

This document relates to the Coronavirus (Scotland) Bill (SP Bill 66) as introduced in the Scottish Parliament on 31 March 2020

Coronavirus (Scotland) Bill

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) 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) Bill ("the Bill") is to respond to the emergency situation caused by the Covid-19 pandemic. The Bill complements and supplements the Coronavirus Act 2020 ("the 2020 Act"), passed by the UK Parliament on 25 March 2020, and which the Scottish Parliament gave its consent to on 24 March 2020.

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

- Eviction from dwelling houses
- Protection for debtors
- Children and vulnerable adults
- Justice
- Alcohol licensing
- Public bodies
- 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 and whether provisions should be in primary or in subordinate legislation, 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.

Section 10(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: negative

Provision

6. Section 10(1) provides that the Scottish Ministers may by regulations suspend the operation of any provision under Part 1 of the Bill and revive any provision that is suspended. This power may be exercised more than once. Regulations made under section 10(1) may make different provision for different purposes and transitional, transitory or saving provision.

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

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in force where this is necessary and this provides flexibility where provisions are not needed temporarily but may be needed again mean that it is not appropriate for them to be expired. That transitional, transitory or saving provision can be made allow for appropriate arrangements to be made when suspending or reviving provisions.

Choice of procedure

8. It is considered that the negative procedure is appropriate given that the Scottish Parliament has considered the provisions in the Bill and 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 10(6) – Power to suspend and revive provisions of this Act

Power conferred on: High Court of Justiciary

Power exercisable by: Act of Adjournal

Parliamentary procedure: none

Provision

9. Paragraph 11 of schedule 4 contains a power for the High Court of Justiciary to make an Act of Adjournal for the purposes of giving effect to that paragraph which enables provision to be made in regulations about trials on indictment without juries. Should such regulations be suspended by virtue of section 10 then section 10(6) allows the High Court of Judiciary to make saving, transitory and transitional provision by way of Act of Adjournal in connection with this suspension.

Reason for taking power

10. 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 mean that it is not appropriate for them to be expired. That transitional, transitory or saving provision can be made allow for appropriate arrangements by way of Act of Adjournal to be made when suspending or reviving provisions.

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Choice of procedure

11. Matters of this detail which relate to the administrative and procedural work of the court are most appropriately be dealt with by the High Court of Justiciary by Act of Adjournal.

Section 11(3) – Expiry

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

12. The Bill, apart from section 1 and Part 2, expires on 20 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

13. The Bill contains extraordinary measures required to respond to an emergency situation. Whilst the provisions in Part 1 of the Bill are 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 by two further periods of six months this but that this should only be done with the approval of the Scottish Parliament. 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.

Choice of Procedure

14. The affirmative procedure is considered appropriate given that the regulation would amend primary legislation and have the effect of extending Part 1 of the Bill.

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Section 11(9) – Expiry

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

15. Section 11(9) provides that the Scottish Ministers may by regulations make transitional, transitory or saving provision in connection with the expiry of any provision of the Act.

Reason for taking power

16. 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. The type of arrangements that appropriate may depend on various factors and so the flexibility is needed.

Choice of procedure

17. The negative procedure is considered appropriate to allow for flexibility whilst providing scrutiny by the Scottish Parliament.

Section 11(11) – Expiry

Power conferred on: High Court of Justiciary

Power exercisable by: Act of Adjournal

Parliamentary procedure: none

Provision

18. Paragraph 11 of schedule 4 contains a power for the High Court of Justiciary to make an Act of Adjournal for the purposes of giving effect to that paragraph which enables provision to be made in regulations about trials on indictment without juries. Should paragraph 11 be expired by section 11(1) of the Bill then section 11(11) allows the High Court of

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Judiciary to make saving, transitory and transitional provision by way of Act of Adjournal in connection with this expiry.

