

# Coronavirus (Scotland) (No.2) Bill

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## Delegated Powers Memorandum

### Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Coronavirus (Scotland) (No.2) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

### Outline of Bill provisions

2. The purpose of the Coronavirus (Scotland) (No.2) Bill ("the Bill") is to respond to the emergency situation caused by the coronavirus (Covid-19) pandemic. The Bill complements and supplements:

- the Coronavirus Act 2020, passed by the UK Parliament on 25 March 2020, to which the Scottish Parliament gave its consent on 24 March 2020;
- the Coronavirus (Scotland) Act 2020, passed by the Scottish Parliament on 1 April 2020.

3. The Bill covers a range of issues, with much of the detail set out in schedules, as follows:

- Protection of the individual
- Operation of the justice system
- Reports, accounts and other documents
- Other measures in response to coronavirus

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## Rationale for subordinate legislation

4. The Government has had regard, when deciding what subordinate legislation powers and respective Parliamentary procedures are appropriate for the Bill, to:

- the need to strike a balance between the importance of the issue and providing flexibility to respond to changing circumstances;
- the need to make proper use of valuable Parliamentary time; and
- the need to deal with the unexpected, which might otherwise frustrate the purpose of the provision in primary legislation approved by the Parliament.

5. The delegated powers provisions are listed below, with a short explanation of what each power allows, why the power has been taken in the Bill and why the selected form of Parliamentary procedure has been considered appropriate.

## Delegated Powers

**Section 8(1) – Power to suspend and revive provisions of this Act**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** regulations made by Scottish statutory instrument

**Parliamentary procedure:** affirmative if textually amending primary legislation, otherwise negative

## Provision

6. Section 8(1) provides that the Scottish Ministers may by regulations suspend the operation of any provision of Part 1 of the Bill and revive any provision that is suspended. This power may be exercised more than once. Regulations made under section 8(1) may make different provision for different purposes and transitional, transitory, saving or consequential provision.

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### **Reason for taking power**

7. This power is needed as the effects of the coronavirus outbreak may vary over time. The intention is that the provisions of the Bill should only be in force where this is necessary and this provides flexibility where provisions are not needed temporarily but may be needed again, meaning that it is not appropriate for them to be expired. Transitional, transitory, consequential or saving provision can also be made to allow for appropriate arrangements to be made when suspending or reviving provisions.

### **Choice of procedure**

8. The affirmative procedure is considered appropriate where regulations made under this power amend primary legislation. In other cases it is considered that the negative procedure is appropriate, given that the Scottish Parliament has considered the provisions in the Bill and the use of this power would not change the content of those provisions. The use of the negative procedure will allow flexibility for adjustments to take place whilst providing scrutiny by the Scottish Parliament.

## **Section 9(3) – Power to amend the expiry date for Part 1 of the Act**

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

### **Provision**

9. Part 1 of the Bill expires on 30 September 2020. This provision allows the Scottish Ministers to make regulations amending the expiry date to 31 March 2021 and to further extend this to date to 30 September 2021. Regulations further extending the expiry date to 30 September 2021 can only be made after 30 September 2020.

### **Reason for taking power**

10. The Bill contains extraordinary measures required to respond to an emergency situation. Whilst the provisions in Part 1 of the Bill are

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considered to be appropriate and proportionate, many are far-reaching and unprecedented. As one of the safeguards, Part 1 of the Bill expires automatically on 30 September 2020. It is recognised that it could be appropriate to extend the expiry date, and so this power provides a limited basis on which that may be done (by two further periods of six months) without resorting to fresh primary legislation.

### **Choice of procedure**

11. The affirmative procedure is considered appropriate given that the regulations would amend primary legislation and would have the effect of extending Part 1 of the Bill. Its use will ensure that the expiry date can only be extended with the express approval of the Scottish Parliament. As a further safeguard, before laying a draft of the regulations, the Scottish Ministers must lay before the Scottish Parliament a statement of their reasons why the regulations should be made.

**Section 9(9) – Power to make consequential, transitional, transitory or saving provision in connection with the expiry of Part 1 of the Act**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** regulations made by Scottish statutory instrument

**Parliamentary procedure:** affirmative if textually amending primary legislation, otherwise negative

### **Provision**

12. Section 9(9) provides that the Scottish Ministers may by regulations make consequential, transitional, transitory or saving provision in connection with the expiry of any provision of the Bill under section 9(1).

