

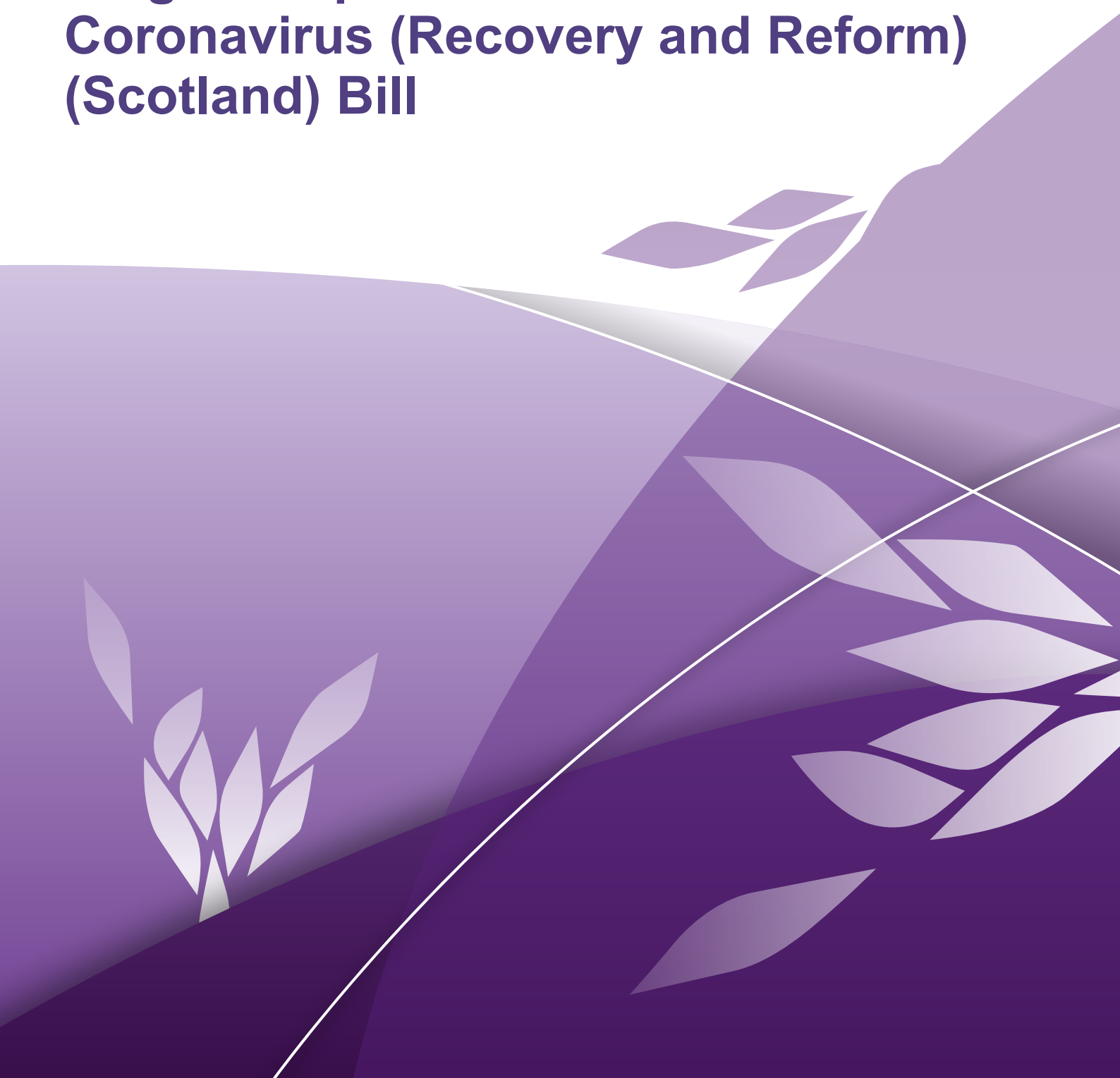


The Scottish Parliament
Pàrlamaid na h-Alba

Published 1 April 2022
SP Paper 150
4th Report, 2022 (Session 6)

Education, Children and Young People Committee

Stage 1 Report on Part 2 of the Coronavirus (Recovery and Reform) (Scotland) Bill



Published in Scotland by the Scottish Parliamentary Corporate Body.

All documents are available on the Scottish
Parliament website at:
[http://www.parliament.scot/abouttheparliament/
91279.aspx](http://www.parliament.scot/abouttheparliament/91279.aspx)

For information on the Scottish Parliament contact
Public Information on:
Telephone: 0131 348 5000
Textphone: 0800 092 7100
Email: sp.info@parliament.scot

Contents

Introduction	1
Purpose and content of the Bill	2
Education provisions in the Bill	2
Educational establishments and student accommodation	3
Continuing operation of educational establishments	3
Views on the powers to make regulations	4
Relationship with local authority powers	6
Alternative proposals	8
Exemptions	10
Compatibility with ECHR	11
School boarding and student accommodation	12
Subordinate legislation procedures for regulations under Chapter 1 of Part 2	15
School consultations	17
Conclusion	19
Annexe A - Minutes of meeting	20
Annexe B - Evidence	21
Written evidence	21
Official reports of meetings	21

Education, Children and Young People Committee

To consider and report on matters falling within the responsibility of the Cabinet Secretary for Education and Skills and matters relating to the Historical Abuse Inquiry within the responsibility of the Deputy First Minister.