Reason for taking power

19. Where paragraph 11 of schedule 4 expires by virtue of section 11(1) of the Bill then it may be that appropriate arrangements are needed to bridge how the emergency provisions regarding trials on indictment by jury are ended. The type of arrangements that appropriate may depend on various factors and so the flexibility is needed including being able to make appropriate provision by way of Act of Adjournal.

Choice of procedure

20. Matters of this detail which relate to the administrative and procedural work of the court are most appropriately be dealt with by the High Court of Justiciary by Act of Adjournal.

Section 12 – Power to bring forward expiry

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

21. 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 12. Section 13 enables the Scottish Ministers to make regulations providing that any provision of the Act can be expired early (including earlier than set out in previous regulations made under section 13). Such regulations can make different provision for different purposes and transitional, transitory or saving provision.

Reason for taking power

22. 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

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to expire provisions earlier than provided for by the sunseting of Part 1 of the Bill under section 12. If needed to provide for a smooth transition transitional, transitory and saving provision can be made.

Choice of procedure

23. 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. It is not intended to keep provisions of the Bill in force any longer than is necessary. The negative procedure still ensures appropriate scrutiny by the Scottish Parliament.”

Section 13 – 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

24. 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

25. The Bill includes modifications to secondary 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 14 would enable the Scottish Ministers to update the relevant Bill provision.

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26. 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 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.

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

Choice of procedure

28. It is considered that the made affirmative procedure is used as the regulations would be modifying provisions of the Bill but flexibility is needed so that the regulations can be made urgently to ensure that the Bill provisions can operate effectively. The made affirmative allows flexibility should the Scottish Parliament not be sitting at the point such regulations are needed.

Section 15(1) – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

29. Section 15(1) provides that the Scottish Ministers may by regulations make freestanding ancillary provision, namely incidental, supplementary, consequential, transitional, transitory or savings 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

30. It is appropriate to take a power to deal with anything that might emerge in the course of implementing the Bill, for example unexpected interaction between modifications made to secondary legislation. Without

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the power proposed it would be necessary to return to 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.

31. 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

32. 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 15(2) – Ancillary provision

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

33. Section 15(2) provides that the Scottish Ministers may by regulations modify regulations made under section 15(1) in consequence of regulations made:

- suspending or reviving provisions of Part 1 of the Bill (section 10)
- the expiry of a provision under the sunset provision in section 11
- under section 12 relating to early expiry.

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Reason for taking power

34. It is appropriate to take this power to allow for regulations made under section 16(1) to be adjusted to take account of the suspension, revival or expiry of provisions in the Bill.

Choice of procedure

35. Regulations 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 16(2) – commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure

Provision

36. Section 16(2) provides that the Scottish Ministers may make regulations to bring paragraph 11(1) of schedule 3 (and section 4 so far as it relates to that paragraph), into force on such day as the Scottish Ministers appoint. All other provisions of the Bill come into force on the day after Royal Assent.

Reason for taking power

37. It is usual practice for commencement provisions to be dealt with by subordinate legislation, and it is appropriate for provisions in the Bill not coming into effect on the day after Royal Assent to be commenced at such a time as the Scottish Ministers consider suitable.

Choice of procedure

38. As is usual for commencement regulations, the default laying requirement in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010 applies. Commencement regulations bring into force provisions whose underlying policy has already been considered by the

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Scottish Parliament during the passage of the Bill. Any regulations under this section will be laid before Parliament as soon as practicable after being made.

Section 16(4) – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid, no procedure

Provision

39. Section 16(4) 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

40. The power to make such regulations may be needed to enable a smooth commencement of and transition to the coming into force of the provision in the Bill.

Choice of procedure

41. 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.

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Schedule 1, paragraph 8 – Power to modify notice periods

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

42. Paragraph 8 of Schedule 1 confers on Scottish Ministers a power to modify a reference to a period of time which is specified in any of paragraphs 2, 4, 6 and 7 of schedule 1. These periods of time relate to the notice period for a notice to leave in relation to private residential tenancy under the Private Housing (Tenancies) (Scotland) Act 2016, the notice period for a notice of proceedings for possession in relation to assured tenancies under the Housing (Scotland) Act 1988, notice periods relating to tenancies under the Rent (Scotland) Act 1984 and notice periods relating to Scottish secure tenancies under the Housing (Scotland) Act 2001. The notice period which applies will depend on the type of tenancy and the grounds cited by the landlord for repossession.

