

Coronavirus (Recovery and Reform) (Scotland) Bill

[As amended at Stage 2]

Supplementary Delegated Powers Memorandum

Purpose

1. This memorandum has been prepared by the Scottish Government in accordance with rule 9.7.9 of the Parliament's Standing Orders in relation to the Coronavirus (Recovery and Reform) (Scotland) Bill as amended at Stage 2. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were either introduced to the Bill or amended at Stage 2. It should be read in conjunction with the Delegated Powers Memorandum published to accompany the Bill on introduction.

2. The contents of this memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Provisions conferring power to make subordinate legislation introduced or amended at Stage 2

3. The amended or new delegated powers in the Bill 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.

4. 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 (Recovery and Reform) (Scotland) 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.

This document relates to the Coronavirus (Recovery and Reform) (Scotland) as amended at Stage 2 (SP Bill 9A)

Delegated Powers

Section 1 – amendment to new section 86A in the Public Health etc. (Scotland) Act 2008 - Public health protection regulations

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative or made affirmative

Provision

5. At stage 2 amendments were agreed to that inserted new sections 86AA and 86AB into the Public Health etc. (Scotland) Act 2008. These provide that the power in new section 86A(1) of that Act (inserted by section 1 of the Bill) can only be exercised in certain circumstances when a public health declaration is in place. This applies where regulations under new section 86A(1) are made in response to a particular infection or contamination. These provisions ensure that some aspects of the public health protection power could have effect only after a parliamentary vote on and approval of a formal Government declaration, with an alternative approach where this is not practicable.

Reason for taking power

6. This power is intended to strengthen Parliamentary involvement in the making of certain types of regulations in order to preserve the ability for swift and effective action in the event of a future public health threat but balance this with proper parliamentary scrutiny.

7. New section 86AA sets out the requirement that key aspects of the power in section 86A(1) can only be exercised when Ministers have made a public health declaration and this has been approved by the Scottish Parliament. Proposed section 86AB provides a process for a declaration to come into force where it is not practicable for the Parliament to approve a declaration in advance.

8. New section 86AA(1) provides that key aspects of the power can only be exercised when there is a public health declaration in place. Such a declaration will be made by the Scottish Ministers following consultation with the Chief Medical Officer or other appropriate person to ensure that any action taken is grounded in evidence. A public health declaration would be needed for the Scottish Ministers to use the power in new section 86A(1) to make regulations in response to a particular infection or contamination.

9. A declaration will only come into force once a motion approving it has been approved by the Scottish Parliament. Where it is not practicable for the Scottish Parliament to approve a declaration (for example, if the Parliament is dissolved) then new section 86AB provides that a declaration can come into force as soon as it is made but such a

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declaration will cease to have effect if it is not approved by the Scottish Parliament within 28 days (not including certain recess periods and dissolution).

10. If a public health declaration is in place and the Scottish Ministers consider that the test for making such a declaration is no longer met then the Scottish Ministers must revoke that declaration and lay notice of this before Parliament. Once revoked, a further declaration would be needed to exercise key aspects of new section 86A(1).

11. The Scottish Ministers may exercise new section 86A(1) to put in place “preparedness” regulations when there is no “live” public health threat. A public health declaration does not need to be in place for this to be done. Such regulations could supplement the public health resilience framework, provide greater clarity to public bodies about the powers they would have to respond to future public health threats and clarify for the public the types of measures which might be introduced should a significant public health threat emerge in the future.

12. The fact that a public health declaration is in force does not require the Scottish Ministers to make regulations under new section 86A(1) – it simply opens up the potential for Ministers to do this if the test for making regulations is met.

Choice of procedure

13. The regulation making power in new section 86A(1) can be exercised using the draft affirmative procedure, though in certain circumstances the made affirmative procedure may be used. This did not change at Stage 2, though new sections 86AA and 86AB introduce the requirement that key aspects of the power in new section 86A(1) can only be exercised when a public health declaration is in force.