ecyp.committee@parliament.scot

Committee Membership



Convener
Stephen Kerr
Scottish Conservative
and Unionist Party



Deputy Convener
Kaukab Stewart
Scottish National Party



Stephanie Callaghan
Scottish National Party



Bob Doris
Scottish National Party



James Dornan
Scottish National Party



Fergus Ewing
Scottish National Party



Ross Greer
Scottish Green Party



Michael Marra
Scottish Labour



Oliver Mundell
Scottish Conservative
and Unionist Party



Willie Rennie
Scottish Liberal
Democrats

Introduction

1. The Coronavirus (Recovery and Reform) (Scotland) Bill ("the Bill") was introduced by John Swinney, Deputy First Minister and Cabinet Secretary for Covid Recovery on 25 January 2022. The COVID-19 Recovery Committee was designated by the Parliamentary Bureau as the lead committee for Stage 1 consideration of the Bill. The Criminal Justice Committee and the Local Government, Housing and Planning Committee were designated as secondary committees.
2. At its meeting on 2 February 2022, the Education, Children and Young People Committee agreed to consider the education provisions in Part 2 of the Bill at Stage 1 and to report to the lead committee.
3. The Committee, together with the lead and secondary committees, launched a joint call for views on the Bill which ran from 3 February to 25 February 2022. This resulted in 89 detailed written submissions. 3926 responses were submitted to an accompanying online survey. 34 of the detailed written submissions contained specific views on the education provisions in the Bill.
4. The Committee took oral evidence on the Bill on [2 March 2022](#) from key stakeholders and on [9 March 2022](#) from the Cabinet Secretary for Education and Skills, Shirley-Anne Somerville ("the Cabinet Secretary").

Purpose and content of the Bill

5. The effect of the Bill is to make permanent certain of the reforms to the delivery of public services that were introduced in response to the COVID-19 pandemic. The Scottish Government consulted on the proposals in its consultation paper entitled “Covid recovery: a consultation on public health, public services and justice system reforms”, which was open for nearly 12 weeks from 17 August 2021 to 9 November 2021.
6. The long title states that the Bill is—

“An Act of the Scottish Parliament to make provision about public health protection powers; to make provision about educational establishments and school consultations; to make miscellaneous public service reforms; to modify the law on tenancies; to make temporary modifications to the law in relation to the justice system; and for connected purposes.”
7. The Bill is divided into 6 Parts, as follows—
 - Part 1: Public health protections (clauses 1 – 4)
 - Part 2: Education (clauses 5 – 14)
 - Part 3: Public service reform (clauses 15 – 32)
 - Part 4: Tenancies (clauses 33 – 37)
 - Part 5: Temporary justice measures (clauses 38 – 44)
 - Part 6: Final provisions (clauses 45 – 47)

Education provisions in the Bill

8. The provisions in the Bill cover a wide range of policy areas. The Education, Children and Young People Committee’s interest is engaged in relation to Part 2 of the Bill which provides for powers for Ministers to make regulations and directions affecting school education. These provisions are designed to ensure that the Scottish Ministers have powers to enable educational establishments to take necessary and appropriate action to protect public health and ensure the continuity of educational provision. These relate to—
 - the temporary closure or conditions on the functioning of educational establishments or student accommodation; and
 - how local authorities would need to undertake consultations about proposals in relation to schools.

Educational establishments and student accommodation

9. The Scottish Government’s consultation on the Bill sought views on extending or making permanent “powers to make directions to close educational establishments, and to ensure continuity of education” contained within Part 2 of schedule 16 of the Coronavirus Act 2020 and Part 2 of schedule 17 of the UK Act. Specifically, the consultation made reference to Education Closure Directions and Education Continuity Directions.
10. The Bill restates and would make permanent some, but not all, powers in those parts of the 2020 Act. Chapter 1 of part 2 of the Bill provides for Ministers to make regulations similar to some of the powers to give directions provided for in schedules 16 and 17 of the Coronavirus Act 2020. There are three regulation-making powers in Chapter 1 of Part 2 of the Bill as follows—
 - continuing operation of educational establishments
 - school boarding accommodation
 - student accommodation
11. Before making regulations under this chapter, Ministers must have regard to any advice from the Chief Medical Officer (or from another person designated for the purposes of section 6 of the Bill by Scottish Ministers) and consider that making regulations is a necessary and proportionate action for or in connection with protecting public health.
12. The Policy Memorandum provided information on the two alternative approaches considered by the Scottish Government. In terms of the Bill’s overall objectives, these were to allow all temporary powers to expire; or to make permanent (or extend further) all of the current temporary powers. In terms of the education-related provisions specifically, two further options were explored. The first was to ‘hold in reserve’ a draft emergency bill which could be introduced as emergency legislation; the second was to make the powers exercisable by direction.