43. In terms of paragraph 8(1)(b), Scottish Ministers can also modify how the grounds for possession are grouped in paragraphs 2, 4, 6 and 7 with reference to the notice period which applies. In terms of paragraph 8(1)(c) Ministers can make consequential amendments to paragraph 9 (consequential modifications in relation to prescribed forms).

44. In terms of paragraph 8(2), the power to modify notice periods may not be exercised by Scottish Ministers so as to specify a period of time which is in excess of six months.

Reason for taking power

45. The purpose of schedule 1 of the Bill is to extend various notice periods which apply when a landlord is seeking to evict a tenant from a

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tenancy in the private rented sector or social rented sector in Scotland. The provisions of schedule 1 modify the relevant notice periods depending on the type of tenancy and the ground of eviction used. These modifications will take effect during the time in which the Bill is in force. The power in paragraph 8 of schedule 1 will enable the Scottish Ministers to further modify these notice periods, during the time the Bill is in force. This will provide the necessary flexibility to allow Ministers to reconsider whether a different notice period is appropriate in relation to a particular ground of eviction during the time when the provisions are in force (provided that no period is in excess of 6 months). This is necessary to enable Scottish Ministers to respond to the implications of the coronavirus pandemic and to ensure that the correct balance is struck between protecting tenants from eviction and the rights of landlords in relation to their property.

Choice of procedure

46. The power is subject to negative procedure. The power is about the detail of the extension of notice periods, rather than the principle that notice periods should be extended to up to six months in response to the coronavirus pandemic. The increase in notice periods is essential to ensure tenants are protected when they may face financial difficulties. This power allows for refinements to those extensions where appropriate. Accordingly, the level of scrutiny afforded by negative procedure seems appropriate.

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Schedule 4, Part 1, Paragraph 1- Electronic Signatures and Transmission of Documents

Power conferred on: The Lord President or the Lord Justice General

Power exercisable by: Direction

Parliamentary procedure: None

Provision

47. Paragraph 1(5) confers a power on the Lord President or the Lord Justice General to direct that the effects of subsections (1) and (2) do not apply to a specified type of document, either in relation to some or all proceedings.

Reason for taking power

48. One of the policy intentions of the Bill is to ensure that courts are capable of continuing to operate during any period that is subject to restrictions as a result of the coronavirus outbreak.

49. The Bill will allow electronic signatures and transmission of documents so that documents can be signed and transmitted electronically, removing the existing requirement for physical movement and contact. However, there will be some documents which are not suitable for electronic signature or transmission. This power will enable the Lord President or Lord Justice General to disapply these provisions where they consider it is necessary to do so.

Reason for choice of procedure

50. A direction from the Lord President or Lord Justice General is the most appropriate and proportionate means of exercising these powers against the background of the operational exigencies of the courts and tribunals. The Bill requires that any direction made under this section be made public.

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Schedule 4, Part 1, Paragraph 2 - Suspension of requirement for physical attendance.

Power conferred on: Court or Tribunal

Power exercisable by: Direction

Parliamentary procedure: None

Provision

51. Paragraph 2(1) confers a power on the court or tribunal to direct a person to physically attend a court or tribunal in circumstances where the subsection would otherwise have the effect of disapplying any such requirement.

Reason for taking power

52. One of the policy intentions of the Bill is to ensure that courts are capable of continuing to operate during any period that is subject to restrictions as a result of the coronavirus outbreak.

53. The Bill provisions create a presumption against physical attendance at a court or tribunal by enabling participation in any part of court proceedings by means of video or audio (including telephone) link, subject to safeguards designed to protect the rights of the parties involved.