Section 1 – amendment to new section 86G in the Public Health etc. (Scotland) Act 2008) – Review of regulations

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative or made affirmative

Provision

14. New section 86G of the Public Health etc. (Scotland) Act 2008 (inserted by section 1 of the Bill) requires Scottish Ministers to review regulations made under section 86A(1) within the first 21 days of the regulations being made, and no longer than each subsequent 21 days thereafter, for as long as the regulations remain in force. The Bill has been amended to add in new subsection (1A) to exclude regulations of a general or contingent nature from this review requirement.

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Reason for taking power

15. Whilst the robust review requirements are appropriate for regulations made in response to a specific public health threat, they are unduly onerous on general or contingent regulations. These regulations would not directly impose restrictions or requirements, but would be provision made to strengthen the existing public health framework and remain on the statute book during non-response phases.

Choice of procedure

16. The regulation making power in new section 86A(1) can be exercised using the draft affirmative procedure though in certain circumstances the made affirmative procedure may be used. This did not change at Stage 2, though new sections 86AA and 86AB introduce the requirement that key aspects of the power in new section 86A(1) can only be exercised when a public health declaration is in force..

Section 1(3) – amendments to section 122 of the Public Health etc. (Scotland) Act 2008 - power to amend enactments

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

17. New section 86F(23)(d) of the Public Health etc. (Scotland) Act 2008 (inserted by section 1 of the Bill) provides that regulations made under new section 86A(1) (public health protection measures) may modify enactments, including the Bill. Section 1(3) of the Bill amends section 122 of the 2008 Act to make provision about the procedure to be used for regulations made under new section 86A(1). Section 122 has been further amended to provide that where regulations are made under section 86A(1) which include provision modifying an Act of the Scottish Parliament or an Act of Parliament then the regulations can only be made using the draft affirmative procedure.

Reason for taking power

18. The Bill provides the power for Scottish Ministers to make regulations to prevent, protect against, provide a public health response to or control a public health threat that presents or could present significant harm to human health. Within the general power in section 86A(1), section 86F(2)(d) provides specifically that regulations made under the public health protection power may “modify any enactment (including this Act)”.

19. This power has been included in the Bill as measures needed to respond to a public health threat may not always be foreseeable and may come in many forms, and regulations may therefore conflict with existing primary or secondary legislation or result in unforeseen consequences that would make the operation of the public health measures impractical.

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20. For example, during the Covid pandemic, Ministers had to modify provision in primary legislation by bringing forward additional expedited primary legislation (the Coronavirus (Discretionary Compensation for Self-Isolation) (Scotland) Act 2022). Although in that case modifications were effected by primary legislation, that may not always be feasible.

21. In recognition of the scope of that power, the Bill has been amended so that any regulations that make provision modifying an Act of the Scottish Parliament or an Act of Parliament can only use the draft affirmative procedure – such regulations cannot be made using the made affirmative procedure.

Choice of procedure

22. Amendments at Stage 2 mean that regulations made under section 86A(1) which include provision modifying an Act of the Scottish Parliament or an Act of Parliament can only be made using the draft affirmative procedure.

Section 1(3) –Amendments to section 122 of the Public Health etc. (Scotland) Act 2008 – explanations of urgency and “sunset” provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative or made affirmative

Provision

23. In addition to the above, amended section 1(3)(c) of the Bill has been amended so that section 122 of the Public Health etc. (Scotland) Act 2008 provides for an explanation of urgency to be provided to the Parliament when the Scottish Ministers make regulations under section 86A(1) using the made affirmative procedure. It also provides that such regulations when made using the made affirmative procedure must expire on a specified day. However, the requirement for a “sunset” provision does not apply if the regulations are amending regulations which already include an expiry date.