Continuing operation of educational establishments

13. The first power in Chapter 1 to make regulations is similar to Education Continuity Directions provided for under Schedule 17 of the 2020 Act. Section 8 is intended to support the continuity of education by providing for regulation-making powers which would create duties on educational establishments. The regulations could include a wide range of provisions, these are:
 - to confer additional functions on education establishments, such as education at a different level or stage than they would normally;
 - require education establishments to be open or conversely to restrict access, including closing;

- change term dates or examination dates;
 - require education establishments to allow “specified people or people of a specified description” access to their premises, including for the purposes of receiving education there;
 - require public health measures.
14. The definition of an Educational Establishment includes “all types of schools (i.e. public, grant-aided and independent schools), early learning and childcare settings, out of school care settings, and higher education and further education institutions” as well as any education and training establishments approved by the SQA as being suitable for presenting persons for SQA qualifications. This could include areas of childminders’ homes.
15. Section 8(5)(iii) provides that regulations could determine that premises could be used ‘for the purpose of protecting public health’. This power would be limited to premises of an education authority (i.e. local authority), further education or higher education institution. This appears to be the only occasion where the bill provides for different powers to apply differently to different types of establishment.
16. Ministers would have wide discretion in how regulations would be drafted. The powers in the 2020 Act were not used in relation to Colleges, Universities or independent schools. Regulations made under this section could apply to specific institutions, to a particular type of education establishment, or to all education establishments.

Views on the powers to make regulations

17. In written evidence, the EIS stated that whilst it supported extension of the emergency powers under the 2020 Act, it argued that the extension should not be indefinite as set out in the Bill. It stated—
- ” The EIS believes that extending such powers to issue regulations indefinitely could upset the balance of power between local authorities and the Scottish Government. Furthermore, having such provisions permanently could allow, a future government, to use such school closure provisions in ways not currently intended or envisaged. ¹
18. In its written submission, COSLA made clear that it supports the regulation-making powers, with the Scottish Government having regard to the advice of the Chief Medical Officer before doing so. It was of the view that these powers will provide Local Authorities with the appropriate legal protection should there be a future pandemic which required the closure of schools. However, COSLA also expressed the view that it would be essential that the Scottish Government should engage closely with local authorities in the use of these powers. Its submission stated—
- ” The direction making powers create the scope for Scottish Ministers to confer additional functions on local authorities, we believe there would be merit in including a mechanism to ensure that Scottish Ministers are required to consult and engage with Local Authorities in the development of any direction. ²

19. The Scottish Association of Social Work’s submission was supportive of the Scottish Government having the powers to close establishments for a period of time, recognising that it needs to be in a position to take such difficult decisions to protect the population against public health threats, particularly if there is a need to make a decision without delay. Its submission stated—

” In particular, staff and young people who are especially vulnerable in instances of a public health emergency, such as those with underlying health conditions or who have a disability, should not be put at risk when attending their work or place of education ... Government must take steps to weigh up harms and consequences of closing educational establishments and such decisions should not be taken lightly or as a matter of first resort unless in extreme circumstances. ³

20. However, the NASUWT’s submission expressed what it considered to be “serious concerns” about making some of the powers in the 2020 Act permanent. It said—

” Granting these powers to Scottish Ministers to use with relatively few constraints on their ability to act, in circumstances they largely determine and with no ready means of challenging them, would not be acceptable to the NASUWT, nor would it meet the principles of the rule of law.

While in Scotland it might be said that Ministers have, in practice, not abused these powers to date, this provides no long-term certainty of system-wide confidence. There is no guarantee that any incumbent Ministers or government would use new permanent powers appropriately. ⁴

21. John Edward from SCIS noted that the Scottish Government has established a public inquiry to examine the handling of the COVID-19 pandemic in Scotland. He argued that legislating for future pandemics might be better done after the conclusion of that inquiry. ⁵

22. The Committee raised this specific point with the Cabinet Secretary when she gave evidence. She said that whilst she understood why some people may consider waiting for the outcome of the inquiry to be a sensible option, the uncertainty around the timing of its conclusion could leave a gap in the Scottish Government’s preparedness for future public health emergencies. She stated—

” I do not know when the next public health emergency will arise or whether we will have another wave of coronavirus that will impact deeply on education. It would be remiss of, and inappropriate for, any Government to wait and hope that nothing happened until the public inquiry finished. ⁶

23. Stakeholders from the Further and Higher Education sectors expressed unease about the level of direction these powers would allow for in their sectors. For example, Edinburgh Napier University’s written submission stated—

” Following the collective collaborative approach between the higher education sector and the Scottish Government and having signalled its intent to replicate the Covid response approach in education to manage future public health emergencies where that is appropriate, we do not believe the proposed provisions to be necessary to achieve the policy objectives of the Bill. ⁷

24. Colleges Scotland’s submission made similar comments. It noted that the sector had worked closely with the Government to “respond to, and mitigate, the impact of the pandemic on college operations”. It stated—

” On the basis of this experience, we would advise that the intended provisions which have been proposed within the Bill are not required. By engaging collaboratively with the Scottish Government, including during those crisis periods through new variants, the college sector has been able to adopt a responsive approach in line with the public health requirements to keep students and staff safe, in line with the four harms model.⁸

25. The submission to the Committee from Universities Scotland also raised concerns about the extent and appropriateness of the regulation-making powers being proposed. It said—

” We are concerned that the Bill gives Ministers responsibility to make regulations at a level of detail that cannot competently be done by government, because government cannot provide for the wide variety of circumstances in which they would need to be applied in the university environment.⁹

26. This report sets out the Committee’s constructive recommendations based on evidence heard. The majority of the members of the Committee are content with the regulation-making powers conferred upon Ministers in Part 2 of the Bill. However, some members of the Committeeⁱ are of the view that these powers are unnecessary and are therefore unable to support the Bill proposals.