### **Reason for taking power**

13. Where provisions of Part 1 of the Bill expire then it may be that appropriate arrangements are needed to bridge how the emergency provisions in the Bill are ended in an orderly fashion. The type of arrangements that are appropriate may depend on various factors

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(including the subject-matter of the provision that is expiring) and so flexibility is needed.

### **Choice of procedure**

14. The affirmative procedure is considered appropriate where regulations made under this power amend primary legislation. In all other cases, the negative procedure is considered appropriate to allow for flexibility while providing for scrutiny by the Scottish Parliament.

### **Section 10(1) – Power to bring forward expiry of the Bill**

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative if textually amending primary legislation, otherwise negative

### **Provision**

15. The Bill contains a sunset clause whereby the provisions in Part 1 of the Bill expire on 30 September 2020 unless extended in accordance with section 9. Section 10(1) enables the Scottish Ministers to make regulations providing that any provision in Part 1 of the Act may expire early (including earlier than set out in previous regulations made under section 9). Such regulations can make different provision for different purposes and areas, consequential provision and transitional, transitory or saving provision.

### **Reason for taking power**

16. This power provides one of the important safeguards in ensuring that the measures included in the Bill are not in force once they are no longer considered necessary. Taking this power will enable the Scottish Ministers to provide that provisions expire earlier than provided for by the sunset of Part 1 of the Bill under section 9. If necessary to ensure an orderly transition when provisions expire in this way, consequential, transitional, transitory and saving provision can also be made.

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## **Choice of procedure**

17. The affirmative procedure is considered appropriate where regulations made under this power amend primary legislation. In all other cases it is considered that the negative procedure is appropriate to enable the Scottish Ministers to respond quickly and with sufficient flexibility to changing or unforeseen circumstances which may necessitate the early expiry of provisions. The negative procedure still ensures appropriate scrutiny by the Scottish Parliament.

## **Section 11(1) – Power to amend in consequence of amendments to subordinate legislation**

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: made affirmative

## **Provision**

18. This provision enables the Scottish Ministers to make regulations modifying provisions of the Bill which modify subordinate legislation if that subordinate legislation is itself modified by other subordinate legislation. This can only be done where the modification to the Bill provision is necessary.

## **Reason for taking power**

19. The Bill includes modifications to subordinate legislation that will have temporary effect. If the underlying subordinate legislation that the Bill modifies is itself amended whilst the relevant Bill provision is in force then the amendments made by the Bill may not work properly. It is unlikely that the powers to make the underlying subordinate legislation would be sufficient to amend the relevant Bill provision. The regulation-making power in section 11(1) would enable the Scottish Ministers to update the relevant Bill provision.

20. The power does not include, and does not need to include, the power to update any provision of the Bill in consequence of changes to the underlying primary legislation that is modified by the Bill. It is expected that

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any changes to the underlying primary legislation would most likely be made by primary legislation that could itself make the necessary consequential changes to this Bill.

21. The power includes the ability to make any transitional, transitory or saving provisions that are appropriate.

### **Choice of procedure**

22. The made affirmative procedure is considered appropriate. While regulations made under this power would modify provisions of the Bill (and so the affirmative procedure would generally be appropriate), additional flexibility is necessary so that the regulations can be made urgently to ensure that the Bill provisions can operate effectively. The made affirmative procedure combines flexibility (should the Scottish Parliament not be sitting at the point such regulations are needed) and appropriate Parliamentary scrutiny (by requiring the approval of the Parliament for the regulations to remain in force).

### **Section 13(1) – Ancillary provision**

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative if textually amending primary legislation, otherwise negative

### **Provision**

23. Section 13(1) provides that the Scottish Ministers may by regulations make freestanding ancillary provision, namely incidental, supplementary, consequential, transitional, transitory or saving provision which they consider appropriate for the purposes of, or in connection with, or for the purposes of giving full effect to, any provision of the Bill or provision made under it.

### **Reason for taking power**

24. It is appropriate to take a power to deal with anything that might emerge in the course of implementing the Bill, for example unexpected

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interactions between modifications made to subordinate legislation. Without the power proposed it would be necessary to return to the Parliament to deal with a matter that is clearly within the policy intentions of the Bill, which would not be an effective use of Parliamentary or government resource or timely given the need to act quickly to deal with the coronavirus outbreak.

