operation of educational establishments (Limitation of Power);
 - section 17A – Bank arrestments: protected minimum balance;
 - section 17C – Power to amend period of moratorium on diligence;
 - section 20A – Regulations under the 1965 Act; and
 - section 46 – Commencement;