Reason for taking power

24. In its response to the Covid-19 Recovery Committee’s Stage 1 report (which endorsed recommendations by the Delegated Powers and Law Reform Committee about made affirmative regulations) the Scottish Government agreed that it was appropriate to provide an explanation of urgency if regulations are made using the made affirmative procedure provided for by the Bill. The Bill has been amended to require an explanation of urgency to be provided if regulations are made using the made affirmative procedure. The Scottish Government was also sympathetic to the Committees’ recommendation in relation to a “sunset” provision and the Bill has been amended to require the Government to include a sunset provision in the regulations

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made using the made-affirmative procedure where this is appropriate given the nature of the power.

Choice of procedure

25. As set out in the Delegated Powers Memorandum accompanying the Bill as introduced, regulations made under section 1(3) would be subject to the affirmative procedure, with scope for the made affirmative procedure in case of urgency. An explanation of urgency and inclusion of “sunset” provision is only required if regulations are made using the made affirmative procedure.

Sections 8(1), 9(1) and 10(1) – Regulations on continuing operation of educational establishments, Regulations on school boarding accommodation, Regulations on student accommodation

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative or made affirmative

Provision

26. As explained in the Delegated Powers Memorandum accompanying the Bill as introduced, section 8(1) provides the Scottish Ministers with powers in relation to educational establishments, to enable them to take necessary and appropriate action to protect public health and ensure the continuity of educational provision, and mitigate against some of the wider harms that can be caused by threats to public health. Ministers can make regulations to require specific actions to be taken in relation to the continuing operation of educational establishments for a specified period.

27. Section 8(2A) and (2B) limit the power to make regulations under section 8(1) of the Bill, insofar as they apply to the operator of further and higher education institutions. Such regulations may not make provision relating to any of the non-educational functions of the operator of those institutions. This limitation will not apply to any additional functions which may be conferred on an operator under section 8 in relation to the use of their premises for the purpose of protecting public health.

28. New section 12A provides that the regulation-making powers under sections 8 to 10 of the Bill can only be exercised when a public health declaration is in place, and has been approved by the Scottish Parliament. 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 under this Chapter may be a way of protecting against that danger. Section 12B provides an alternative approach where it is not practicable to obtain parliamentary approval in advance of a declaration taking effect.

Reason for taking power

29. The limitations on the power in section 8(1) in new subsections (2A) and (2B) will restrict regulations made under it to matters which support the continuity of further and higher education and ensure that regulations made for these purposes do not result in any unintended consequences on the other operation of further and higher education institutions.

30. In excluding the non-educational functions of further and higher education institutions from the scope of the section 8 power to make regulations, this leaves those functions only capable of being regulated under the wider public health powers applying to all settings, as set out in Part 1 of the Bill. The non-educational functions are those which do not relate solely to the teaching and delivery of further or higher education. Further education and higher education are defined for Part 2 of the Bill in section 5 and have the meanings given in sections 6 and 36 respectively of the Further and Higher Education (Scotland) Act 1992.

31. New section 12A, is intended to strengthen Parliamentary involvement in the making of regulations under sections 8 to 10 of the Bill in order to preserve the ability for swift and effective action in the event of a future public health threat but balance this with proper parliamentary scrutiny.

32. Section 12A provides that the powers in sections 8 to 10 of the Bill can only be exercised when there is a public health declaration in place. Such a declaration will be made by the Scottish Ministers following consultation with the Chief Medical Officer or other appropriate person to ensure that any action taken is grounded in evidence.

33. A declaration will only come into force once a motion approving it has been approved by the Scottish Parliament. Where it is not practicable for the Scottish Parliament to approve a declaration (for example, if the Parliament is dissolved) then section 12B provides that a declaration can come into force as soon as it is made but such a declaration will cease to have effect if it is not approved by the Scottish Parliament within 28 days (not including certain recess periods and dissolution).

34. That a public health declaration is in force does not require the Scottish Ministers to make regulations under this section – it simply opens up the potential for Ministers to do this if the test for making regulations is met.