Relationship with local authority powers

27. The EIS and COSLA both advised the Committee that education authorities currently do not have the power to close schools unilaterally on public health grounds. When appearing before the Committee, David Belsey of the EIS explained the position as follows—

” If a local authority cannot physically staff a school, it can close the school. However, if a local authority wants to close a school on public health grounds, it has to get permission from the local public health authorities and, in effect, from the Scottish Government. When we were looking to close schools before Christmas 2020 in order to protect staff and pupils, local authorities told us that they could not close schools early before Christmas because of the way in which the powers are set out.¹⁰

28. The EIS suggested that the Bill should provide local authorities with a power to close a school on public health grounds in addition to the powers of Ministers to do so. David Belsey stated—

ⁱ Stephen Kerr; Michael Marra; Oliver Mundell; and Willie Rennie

” We are saying that the Government should have strategic oversight and should make such decisions, but that local authorities should also be able to close a school and move to online learning. We are looking for greater flexibility. ¹¹

29. The existing provisions relating to school closure and public health are in set out in regulation 6 of the Schools General (Scotland) Regulations 1975. These regulations state—

” Where a health board competent person advises an education authority that, in order to prevent the spread of disease or other danger to health, a school under their management should be closed temporarily or that certain pupils be excluded from that school for a specified time or, where that school is a boarding school, that the pupils should be confined to the school premises for a specified time, the education authority shall forthwith close that school or exclude or confine the said pupils, as the case may be, accordingly.

30. The Schools General (Scotland) Amendment Regulations 1987 amended Regulation 5 of the Schools General (Scotland) Regulations 1975 to set the minimum number of school days to 190 per year. However, this duty is qualified under the regulations which state—

” An education authority shall, except where prevented by circumstances outwith their control, secure that every school under their management shall be open for at least [190 days].

31. The extent to which an education authority could rely on the caveat “prevented by circumstances outwith their control” to close a school to secure the health and safety of staff and pupils is not clear. Conversely, West Lothian Council’s submission questioned how regulations which would require schools to be open would interact with an education authority closing a school “where necessary, having regard to the availability of staff and health and safety of staff/pupils”. ¹²

32. The Committee explored with the Cabinet Secretary whether the Scottish Government has engaged with local authorities on whether the Schools General (Scotland) Regulations 1975 needed to be amended, replaced or repealed to clarify their duties around the closure or keeping open of schools.

33. The Cabinet Secretary advised the Committee that education authorities have wide-ranging powers in relation to schools, and it is the education authority that makes any decision to close one of its schools for public health reasons or for any other reason. By way of an example, she said that education authorities closed their schools on 20 March 2020, which is before the Coronavirus (Scotland) Act 2020 came into force. She said that local authorities relied on their own powers close schools in response to public health advice and that Ministers did not give a direction under the UK Act until mid-May 2020.

34. The Cabinet Secretary indicated that she is keen for the Scottish Government to listen to the concerns raised by the EIS. She said—

” ...we want to get that right and make sure that there is no dubiety about where the powers lie for that. The important powers around education lie with local authorities. The bill will give the Government particular powers only in a public health emergency, and without those powers being in place and a public health emergency happening, the powers for education remain with local authorities.

13

35. **The Committee notes the Cabinet Secretary's willingness to engage with the EIS to discuss its concerns that local authorities do not have the power to close a school on public health grounds. It is of the view that clarity is required on this matter and that local authorities and other stakeholders should have a clear and unambiguous understanding of where responsibility lies to close schools quickly in any future public health emergencies.**

Alternative proposals

36. Some of the evidence received by the Committee from key stakeholders made alternative proposals to those set out Chapter 1 of Part 2 of the Bill.
37. The Children and Young People's Commissioner Scotland's (CYPCS) written submission suggested that, as an alternative to the provisions in the Bill, that the Scottish Government ought to develop draft emergency legislation as part of wider contingency planning for future pandemics ready to be implemented should the emergency need arise. The CYPCS argued that this process would allow for planning to cover a range of scenarios and that “if this planning is conducted in a transparent manner, with public engagement and with appropriate impact assessment, it has the potential to strengthen public confidence and adherence to restrictions in a future emergency.”¹⁴
38. As noted earlier in this report, the Policy Memorandum states that the alternative option of developing draft emergency legislation had been explored by the Scottish Government whilst the Bill proposals were being developed. It said—
- ” While this approach may be feasible, it would be unusual, and it is not certain that it would be possible to introduce the draft provisions via emergency legislation with the urgency required by the circumstances of a developing public health crisis.
39. This alternative proposal was put to the Cabinet Secretary when she appeared before the Committee. She expressed the view that, even if such emergency legislation were to be prepared in advance of an emergency situation, such as another public health emergency, there could still be a need for it to be rushed through the Parliament when required. She restated the Scottish Government's view set out in the Policy Memorandum that this could curtail its ability to be as responsive as possible. She said—

” The suggestion is that we should have a draft bill that we could then present to Parliament, but that would not allow the Government to take the swift action that was necessary. The next stage, following the enactment of such a bill, would be the making of regulations. By then, we could be quite far into a public health emergency.¹⁵

40. **The Committee notes that the Scottish Government does not support the alternative approach to the Bill put forward by the CYPCC that a draft bill should be prepared ready to implement in the event of a future emergency situation. It also acknowledges that such an approach was considered and rejected by the Scottish Government when developing the Bill proposals. However, the Committee calls on the Scottish Government to provide further detailed comment on its rationale for dismissing this approach in favour of the provisions set out in the Bill as introduced.**

41. As mentioned earlier in this report, the Committee heard opposition to the approach to the regulation-making powers set out in the Bill in both oral and written evidence from Universities Scotland and Colleges Scotland.