54. This power enables the general presumption to be disapplied where the court or tribunal considers it necessary to do so.

Reason for choice of procedure

55. A court or tribunal direction is the most appropriate and proportionate means of exercising these powers against the background of the operational exigencies of the courts and tribunals.

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Schedule 4, Part 1, Paragraph 3 - Attendance by electronic means.

Power conferred on: Court or Tribunal

Power exercisable by: Direction

Parliamentary procedure: None

Provision

56. Paragraph 3(1) gives a court or tribunal the power to direct that a person excused from a requirement to physically attend a court or tribunal must instead appear by electronic means in accordance with a direction issued by the court or tribunal.

Reason for taking power

57. This provision allows a court or tribunal to direct *how* a person must appear before the court or tribunal by electronic means. One of the policy intentions of the Bill is to ensure that courts and tribunals are capable of continuing to operate during any period that is subject to restrictions as a result of the coronavirus outbreak.

58. The Bill provisions create a presumption against physical attendance at court or tribunal by enabling participation in any part of proceedings by means of video or audio (including telephone) link, subject to safeguards designed to protect the rights of the parties involved.

59. This power enables the court or tribunal hearings to continue within the public health guidelines.

Reason for choice of procedure

60. A court or tribunal direction is the most appropriate and proportionate means of exercising these powers on a case by case basis against the background of the operational exigencies of the courts and tribunals.

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Schedule 4, Part 1, Paragraph 4 - Further provision about attendance

Power conferred on: Court or Tribunal

Power exercisable by: Direction

Parliamentary procedure: None

Provision

61. Paragraph 4(1)(a) gives a court or tribunal the power to issue a general direction under section 3(1) that applies to all proceedings of a specified type, provided that the only party to such proceedings is a public official. Paragraph 4(1)(b) gives a court or tribunal the power to issue a further direction overriding a general direction issued under paragraph (a) in individual cases.

Reason for taking power

62. This power allows the court or tribunal to make a general direction where it is undesirable or unnecessary to make directions in every case. This power would allow a court, for example, to issue a direction as to how applications for search warrants should be made by the procurator fiscal. It gives courts and tribunals the flexibility to manage individual cases appropriately.

63. One of the policy intentions of the Bill is to ensure that courts and tribunals are capable of continuing to operate during any period that is subject to restrictions whilst the coronavirus emergency is ongoing and in its aftermath.

64. The Bill provisions create a presumption against physical attendance at court or tribunal by enabling participation in any part of proceedings by means of video or audio (including telephone) link, subject to safeguards designed to protect the rights of the parties involved.

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Reason for choice of procedure

65. A court or tribunal direction is the most appropriate and proportionate means of exercising these powers against the background of the operational exigencies of the courts and tribunals.

Schedule 4, Part 5, Paragraph 11 (1)– Conduct of Trial on Indictment

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid no procedure

Provision

66. Paragraph 11(1) confers a power on the Scottish Ministers to provide that trial on indictment may be conducted without a jury. The power may only be used where it is necessary and proportionate to do so.

Reason for taking power

67. One of the policy intentions of the Bill is to ensure that courts are capable of continuing to operate during the period of the coronavirus outbreak and its immediate aftermath. The over-riding public health imperatives are not compatible with our current court system. In those trials which are conducted with a jury it means that 15 people are expected to work closely together in confined surroundings to act as jurors. As a result, new jury trials have been suspended.

68. Any ongoing suspension of jury trials would mean that accused people, victims and witnesses are unable to access justice and are being disadvantaged. Providing the Scottish Ministers with the power to provide that such trials may be conducted without a jury will help ensure that the justice system continues to function during this emergency period and in its

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immediate aftermath. The ability for solemn trials to be progressed during this time will maintain public confidence and keep our communities safe.

69. This measure could have been proposed to be commenced immediately on Royal Assent. But as the suspension of Jury trials has only recently happened, it was considered appropriate to not immediately move to such a significant change. But, if as appears likely, such a change does become necessary enabling the measure to be commenced promptly by way of secondary legislation will be important.