35. Section 12A also ensures that the public health declaration is revoked if Scottish Ministers no longer consider that an infectious disease or contaminant constitutes or may constitute a danger to human health, and that the making of regulations under this section may be a way of protecting against that danger.

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Choice of procedure

36. As set out in the Delegated Powers Memorandum accompanying the Bill as introduced, regulations made under section 8(1) would be subject to the affirmative procedure, with scope for the made affirmative procedure in case of urgency.

Section 12 – Procedure for regulations

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative or made affirmative, or laid-no procedure if revoking regulations

Provision

37. New subsection (6) of section 12 provides for an explanation of urgency to be provided to the Parliament when the Scottish Ministers make regulations using the made affirmative procedure using the powers in section 8, 9 or 10 of the Bill. New subsections (7) and (8) provide that such regulations when made using the made affirmative procedure must expire on a specified day. However, the requirement for a “sunset” provision does not apply if the regulations are amending regulations which already include an expiry date.

38. New subsection (9) of section 12 provides that education regulations that only contain revocations of previous regulations (or such revocations and any transitional, transitory or saving provision), and meet the urgency requirements in section 12(2), are to be made in the form of a laid, no procedure SSI.

Reason for taking power

39. In its response to the Covid-19 Recovery Committee report (which endorsed recommendations by the Delegated Powers and Law Reform Committee about made affirmative regulations) the Scottish Government agreed that it was appropriate to provide an explanation of urgency if regulations are made using the made affirmative procedure provided for by the Bill. The Bill has been amended to require an explanation of urgency to be provided if regulations are made using the made affirmative procedure. The Scottish Government was also sympathetic to the Committees’ recommendation in relation to a “sunset” provision and the Bill has been amended to require the Government to include a sunset provision in the regulations made using the made-affirmative procedure where this is appropriate given the nature of the power.

40. With regard to new subsection (9) this means that regulations made under this Chapter can be revoked (in whole or in part) quickly and is similar in effect to comparable provisions in Part 1.

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Choice of procedure

41. An explanation of urgency and inclusion of “sunset” provision is only required if regulations are made using the made affirmative procedure.

Section 17A – Bank arrestments: protected minimum balance

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

42. Section 73F of the Debtors (Scotland) Act 1987 makes provision for the protection of a minimum balance in certain bank accounts. The protected minimum balance is the sum that is protected in an individual’s bank account when a bank arrestment is executed for a debt owed. Section 17A(2)(c) of the Bill amends section 73F of the Debtors (Scotland) Act 1987 to allow Scottish Ministers to vary the level of protected minimum balance by regulations.

Reason for taking power

43. The power to vary the protected minimum balance in a bank arrestment currently exists in section 49(7) of the Debtor (Scotland) Act 1987. This power allows for the variation of the sums in relation to the execution of an earnings arrestments, which is a different type of diligence. The protected minimum balance is currently determined by the prescribed monthly salary figure below which no earnings arrestment deduction can be made. Section 17A of the Bill de-couples the link between earnings arrestments and the protected minimum balance in bank arrestments. Consequently, the new power to vary the protected minimum balance in the Debtors (Scotland) Act 1987 is created to allow for future amendments to be made.

Choice of procedure

44. The negative procedure has been chosen as the appropriate procedure to allow the protected minimum balance to be varied by secondary legislation. This is consistent with the procedure which is currently adopted for the variation of earnings arrestment amounts and which, consequently, fixes the protected minimum balance.

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Section 17C – Power to amend period of moratorium on diligence

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

45. Section 198 of the Bankruptcy (Scotland) Act 2016 prescribes the duration of the moratorium on diligence and associated timescales. The moratorium on diligence provides an individual with breathing space to seek advice and consider appropriate remedy to problem debt without the threat of enforcement action being taken by creditors. Section 17C of the Bill inserts a provision into section 198 of the Bankruptcy (Scotland) Act 2016 allowing Scottish Ministers to vary the period of moratorium on diligence by regulations.