42. Universities Scotland noted that the powers drafted in the Coronavirus Act 2020 were drafted hurriedly as a necessary response to the situation in March 2020. Alastair Sim suggested that the Bill presents an opportunity to best determine what powers a Government might need in any future pandemic and how those powers could most appropriately be framed. He went on to say that an alternative framework approach would help achieve the Government’s objectives, whilst not requiring it to engage in a level of granular detail that would be best dealt with by institutions themselves. He stated—

” From my point of view, it would be much better to have a framework in which ministers set out the general requirements but in which institutions decide the granular stuff, such as who should come into universities in person to complete their studies, what buildings should be open, what research projects need to continue, when students do assessments and how they are assessed. Such matters need detailed consideration at an institutional level, with consultation with staff and students. To be frank, no Government would have the detailed local knowledge to be able to do that.¹⁶

43. Universities Scotland set out its suggested framework approach which provided for regulation making powers but with less granular detail in its written submission as follows—

- Give Ministers the power to set out a framework of overall requirements at intense stages of a pandemic, e.g. requiring higher education institutions to have a range of non-pharmaceutical interventions in place; and/ or requiring limits to/ prioritisation of who should continue to receive in person teaching.
- Give Ministers a duty to consider the educational and welfare needs of students, as well as the need to manage the public health emergency, when developing guidance or making regulations.

- Give universities the duty to have regard to any guidance from Ministers, either applying to society in general or to higher education in particular.
 - If regulations require universities to do things, keep these at a high level of principle so that universities can make competent local decisions (involving staff and student representatives) about how to implement the regulations.¹⁷
44. Colleges Scotland stated in its written submission that it also supported the establishment of a framework approach for the college sector "with clear expectations and requirements for institutions to implement in line with their own unique circumstances, as opposed to any prescriptive approach."¹⁸ It said it would look to actively collaborate with the Scottish Government in developing and implementing such an approach.
45. The Committee discussed the alternative approach put forward by Universities Scotland with the Cabinet Secretary when she gave evidence. Whilst she acknowledged Universities Scotland's position, the Cabinet Secretary made clear she did not consider this to be appropriate. She said that the Scottish Government needs the ability to react if a situation were to arise whereby an institution was taking decisions that were not consistent with what was required by the public health advice to Government in an emergency situation. She said—
- ” I think that a framework approach would lead to gaps in our ability to make decisions. With regard to getting into the granularity of some aspects, I am happy to carry on our conversations with Universities Scotland to see whether we can come to more agreement on the matter than we currently have, as we clearly do not have agreement right now. Nonetheless, it is very important that we have the ability to take quick decisions and to enforce them. As we do that, we would, of course, work with institutions to ensure that nothing inappropriate was being done.¹⁹

46. **The Committee notes the opposition of both Universities Scotland and Colleges Scotland to the regulation-making powers as currently set out in the Bill. It also notes the Scottish Government's disagreement with the alternative framework proposal put forward by Universities Scotland.**
47. **The Committee welcomes the undertaking made by the Cabinet Secretary to continue with discussions with Universities Scotland and Colleges Scotland to bridge the current gap in their respective positions. It would encourage the respective parties to seek to resolve their differences in this regard and make every effort to find common ground. The Committee further calls on the Scottish Government to commit to providing both it and the lead committee with an update on the outcomes from these further discussions in advance of Stage 2 consideration.**

Exemptions

48. The Committee also discussed with the Cabinet Secretary some practical risks of the Scottish Government ordering further and higher education institutions to close. For example, it considered that there could be a risk in leaving laboratories or

experimental equipment unattended and that animal welfare would be a key concern at some institutions. The Committee noted that there may also be a need to keep certain key facilities open during a public health emergency, such as those involved in medical research.

49. The Cabinet Secretary acknowledged that such practical issues would require to be managed flexibly and that some exceptions may have to be applied. She said—

” We need the ability to say that, for example, one campus in an institution might have to close with the exceptions that can be made for—again I give the most obvious example—animal welfare, but there are other possible areas. ...We would always take the partnership approach that we have always taken to those things, but we still need that full stop that allows the Government to take decisions if an institution is taking a different approach on aspects of public health. In saying that, and as I have said on numerous occasions, if aspects of the granular detail are causing concerns, I am more than happy to work with Universities Scotland on them. ²⁰

50. **The Committee is of the view that it is essential that clarity is provided on how exceptions to closure will be managed. It therefore calls on the Scottish Government to provide further detail on—**

- **how it intends to consult with institutions to identify those facilities whose closure may not be possible or may have to be limited for practical, safety or welfare reasons; and**
- **how such issues would be addressed in the development and application of regulations under this Part of the Bill.**

Compatibility with ECHR

51. The Committee discussed the collaborative approach the Scottish Government had taken with stakeholders during 2020 and 2021. A number of witnesses, including Megan Farr from the CYPSC noted that the Bill would provide powers for use by any future Government. The implication is that the test should not be whether the current Government would use the powers appropriately and take decisions collaboratively, but whether any future Government would do so. The written submission from CYPSC argued that—

” States’ abilities to interfere with human rights in a time of emergency are not unlimited. Any emergency powers must be lawful, necessary, proportionate and time limited. They must be limited to the extent strictly required by the situation. ²¹

52. CYPSC also suggested that there may be grounds for concern about the compatibility of the proposed provisions with the European Convention of Human Rights. The Bill as introduced, received statements of legislative competence from the Presiding Officer and the Deputy First Minister. The policy memorandum discussed potential impacts on rights of regulations made under this Part of the Bill.