70. Before exercising the power the Scottish Ministers are under a duty to consult the Lord Justice General – the most senior judge in Scotland. In addition they must consult any other appropriate person for example representatives of the Faculty of Advocates and the Law Society of Scotland.

Reason for choice of procedure

71. These Regulations are subject to the default procedure in section 30 of the Interpretation and Legislative Reform (Scotland) Act 2010. Normally this procedure would not be chosen for such a significant change. However, this reflects the possibility that, by the time the situation has become sufficiently serious for Ministers to decide there is no alternative to introducing this measure, the Parliament might no longer be sitting.

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Schedule 4, Part 5, Paragraph 11 (7)- Conduct of Trial on Indictment

Power conferred on: High Court of Justiciary

Power exercisable by: Act of Adjournal

Parliamentary procedure: Laid no procedure

Provision

72. Paragraph 11(7) confers a power on the High Court to make Court rules to ensure that the criminal procedure for these trials will operate effectively in practice where Scottish Ministers have exercised their power under Paragraph 11(1).

Reason for taking power

73. This is to provide the High Court with sufficient flexibility to make any supplementary, incidental, consequential, transitional, transitory or saving provision that they consider necessary or expedient for the purposes of, in consequence of, or in connection with, the power under sub-section Paragraph 11(1).

Reason for choice of procedure

74. Matters of this detail which relate to the administrative and procedural work of the court are most appropriately be dealt with by the High Court of Justiciary by Act of Adjournal because they have the practical expertise to do so.

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Schedule 4, Part 7, Paragraph 13(3) – Community payback orders: extension of unpaid work or other activity requirements

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

75. This paragraph extends, by 12 months, the period within which unpaid work or other activity requirements in Community Payback Orders (“CPOs”) must be completed. This applies to all CPOs imposed by a court on or before the Bill for this Act received Royal Assent, and affects the particular period specified for each individual order.

76. Sub-paragraph (3) gives the Scottish Ministers the power to further extend this period by regulations. Such a further extension would apply to all CPOs imposed on or before the day the regulations come into force.

Reason for taking power

77. The 12 month extension to the periods within which unpaid work or other activity requirements must be completed is intended to both relieve pressure on local authorities arising from the effects of coronavirus, and to prevent those on community orders failing to comply with those orders simply because unpaid work programmes are not currently available. Should the effects of coronavirus continue to the point where, even with that 12 month extension, unpaid work cannot be delivered effectively, this power will enable the Scottish Ministers to further extend the period.

Choice of procedure

78. As this power can be used to amend timescales set by the courts in relation to the administration of sentences, it is considered appropriate that it be subject to the affirmative procedure.

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79. As an additional safeguard, the regulations can only be made if the Scottish Ministers are satisfied that, if no action were taken, it is likely that there would be non-compliance with unpaid work or other activity requirements as a result of the coronavirus pandemic, or that such regulations are necessary as a result of the impact of the pandemic on local authorities (which deliver community orders through justice social work) or on the Scottish Courts and Tribunals Service.

Schedule 4, Part 7, Paragraph 15(1) – Community orders: postponement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

80. This paragraph gives the Scottish Ministers the power to postpone the effects of CPOs or drug treatment and testing orders (“DTTOs”). The orders to be affected by such a postponement can be specified by reference to the type of order (e.g. Community Payback Order); the requirements imposed under an order (e.g. supervision requirements); the type of offender; and the type of offence the offender has been convicted of.

81. During the period of postponement, which cannot be longer than 6 months, no time elapses with regard to any relevant time periods specified in the order. For example, if a CPO contained an offender supervision requirement which, at the point of postponement, had 3 months left to run, that position would be maintained until the end of the postponement period, at which point 3 months would still remain. During the period of postponement, the offender is not subject to any of the requirements of the order and so cannot breach the order.

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82. The regulations cannot postpone an unpaid work or other activity requirement.