25. It is considered that such matters are best addressed through subordinate legislation. The power is restricted in that it can only be used for the purposes of, in connection with, or for the purpose of giving full effect to the Bill, or provision made under it.

### **Choice of procedure**

26. The affirmative procedure is considered appropriate where regulations made under this power amend primary legislation. In all other cases, it is considered that the negative procedure is appropriate given that the Scottish Parliament has considered the provisions of the Bill and these regulations are concerned with making provision for the purposes of, or in connection, with giving full effect to the Bill.

### **Section 13(3) – Ancillary provision**

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative if textually amending primary legislation, otherwise negative

### **Provision**

27. Section 13(3) provides that the Scottish Ministers may by regulations modify regulations made under section 13(1) in consequence of regulations made:

- under section 8 to suspend or revive a provision of Part 1 of the Bill
- under section 9 in connection with the expiry of a provision under the sunset provision



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- under section 10 to provide for early expiry of a provision.

### **Reason for taking power**

28. It is appropriate to take this power to allow for regulations made under section 13(1) to be adjusted to take account of the suspension, revival or expiry of provisions in the Bill without further primary legislation being required.

### **Choice of procedure**

29. The affirmative procedure is considered appropriate where regulations made under this power amend primary legislation, though in practice this is unlikely to apply. In all other cases, regulations made under this power will only be made in consequence of other regulations and so the negative procedure is appropriate as it strikes a balance between the use of Parliamentary time and resource on one hand and the nature and content of the regulations on the other.

### **Section 14(2) – Commencement**

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure

### **Provision**

30. Section 14(2) enables the Scottish Ministers to make regulations making transitional, transitory or saving provision in connection with the coming into force of the Bill.

### **Reason for taking power**

31. The power to make such regulations may be needed to enable a smooth commencement of, and transition to, the coming into force of the provisions of the Bill.

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## **Choice of procedure**

32. As is usual for regulations relating to commencement, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. This is considered appropriate as the regulations will be making provision to smooth commencement of provisions that have already been considered by the Scottish Parliament during the passage of the Bill.

**Schedule 3, paragraph 4(2), new section 33B(1A) – Power to further extend the extension of the period for the ministerial statement on local connection under section 33B of the Housing (Scotland) Act 1987**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** regulations made by Scottish statutory instrument

**Parliamentary procedure:** affirmative

## **Provision**

33. Paragraph 4(2)(a) of schedule 3 amends section 33B(1) of the Housing (Scotland) Act 1987 (“the 1987 Act”) to extend, by six months, the deadline for the Scottish Ministers to publish a statement on the circumstances and criteria for exercising the power in section 33A of the 1987 Act, relating to referrals between local authorities on the grounds of local connection. It has the effect of extending the deadline for publishing the statement, to 18 months from the coming into force of section 33B(1) (on 7 November 2019).

34. Paragraph 4(2)(b) inserts new subsections (1A) and (1B) into section 33B of the 1987 Act to give the Scottish Ministers the power to make regulations further extending the period in section 33B(1) by up to six months on a one-off basis.

## **Reason for taking power**

35. The extension of the deadline is necessary as a result of the uncertainty and pressures of responding to the coronavirus outbreak. It is

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no longer practically possible, at this time, to conduct the required consultation on the statement on local connection, as required under section 33B(3) of the 1987 Act. To further safeguard against a continuation of the current uncertainty relating to the outbreak, paragraph 4(2)(b) gives the Scottish Ministers the power to further extend the deadline. Without the power proposed, it would be necessary to return to the Parliament to deal with a matter that is clearly within the policy intentions of the Bill, which would not be an effective use of Parliamentary or government resource.

### **Choice of procedure**

36. The affirmative procedure is considered appropriate as regulations made under this power would amend a deadline that it is set out in primary legislation. Its use will ensure that the expiry date can only be extended with the express approval of the Scottish Parliament.

### **Schedule 4, paragraph 1(2)(b) – Power to specify the Championship period in the UEFA European Championship (Scotland) Act 2020**

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

### **Provision**

37. Section 1 of the UEFA European Championship (Scotland) Act 2020 (“the 2020 Act”) defines the Championship period as the period beginning on 1 June 2020 and ending on 12 July 2020.