53. When asked for a response to the concerns raised by CYPSC regarding the compatibility of the provisions with the ECHR, the Cabinet Secretary sought to reassure the Committee that the Scottish Government was satisfied that this was not the case. She stated—
- ” Any regulations that were made under the legislation, once enacted and its provisions commenced, would have to be compatible with the ECHR.... Any interference with a right under the ECHR would have to be justified in accordance with the Scottish ministers’ human rights obligations. ²²
54. The Cabinet Secretary also indicated that she was of the view that the concerns raised with the Committee were based on a misunderstanding that there had been a derogation from aspects of the ECHR. However, she also said that the Scottish Government would continue to listen to stakeholders who have concerns in this regard and would aim to alleviate these.

- 55. The Committee notes the divergence of views between the Scottish Government and the CYPSC on the compatibility of the regulation-making powers in Part 2 of the Bill with the ECHR. It is essential that the Bill meets the relevant ECHR requirements. The Committee therefore calls on the Scottish Government to provide a more detailed response to the concerns raised by the CYPSC in both written and oral evidence on ECHR compatibility prior to Stage 2 consideration.**

School boarding and student accommodation

56. The second and third powers to make regulations in Chapter 1 are similar to each other. Sections 9 and 10 provide for Ministers to make regulations in relation to school boarding accommodation and student accommodation respectively. These regulations reflect the powers to give a “boarding accommodation closure direction” and a “student accommodation closure direction” under Schedule 16 of the Coronavirus Act 2020. regulations under sections 9 and 10 could apply to specific residential premises, to a particular type of residential premises, or to all student residential premises or all school boarding premises.
57. These regulations could require those managing boarding facilities and student accommodation to take reasonable steps to restrict or prohibit access to those premises. They may also require those managers to provide support for students or pupils to comply with any restriction or requirement relating to the protection of public health (such as self-isolate). At times in the pandemic, there were reports of students facing difficulties to comply with self-isolation rules with their communal living arrangements.
58. Should ministers consider the regulations to be required urgently, then they may come into force immediately. Under this procedure the regulations would cease to be in force after 28 days (longer if Parliament is in recess) unless agreed by Parliament. Should Parliament not agree to the regulations, Ministers would not be prevented from making further regulations.

59. The definition of school boarding refers to the definition in the Public Services Reform (Scotland) Act 2010. That is residential accommodation for the purpose of or in connection with the pupil's attendance at a school, and provided (directly or indirectly) by the managers of the school. The Bill itself defines student accommodation. Section 10 (6) states that "'student accommodation' means residential accommodation which has been built or converted for the purpose of being provided to students"
60. Again, regulations under 9 or 10 could apply to specific residential premises, to a particular type of residential premises, or to all student residential premises or all school boarding premises.
61. The Committee was keen to establish the Scottish Government's intention behind the power to put a duty on the manager of such an establishment to restrict access to accommodation.
62. The Cabinet Secretary explained that the provision is in the bill to show that the Scottish Government has learned lessons from the way in which access to student accommodation was managed at the start of the pandemic and to ensure that it is better prepared in future to provide the assistance and support students need.
63. Craig Robertson from the Scottish Government expanded on the rationale for the powers explaining that—
- ” ...we are looking at a scenario in which there is a designated outbreak in a hall of residence and we want to prevent students who do not have the virus from going into that setting and putting themselves at risk. We might want to have the power to restrict access on that basis...It is also important to flag that the bill will contain the power to ensure that support is provided in that setting...The bill is about trying to get equivalence of treatment for students who find themselves in that situation, so that they know what they are likely to get. ²³
64. In its written submission, Universities Scotland stated that effective measures are already in place involving universities, health boards, Public Health Scotland and the Scottish Government in the management of outbreaks in student accommodation, and statutory powers appear unnecessary. It expressed the view that as with those in section 8 of the Bill, these provisions put Ministers in the position of making decisions which should be made locally by universities and public health authorities, rather than for Ministers to make specific regulations about specific accommodation. ²⁴
65. Universities Scotland also stated that many students who live in purpose-built student accommodation, that is their only home. They suggested that an unintended consequence of the proposed provisions could be that students would be made homeless. ²⁵
66. Colleges Scotland made similar points in its written submission, suggesting that the partnership approach followed throughout the pandemic should remain in place moving forward. ²⁶
67. John Edward of the Scottish Council of Independent Schools informed the Committee that during the pandemic his sector had worked extremely well in partnership with the Scottish Government officials, Public Health Scotland and

infection control groups in NHS boards etc. He explained that the sole issue of disagreement during this period related to the extended isolation period of boarding pupils in residences beyond what was required for other individuals. He stated—

” We did not see that as proportionate or necessary. The biggest risk that boarding school pupils from abroad ran was picking up infections in local communities. All the figures showed that they were safer being inside the school rather than out.²⁷