Reason for taking power

83. Immediate action is being taken through Schedule 4, Part 7, Paragraph 13(3) – by extending the periods within which the unpaid work or other activity requirements of CPOs must be completed - to mitigate the significant difficulties being experienced by local authorities in continuing to deliver community sentences. However, should the situation worsen, it may be necessary to take further steps to ensure that local authorities (through justice social work) have the capacity to focus on higher risk cases. This power achieves this by enabling the Scottish Ministers to postpone certain orders or requirements.

Choice of procedure

84. As this power can be used to amend the operation of sentences imposed by the courts, it is considered appropriate that it be subject to the affirmative procedure.

85. As an additional safeguard, the regulations can only be made if the Scottish Ministers are satisfied that, if no action were taken, it is likely that there would be non-compliance with the requirements of community orders as a result of the coronavirus pandemic, or that such regulations are necessary as a result of the impact of the pandemic on local authorities (which deliver community orders through justice social work) or on the Scottish Courts and Tribunals Service.

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Schedule 4, Part 7, Paragraph 16(1) – Community orders: variation

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

86. This paragraph gives the Scottish Ministers the power to vary the requirements of CPOs or DTTOs. Such variation can include revoking requirements, or orders in their entirety.

87. The orders to be affected by such a variation can be specified by reference to the type of order (e.g. Community Payback Order); the requirements imposed under an order (e.g. supervision requirements); the type of offender; and the type of offence the offender has been convicted of.

Reason for taking power

88. During the period of the coronavirus pandemic it is expected that – at a minimum – it will not be possible for those subject to community orders to complete unpaid work or other activity requirements. This is recognised in the extension to the period within which such requirements must be completed in Schedule 4, Part 7, Paragraph 13(3). Furthermore, it may become necessary for the Scottish Ministers, though the powers in Schedule 4, Part 7, Paragraph 15(1), to postpone certain orders or requirements for a period of time. As a result, there is a risk that an unmanageably large number of hours of unpaid work or other activity (and possibly other requirements) will be due to be carried out following the coronavirus pandemic, which cannot realistically be delivered.

89. In such circumstances, this power may be necessary in order to prevent the system being overwhelmed. In particular, it may be necessary to reduce or revoke certain requirements or orders in order to ensure that

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local authorities (through justice social work) and other relevant organisations can focus on higher risk, higher priority cases.

Choice of procedure

90. As this power can be used to alter or even revoke sentences imposed by the courts – which would not ordinarily be contemplated – it is considered appropriate that it be subject to the affirmative procedure.

91. As an additional safeguard, the regulations can only be made if the Scottish Ministers are satisfied that, if no action were taken, it is likely that there would be non-compliance with the requirements of community orders as a result of the coronavirus pandemic, or that such regulations are necessary as a result of the impact of the pandemic on local authorities (which deliver community orders through justice social work) or on the Scottish Courts and Tribunals Service. Furthermore, the Scottish Ministers must be satisfied that any variation through regulations does not make the affected orders more difficult to comply with.

Schedule 4, Part 9, Paragraph 20 (1) – Emergency release of prisoners

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative or made affirmative

Provision

92. Schedule 7, Part 9, Paragraph 20(1) confers a power on the Scottish Ministers to provide by regulations for the early release of a class of persons from prison. The Scottish Ministers can only exercise this power if they are satisfied that it is a necessary and proportionate response to the effects of coronavirus on prisons. The regulations must be for the purpose of protecting the security and good order of prisons or the health, safety and welfare of those accommodated or working in prisons.

This document relates to the Coronavirus (Scotland) Bill (SP Bill 66) as introduced in the Scottish Parliament on 31 March 2020

Reason for taking the power

93. The coronavirus outbreak may result in a significant reduction in prison staff which will have a significant impact on the prison regime. An outbreak of coronavirus in a prison could result in the isolation of prisoners in their cell. These risks to the operation of prisons would be alleviated by the release of prisoners. The power to authorise the early release of prisoners will enable the Scottish Ministers to act quickly to relieve the pressure on the prison estate caused by the coronavirus outbreak. This will protect the prison regime and those accommodated and working in prisons.