38. Paragraph 1(2)(b) of schedule 4 modifies the existing definition in section 1 of the Championship period to enable the Scottish Ministers to make regulations specifying the dates of the Championship period. It provides that the period may be no more than 42 days long, and it must end no later than 31 December 2022.

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### **Reason for taking power**

39. This power is necessary to ensure that the 2020 Act operates effectively when the Championship takes place. Although there is no suggestion from UEFA that the Championship will be delayed beyond the proposed dates in 2021, the Scottish Government believes that it is prudent for the Bill to make provision for the possibility of further postponement of the Championship into 2022. Unless a power is taken to specify the dates of the Championship period in regulations, it would be necessary to specify new dates on the face of this Bill, and then bring forward fresh primary legislation should they require to be varied. The Scottish Government does not consider that this would be an effective use of Parliamentary or government resource.

### **Choice of procedure**

40. Regulations made under section 1 of the 2020 Act (for example, to define the event zones) are subject to the negative procedure. The Scottish Government considers that this remains the appropriate procedure, given that such regulations will be essentially administrative in nature. The period that may be specified is limited so that it can be no longer than the Championship period as presently defined in the 2020 Act. The use of the negative procedure will allow flexibility for the dates of the Championship period to be amended swiftly if the dates of the Championship were to change again while providing for scrutiny by the Scottish Parliament.

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Schedule 4, paragraph 2(3), new section 16(7) – Power to amend the periods for which the provisions relating to listed building consent and conservation area consent apply

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

### **Provision**

41. Paragraph 2(2) of schedule 4 inserts new subsections (5) and (6) into section 16 of the Planning (Listed Buildings and Conservation Areas) (Scotland) Act 1997 (“the 1997 Act”) to extend the duration of a listed building consent or a conservation area consent that would otherwise lapse during the emergency period because works authorised by the consent have not begun. The emergency period is the period beginning with the coming into force of these provisions and ending on 6 October 2020, and the extended period begins at the same time and ends on 6 April 2021.

42. Paragraph 2(3) of schedule 4 provides that section 16 of the 1997 Act has effect as if a new subsection (7) were inserted to enable the Scottish Ministers make regulations amending the definitions of the emergency and extended periods.

### **Reason for taking power**

43. It is considered appropriate that the Scottish Ministers have the ability to amend the definitions of “emergency period” or “extended period” in the event that the impact of the current situation lasts longer than initially envisaged. Unless a power is taken to do so, it would be necessary to bring forward fresh primary legislation should these periods require to be varied. The Scottish Government does not consider that this would be an effective use of Parliamentary or government resource.

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## **Choice of procedure**

44. The negative procedure is considered appropriate to enable the Scottish Ministers to respond quickly and with sufficient flexibility to changing or unforeseen circumstances which may require changes to the emergency and extended periods, while ensuring appropriate scrutiny by the Scottish Parliament.

Schedule 4, paragraph 5(3), schedule 2A, new paragraph 19(3A) – Power to make orders to amend periods in relation to the additional dwelling supplement

Power conferred on: the Scottish Ministers

Power exercisable by: order made by Scottish statutory instrument

Parliamentary procedure: affirmative

## **Provision**

45. Paragraph 5(3)(a) of schedule 4 extends the repayment window for additional dwelling supplement (“ADS”) by inserting a new paragraph 8B into schedule 2A of the Land and Buildings Transaction Tax (Scotland) Act 2013 (“the 2013 Act”). Paragraph 8B(1) sets out that the new provision applies to transactions where the effective date falls within a specified period.

46. Paragraph 5(3)(b) of schedule 4 inserts a new sub-paragraph (3A) into paragraph 19 of schedule 2A of the 2013 Act. New paragraph 19(3A) enables the Scottish Ministers to make an order extending the period in paragraph 8B(1) within which a transaction must fall in order to qualify for the extended repayment window. The power can only be exercised where the Scottish Ministers are satisfied that it is appropriate to make the order for a reason relating to coronavirus.

## **Reason for taking powers**

47. The extent and duration of any coronavirus outbreak-related impact on the housing market, and consequently the period of transactions to which the provisions might ultimately need to apply is currently uncertain.

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As such, this power is needed to allow for the possibility of extending the provisions to relevant transactions with an effective date outside of the period on the face of the Bill (24 September 2018 to 24 March 2020).