68. The Committee sought clarity on the consideration that was given to ensuring the proposed provisions would meet the needs of both student accommodation and boarding schools.
69. The Cabinet Secretary confirmed that the Scottish Government recognised the need to take account of the different scenarios that will arise in different sectors. She acknowledged the unique nature of boarding schools and school residences. She advised the Committee that the Scottish Government had worked closely with the Scottish Council of Independent Schools, individual schools and boarding schools to reflect their special circumstances in the measures applied during the pandemic.
70. She indicated that it would be necessary to ensure that what is put in place in the Bill for boarding schools and school residences also takes that unique type of environment into account. She said—

” ...I suppose that it comes down to the same types of issues about provision of support and the protection of the wider public. The guidance on how we might do that will be very different for university halls compared to boarding schools. However, the continuity that runs through the measures in the bill is to do with support and the protection of public health.²⁸

- 71. The Committee notes that proposals relating to the closure of or restriction of access to school boarding and student accommodation have been developed in response to lessons learned from previous handling of such matters during the pandemic. It is encouraged that the provisions have been designed to take account of the different scenarios involved and that they will also allow for support for students or pupils to comply with any restriction or requirement relating to the protection of public health, such as to self-isolate.**

Subordinate legislation procedures for regulations under Chapter 1 of Part 2

72. There are two procedures for regulations made under sections 8, 9 or 10. Either the affirmative procedure or the ‘made affirmative’ procedure. This is a key change to the powers as they stand under the 2020 Act. The Education Continuity Directions have been simply directions, with no Parliamentary procedure attached.
73. Prior to making regulations, Ministers must have regard to any advice from the CMO “or from another person designated for the purposes of [Section 6] by the Scottish Ministers, about protecting public health.” Ministers must be “must be satisfied, in view of that advice, that making the regulations is a necessary and proportionate action”.
74. Should ministers consider the regulations to be required urgently, then regulations may come into force immediately, under the ‘made affirmative’ procedure. Under this procedure the regulations would cease to be in force after 28 days (longer if Parliament is in recess for longer than 4 days) unless agreed by Parliament. Should Parliament not agree to the regulations, Ministers would not be prevented from making further regulations under either procedure.
75. The rationale for this ‘made affirmative’ procedure is set out in the Delegated Powers Memorandum. This states—
- "The Scottish Ministers may be required to act quickly in response to rapidly changing circumstances. The timescales involved in the usual draft-affirmative procedure may not allow action to be taken sufficiently quickly, and therefore a form of made affirmative procedure is appropriate to enable the Scottish Ministers to make regulations with immediate effect. The made affirmative procedure would only be used in circumstances where there is an urgent need for action; and may be relied upon to remove restrictions or requirements no longer considered to be proportionate, as well as to impose restrictions or requirements as part of a public health response." (para 31)
76. On 10 February 2022, the Delegated Powers and Law Reform Committee (“DPLRC”) published [a report on its inquiry into use of the made affirmative procedure during the coronavirus pandemic](#). This report noted that prior to the pandemic, the made affirmative procedure was used infrequently. Since the start of the pandemic over 120 instruments were laid using that procedure.
77. The DPLRC made recommendations in a number of areas in relation to future use of the made affirmative procedure. It sought clarity on how Ministers determine whether a situation is suitably urgent and recommended that Ministers provide a statement to Parliament which provides a “consistent level of detailed justification and evidence as to why the Scottish Ministers consider the regulations need to be made urgently.”
78. In terms of new legislation which would provide for such a procedure being utilised, the DPLRC suggested a set of principles as the basis of its scrutiny where legislation includes such provision. These principles included, “legislation making provision for the made affirmative procedure must be very closely framed and its

exercise tightly limited” and “primary legislation [should include] a requirement to provide an explanation and evidence for the reasons for urgency in each case where the procedure is being used”.

79. The Committee notes that the Bill proposes that for regulations made under sections 8, 9 or 10, either the affirmative procedure or the ‘made affirmative’ procedure can be used. It acknowledges that Ministers may have to use the made-affirmative procedure in certain circumstances to ensure regulations are brought in swiftly in emergency situations.

80. However, the Committee supports the principle proposed by the DPLRC that where primary legislation provides for the made affirmative procedure to be used, this should also require a statement to be provided detailing the reasons and justification on each occasion the procedure is used. The Committee considers this would provide an appropriate balance between the need for Ministers to act with agility in appropriate circumstances and parliamentary oversight. It therefore calls on the Scottish Government to bring forward an appropriate amendment at Stage 2 to insert such a requirement in to the Bill.