Choice of procedure

94. As this power will be used to authorise the release of prisoners it is considered appropriate that it be subject to the affirmative procedure.

95. The Scottish Ministers may be required to release prisoners quickly in response to changing circumstances in prison in order to protect the wellbeing of prisoners and prison staff. The timescales involved in affirmative procedure may not be conducive to taking that action quickly. Accordingly, an expedited procedure is being provided which would enable the Scottish Ministers to make regulations with immediate effect in order to release prisoners who would be released in any event in the following 180 days. The early release of prisoners who are due to be released shortly is considered to present a much lower risk to the public, and that lower risk, coupled with the significant risk to the effective operation of prisons, justifies the use of an expedited procedure.

This document relates to the Coronavirus (Scotland) Bill (SP Bill 66) as introduced in the Scottish Parliament on 31 March 2020

Schedule 6, paragraph 7(2) – Freedom of Information power to prescribe further circumstances where Scottish public authorities can extend relevant period

Power conferred on: the Scottish Ministers

Power exercisable by: direction

Parliamentary procedure: none

Provision

96. This paragraph provides that the Scottish Ministers may make directions to specify further circumstances (for the purposes of paragraph 6(1) of schedule 6) in which Scottish public authorities may extend the maximum period for responding to a request for information or a requirement for review under the Freedom of Information (Scotland) Act 2002 (“FOISA”).

97. Sections 10(1) and 21(1) of FOISA specify that Scottish public authorities must respond to requests for information and requirements for review promptly, and in any case not later than the 20th working day after receipt. Paragraph 4 of schedule 6 substitutes longer maximum time periods, and paragraph 6 enables authorities to extend those periods, in certain circumstances.

98. Paragraph 6(1) specifies that those circumstances are where it is not reasonably practicable to respond within the relevant period because of: a) the volume and complexity of the information requested, or b) the overall number of requests being dealt with by the authority at the time the request is being made.

99. Before exercising the power in paragraph 6(2), the Scottish Ministers must be of the view that exercising it would enable Scottish public authorities to better utilise resources to respond to coronavirus. They must also consult the Scottish Information Commissioner.

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Reason for taking power

100. The Scottish Ministers consider that this power is needed to allow them to adapt the operation of paragraph 6(1) in the light of authorities' experience in applying it. For example, it may become apparent as the coronavirus outbreak develops that there are other circumstances which mean that it is not reasonably practicable for authorities to comply with the original 60 working day period for responses.

101. The Scottish Ministers consider that taking a power will enable them to respond quickly and flexibly to developments in order to ensure that authorities' ability to extend maximum time periods remains effective.

Choice of procedure

102. Ministerial directions are not subject to Parliamentary scrutiny. This power is an emergency measure that is designed to allow for fine-tuning of the new discretion in paragraph 6(1) for Scottish public authorities to extend timescales. It can only be used to specify further circumstances in which it is not reasonably practicable for authorities to respond within the original maximum time periods, and so has a limited purpose. It may also only be exercised where the Scottish Ministers are of the view that exercising it would enable Scottish public authorities to better utilise resources to respond to coronavirus, and they must consult the Scottish Information Commissioner before doing so.

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Schedule 6 Part 5 paragraph 16(1) – power to modify the effect of the Public Finance and Accountability (Scotland) Act 2000 in relation to accounts required for the financial year ending 31 March 2021

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: provisional affirmative

Provision

103. Paragraph 16(1) of schedule 6 provides that Scottish Ministers may by regulations make provision modifying the effect of the Public Finance and Accountability (Scotland) Act 2000 as it applies to accounts that are required under section 19 or 20 of that Act for the financial year ending with 31 March 2021.