### **Choice of procedure**

48. The affirmative procedure is considered appropriate given that any extension would amend primary legislation. Additionally, in the case of devolved tax legislation the Scottish Government considers that the affirmative procedure will generally be appropriate where a legislative change effected by subordinate legislation concerns exemptions or reliefs. The affirmative procedure is also consistent with the existing powers to modify ADS contained in paragraph 19 of schedule 2A of the 2013 Act.

**Schedule 4, paragraph 5(3), schedule 2A, new paragraph 19(3B) – Powers to make orders to amend periods in relation to the additional dwelling supplement**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** order made by Scottish statutory instrument

**Parliamentary procedure:** affirmative

### **Provision**

49. Paragraph 5(3)(a) of schedule 4 extends the repayment window for additional dwelling supplement (“ADS”) by inserting a new paragraph 8B into schedule 2A of the Land and Buildings Transaction Tax (Scotland) Act 2013 (“the 2013 Act”). Paragraph 8B(2) provides that the extended period within which a previous main residence must be sold in order to claim for repayment of ADS is 27 months.

50. Paragraph 5(3)(b) of schedule 4 inserts a new sub-paragraph (3B) into paragraph 19 of schedule 2A of the 2013 Act. New paragraph 19(3A) enables the Scottish Ministers to make regulations substituting a longer period for the period of 27 months specified in paragraph 8B(2).

## **Reason for taking powers**

51. The extent and duration of any coronavirus outbreak-related impact on the housing market, and consequently the ability of relevant taxpayers to sell a previous main residence, is currently uncertain. As such, this power is needed to allow the extension provided for in the Bill to be further extended in the event that circumstances justify it. The power can only be exercised where the Scottish Ministers are satisfied that it is appropriate to make the order for a reason relating to coronavirus.

## **Choice of procedure**

52. The affirmative procedure is considered appropriate given that any extension would amend primary legislation. Additionally, in the case of devolved tax legislation the Scottish Government considers that affirmative procedure will generally be appropriate where a legislative change effected by subordinate legislation concerns exemptions or reliefs. The affirmative procedure is also consistent with the existing powers to modify ADS contained in paragraph 19 of schedule 2A of the 2013 Act.

**Schedule 4, paragraph 6(2), new section 153(4A) – Power to prescribe rules for non-domestic rates during the financial year 2020-21**

**Power conferred on:** the Scottish Ministers

**Power exercisable by:** regulations made by Scottish statutory instrument

**Parliamentary procedure:** negative

## **Provision**

53. Paragraph 6(2) of schedule 4 inserts a new subsection (4A) into section 153 of the Local Government etc. (Scotland) Act 1994 (“the 1994 Act”). This allows the Scottish Ministers, during the financial year 2020-21, to make regulations prescribing rules that reduce or remit the amount payable as non-domestic rate. Those rules may reduce or remit the amount either for the whole of that year (including the period prior to the regulations being made), or for such period within that year as is specified in the regulations (including a period beginning prior to the regulations being made).



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## **Reason for taking power**

54. Section 153 of the 1994 Act allows the Scottish Ministers to make rules to be used to calculate liability to pay non-domestic rates. This power was used, amongst other uses, to make the Non-Domestic Rates (Coronavirus Reliefs) (Scotland) Regulations 2020 (S.S.I. 2020/101), which grant a range of rates reliefs from 1 April 2020 for the 2020-21 financial year. Section 153 does not allow provision to be made with backdated effect. It is possible that the Scottish Ministers may wish to make provision for further reliefs for all or part of the 2020-21 financial year, and as part of that may wish to backdate the availability of that relief. This power is accordingly necessary.

55. The power to backdate would be limited to the 2020-21 financial year. Any provision for later years would be made under existing powers in section 153 of the 1994 Act and the Scottish Government does not envisage that it will be necessary to backdate such provision in later years. Such provision can be made in the usual way, prospectively only.

## **Choice of procedure**

56. Regulations under section 153 of the 1994 Act are subject to the negative procedure. In 2020, the Scottish Parliament considered whether the affirmative procedure was appropriate for such regulations at Stage 2 of the Non-Domestic Rates (Scotland) Bill, and decided that negative procedure remained appropriate. The Scottish Government does not consider that a higher level of scrutiny is necessary for the creation of a backdated relief than would be required for creation of a prospective relief, particularly as the principle of backdating reliefs will be considered by the Parliament when it considers the Bill. The negative procedure ensures that the Parliament has the opportunity to scrutinise regulations made under this power.

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