School consultations

81. Chapter 2 of Part 2 of the Bill relates to duties under the Schools (Consultation) (Scotland) Act 2010. The 2010 Act provides for statutory duties on local authorities to consult should they wish to make certain changes to schools. The “relevant proposals” are set out in Schedule 1 of the 2010 Act, and include—
- closing a school;
 - establishing a school;
 - moving a school; or
 - changing the catchment of a school.
82. Chapter 2 would amend the 2010 Act and provide a mechanism for local authorities to make a request to Ministers to allow the statutory consultation process to be amended. Ministers would allow these changes by issuing directions. The consultation processes could be amended through these directions in the following ways—
- removing the requirement to publish papers and consultation reports on proposed changes to education provision in printed form;
 - treating the duties to make proposal papers and consultation reports available for public inspection as duties to make the documents available in a manner they consider appropriate instead; and
 - meet the duty to hold a public meeting by holding the meeting using remote facilities (including by telephone or by video conferencing software).
83. Before issuing a direction, Ministers must be satisfied that doing so is a necessary and proportionate action for or in connection with the protection of public health. The provisions under Chapter 2 or Part 2, would allow ministers to relax certain parts of the statutory consultation process for relevant proposals under the Schools (Consultation) (Scotland) Act 2010. This would enable certain functions to be undertaken digitally, most notably the requirement for a public meeting. Ministers would do this by giving a direction about one or more relevant proposal, following an application from a local authority.
84. The EIS’ submission described printed documents and public meetings as essential parts of the consultation process. It also echoed others’ concerns about the possibility of digital exclusion and suggested that hybrid meetings should be considered. David Belsey said—
- ” The benefits of fewer people attending a meeting by some of them going online might address the public health risks of holding meetings in person. However, for consultations regarding changes to schools, we are clear that we want the maximum number of people to be able to engage with the process, and that suggests that they should be able to do so in the maximum number of ways, including digitally and in person. ²⁹

85. COSLA indicated that it would also support holding public meetings where it was safe to do so. Matthew Sweeney of COSLA said that whilst recognising that in a public health emergency limits could be placed on the number of people who can meet indoors, local authorities should use their "best endeavours" ³⁰ to involve as many people as possible in consultations.

86. Whilst the Committee recognises that school consultation processes may have to be altered in a public health emergency, it is of the view that the opportunity to maximise engagement should be taken wherever possible. For that reason, the Committee considers that the provisions in Chapter 2 of Part 2 should be used only as a last resort.

87. The Committee agrees with COSLA that local authorities should be able to use their "best endeavours" to facilitate involvement in school consultations by as many parents/carers and other members of the community as is possible. It also considers that there should be provision for hybrid meetings to be held in addition to the fully remote meetings proposed in the Bill, which could also help address some of the concerns raised about digital exclusion.

88. The Committee calls on the Scottish Government to bring forward amendments to the Bill to provide the maximum flexibility for local authorities to conduct effective engagement in school consultations in public health emergencies.

Conclusion

89. The Committee draws the attention of the lead committee to the recommendations in this report.

Annexe A - Minutes of meeting

90. [7th Meeting 2022 \(Session 6\) Wednesday, March 2, 2022](#)

The Committee heard evidence on the Bill at Stage 1 from—

David Belsey, Assistant Secretary, Educational Institute of Scotland (EIS);

Matthew Sweeney, Policy Manager - Children and Young People, Convention of Scottish Local Authorities (COSLA);

Alastair Sim, Director, Universities Scotland;

John Edward, Director, Scottish Council of Independent Schools;

Diane Stockton, Consultant in Public Health, Public Health Scotland; and

Paul Little, Vice-Chair of the College Principals Group, Colleges Scotland;

and then from—

Megan Farr, Policy Officer, Children and Young People's Commissioner Scotland; and

Liam Fowley, Vice Chair, the Board, Scottish Youth Parliament.

91. [8th Meeting 2022 \(Session 6\) Wednesday March 9 2022](#)

Coronavirus (Recovery and Reform) (Scotland) Bill:

The Committee heard evidence on the Bill at Stage 1 from—

Shirley-Anne Somerville MSP, Cabinet Secretary for Education and Skills, Scottish Government and

Craig Robertson, Deputy-Director (interim) – Advanced Learning & Science Directorate, Covid Response and

Nico McKenzie-Juetten, Lawyer, Scottish Government Legal Directorate.

Annexe B - Evidence

Written evidence

[Responses submitted to the Committee call for views](#)

Official reports of meetings

[Wednesday March 2, 2022 - evidence from organisations](#)

[Wednesday March 9, 2022 - evidence from Cabinet Secretary for Education and Skills](#)

- 1 [EIS written submission](#)
- 2 [COSLA written submission](#)
- 3 [Scottish Association of Social Work written submission](#)
- 4 [NASUWT written submission](#)
- 5 Official Report, [2 March 2022](#), Col 17
- 6 Official Report, [9 March 2022](#), Col 16
- 7 [Edinburgh Napier University written submission](#)
- 8 [Colleges Scotland written submission](#)
- 9 [Universities Scotland written submission](#)
- 10 Official Report, [2 March 2022](#), Col 6
- 11 Official Report, [2 March 2022](#), Col 6
- 12 [West Lothian Council written submission](#)
- 13 Official Report, [9 March 2022](#), Col 27
- 14 [Children and Young People's Commissioner Scotland written submission](#)
- 15 Official Report, [9 March 2022](#), Col 13
- 16 Official Report, [2 March 2022](#), Col 2
- 17 [Universities Scotland written submission](#)
- 18 [Colleges Scotland written submission](#)
- 19 Official Report, [9 March 2022](#), Col 32
- 20 Official Report, [9 March 2022](#), Col 33
- 21 [Children and Young People's Commissioner Scotland written submission](#)
- 22 Official Report, [9 March 2022](#), Col 11
- 23 Official Report, [9 March 2022](#), Col 30
- 24 [Universities Scotland written submission](#)
- 25 [Universities Scotland written submission](#)
- 26 [Colleges Scotland written submission](#)
- 27 Official Report, [2 March 2022](#), Col 17
- 28 Official Report, [9 March 2022](#), Col 31
- 29 [EIS written submission](#)