104. Paragraph 16(2) of that schedule goes on to provide that in particular, the regulations may make provision about the timescales in which accounts must be provided, the provision of information and documents by electronic means and the manner in which accounts and any other relevant documents are to be published.

105. This last provision is in similar terms to the approach taken to modification of statutory duties in relation to reports and other documents covered in Part 3 of that schedule from which accounts or associated documents required under section 19 or 20 of the Public Finance and Accountability (Scotland) Act 2000 are excluded.

Reason for taking power

106. This power is taken so that amendments can be made for a limited period (the 2020/2021 financial year) to the accounting regime under the Public Finance and Accountability (Scotland) Act 2000. It is a wide power

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designed to allow Scottish Ministers to deal with problems arising because of the coronavirus outbreak in the current accounting regime in respect of the Scottish Administration and other public sector bodies covered by the accounting regime.

Choice of procedure

107. The procedure is provisional affirmative so that regulations can in cases of urgency be allowed to come into force immediately. The regulations must however be approved by the Scottish Parliament and may only be made after consultation with the Auditor General for Scotland.

Schedule 6 Part 5 paragraph 16(3) – power to provide that regulations made under paragraph 17(1) apply to the financial year ending 31 March 2022

Power conferred on: Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: provisional affirmative

Provision

108. Paragraph 16(3) of schedule 6 provides that regulations made under paragraph 16(1) are to apply (with or without modification) to the financial year ending with 31 March 2022.

Reason for taking power

109. This power is taken so that amendments can be made for a limited period (the 2021/2022 financial year) to the accounting regime under the Public Finance and Accountability (Scotland) Act 2000. It is a wide power designed to allow Scottish Ministers to deal with problems arising in the 2021/2022 financial year arising because of the coronavirus outbreak. This means that if the outbreak continued until into that financial year or there

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were knock on accounting problems caused by the outbreak, these could be dealt with.

Choice of procedure

110. The procedure is provisional affirmative so that regulations can in cases of urgency be allowed to come into force immediately. The regulations must however be approved by the Scottish Parliament and may only be made after consultation with the Auditor General for Scotland.

Schedule 7 paragraph 7 – Extending notice period in respect of irritancy of commercial leases

Power conferred on: the Scottish Ministers

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

Parliamentary procedure: negative

Provision

111. Paragraph 7 of Schedule 7 alters the effect of section 4 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1985 to that the minimum period of notice which a landlord is required to give to a tenant of a commercial lease before irritating the lease is increased from 14 days to 14 weeks. New subsections (3A) provide Scottish Ministers with the power to amend that 14 week period if required through the negative procedure.

Reason for taking power

112. It is considered appropriate that Scottish Ministers have the ability to amend the length of the 14 week period in the event that the impact of the current situation lasts longer than initially envisaged.

Choice of procedure

113. 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

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expiry of provisions. It is not intended to keep provisions of the Bill in force any longer than is necessary. The negative procedure still ensures appropriate scrutiny by the Scottish Parliament.

Schedule 7 paragraphs 9 and 10 – Extending Duration of Planning Permission

Power conferred on: **the Scottish Ministers**

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

Parliamentary procedure: **negative**

Provision

114. New subsection (3C), of section 58 of the Town and Country Planning (Scotland) Act (the “1997 Act”), and subsection (8C) of section 59 of the 1997 Act define “emergency period” and “extended period”. New subsections (3D), (3E) of section 58 of the 1997 Act, and subsections (8D) and (8E) of the 1997 Act provide Scottish Ministers with the power to amend those periods if required through the negative procedure.

Reason for taking power

115. The new subsections extend the duration of planning permission or planning permission in principle where it would otherwise lapse during the emergency period. Those permissions will be extended to the end of the extended period and will lapse 12 months from the date of commencement. It is considered appropriate that 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.

Choice of procedure

116. 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. It is not intended to keep provisions of the Bill in force any longer than is necessary. The negative procedure still ensures appropriate scrutiny by the Scottish Parliament.

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Coronavirus (Scotland) Bill

Delegated Powers Memorandum

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