Reason for taking power

46. A specific power to amend the moratorium period and associated timescales ensures the Government is able to review and adapt the moratorium period more quickly and flexibly under secondary legislation as appropriate.

Choice of procedure

47. The affirmative procedure has been chosen as the appropriate procedure to provide the necessary Parliamentary scrutiny. This reflects the significance of moratorium protection and the implications for both debtors and creditors where changes to the period involved are being considered.

Section 20A – Regulations under the 1965 Act

Power conferred on: the Registrar general, with the approval of the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure (or negative procedure where section 54(2) of the 1965 Act applies)

Provision

48. Section 54 of the Registration of Births, Deaths and Marriages (Scotland) Act 1965 empowers the Registrar General, with the approval of the Scottish Ministers, to make regulations on matters such as the form of registers for births, marriages and deaths. At the moment, the powers allow different provision for different cases or circumstances to be made in respect of the marriage register. The amendment made by section 20A to section 54(1A) of the 1965 Act extends that to cover any regulations made under

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section 54(1), so that the power to make different provision for different cases or circumstances will cover other registers as well.

Reason for taking power

49. The ability to make different provision for different cases or circumstances will help to future proof the legislation. For example in the future, there may need to be different formats for birth registration forms and death registration forms, depending on whether the forms are electronic or are manually signed and scanned into the electronic register. It will follow a more usual approach that regulations under section 54(1) of the 1965 Act should be able to make different provision for different cases or circumstances, rather than specifying that this applies to the register of marriages. Section 54(1A) as currently in force was inserted for a particular purpose, by section 33 of the Marriage and Civil Partnership (Scotland) Act 2014.

Choice of procedure

50. This provision amends the existing power in section 54(1A) of the 1965 Act, and does not change the procedure. The approach taken in the 1965 Act is that regulations made by the Registrar General are not subject to negative or affirmative Parliamentary procedures (unless they set fees or prescribe cases under section 20(1A)(b) of the 1965 Act, when they are subject to the negative procedure). Having no negative or affirmative Parliamentary procedure for this amended power is consistent with the 1965 Act generally. The default position applies under section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010, so that the regulations are laid before Parliament.

Section 46 – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure

Provision

51. The fixed commencement table in amended section 46(1) sets out the commencement dates for most of the provisions in the Bill, as set out in detail in the table. Subsections (1A) and (1B) make special provision in relation to how sections 18 and 20 will come into force. The previously existing powers in section 46(2) and (3) to make provision for commencement by regulation will only apply to any other provisions in the Bill which are not referenced in the fixed commencement table or in subsections (1A) and (1B) (that is, at Stage 2, sections 20A and 20B).

Reason for taking power

52. The amendments made to section 46 were intended to codify most aspects of commencement policy in this Bill, to ensure a seamless transfer from the existing

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temporary provisions which expire in September 2022 and to eliminate the need for commencement regulations immediately after summer recess.

Choice of procedure

53. It is standard for commencement powers to be subject to laid only procedure.

Paragraph 25 of the schedule – amendment to add paragraph 25(6)

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative or made affirmative

Provision

New subparagraph (6) of paragraph 25 provides for an explanation of urgency to be provided to the Parliament when the Scottish Ministers make regulations under paragraph 24(1) of the schedule using the made affirmative procedure.

Reason for taking power

54. In its response to the Covid-19 Recovery Committee report (which endorsed recommendations by the Delegated Powers and Law Reform Committee about made affirmative regulations) the Scottish Government agreed that it was appropriate to provide an explanation of urgency if regulations are made using the made affirmative procedure provided for by the Bill and the Bill has now been amended to require an explanation of urgency to be provided if regulations are made using the made affirmative procedure.

Choice of procedure

55. Such an explanation of urgency is only required if regulations are made using the made affirmative procedure.

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[As amended at Stage 2]

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