

Coronavirus (Discretionary Compensation For Self-Isolation) (Scotland) Bill

Revised Delegated Powers Memorandum

Introduction

1. This Memorandum has been prepared by the Scottish Government in accordance with Rule 9.3.3B of the Parliament's Standing Orders, in relation to the Coronavirus (Discretionary Compensation for Self-isolation) (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.

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

Outline Of Bill Provisions

3. The purpose of the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill is to make temporary modifications of the Public Health etc. (Scotland) Act 2008 to change a duty on health boards to a discretionary power. Instead of a duty, there will be a discretionary power for health boards to compensate people whom they ask to self-isolate for coronavirus-related reasons, and carers of such people. The modifications are temporary and apply only until the operative provision of the Bill expires.

4. The Bill has seven sections. In summary, they make provision as follows:

- Section 1 modifies sections 56 and 58 of the Public Health etc. (Scotland) Act 2008 ("the 2008 Act") so that the duty in both of those sections for health boards to pay compensation becomes a discretionary power to pay compensation, where the request to self-isolate made by the health board (or, under section 58, where the care recipient is subject to an exclusion, restriction, or quarantine order) is for a reason relating to coronavirus. Coronavirus is defined as severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).
- Section 2 provides that section 1 expires at the end of 31 October 2022. Section 2(2) provides the Scottish Ministers with a regulation-making power to make transitional, transitory or saving provision in connection with the expiry of section 1.

This document relates to the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill (SP Bill 6A) as introduced in the Scottish Parliament on 15 November 2021

- Section 3 confers powers on the Scottish Ministers to amend the expiry date of section 1, which is set out in section 2. Section 3(1) contains a power to make regulations to change the expiry date so that section 1 expires on an earlier date, to be specified in the regulations. Section 3(2) contains a power to make regulations to change the expiry date so that section 1 expires on a later date, to be specified in the regulations. Section 3(3) provides that the later date cannot be later than 6 months after the expiry date applicable at the time the regulations are made. Regulations made under section 3 may make different provision for different purposes or areas and may make transitional, transitory or saving provision.
- Section 4 provides for the relevant Parliamentary procedures to be followed when making regulations under section 3. Section 4(2A) provides that before making regulations under section 3(1) or laying draft regulations under section 3(2), the Scottish Ministers must consult each health board in Scotland as well as such other persons the Scottish Ministers consider appropriate. Regulations made to change the expiry date to an earlier date are subject to the negative procedure. Regulations made to change the expiry date to a later date are subject to the affirmative procedure. Section 4(3) provides that, when draft regulations to change the expiry date to a later date are laid before the Scottish Parliament, the Scottish Ministers must also lay before the Parliament a statement of the Ministers' reasons as to why regulations should be made. Section 4(4) provides the Scottish Ministers with the power to make regulations urgently to move the expiry date to a later date, by using the made affirmative procedure. In such cases, the regulations must be laid before the Scottish Parliament with an accompanying statement of the Scottish Ministers' reasons for making the regulations and their reasons for making the regulations urgently.
- Section 5 provides that paragraph 46 of schedule 21 of the Coronavirus Act 2020 ("paragraph 46") expires on the date on which the Bill (which will then be an Act) comes into force, to the extent that it has not already expired. Section 5(2) provides the Scottish Ministers with a regulation-making power to make transitional, transitory or saving provision in connection with the expiry of paragraph 46.
- Section 6 provides the commencement date (the day after Royal Assent) and section 7 provides the short title of the Act, once the Bill has been passed.

Rationale For Subordinate Legislation

5. The Bill confers four delegated powers on the Scottish Ministers which are set out 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.

6. The Scottish Government has had regard, when deciding whether, where and how provision should be set out in subordinate legislation rather than on the face of the Bill, to:

- the need to ensure that the modifications to the 2008 Act are only in place for so long as the Scottish Ministers consider appropriate;

This document relates to the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill (SP Bill 6A) as introduced in the Scottish Parliament on 15 November 2021

- the need to make proper use of valuable parliamentary time; and
- the need to make allowance for the uncertainty presented by the coronavirus pandemic, which might otherwise frustrate the purpose of provisions in primary legislation approved by the Scottish Parliament.

Delegated Powers

Section 2(2) – Power to make ancillary provision in connection with the expiry of section 1

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

7. Section 2(2) provides the Scottish Ministers with the power to make, by regulations, transitional, transitory or saving provision in connection with the expiry of section 1. (The Bill provides that section 1 expires at the end of 31 October 2022.) Section 2(3) provides that regulations under section 2 may make different provisions for different purposes or areas.

Reason for taking power

8. This power is considered necessary to allow the Scottish Ministers to make provision to deal with possible circumstances where a request to self-isolate is made at a time when health boards have discretion as to whether to pay compensation for self-isolation (when the modifications in this Bill are in place), but some or all of the loss is suffered at a time when the modifications have expired and the duty to pay compensation applies. In order to provide clarity in relation to such circumstances, it may be necessary to make regulations to make transitional, transitory or saving provision in connection with the expiry of section 1, as appropriate. The power may also provide some assistance in dealing with any unexpected issues or consequences related to expiry.

Choice of procedure

9. Section 2(4) provides that regulations made under section 2 are subject to the negative procedure. This approach is typical for ancillary powers of this type. The regulations may make detailed provision and such detail is appropriate for inclusion in secondary legislation subject to the negative procedure. The negative procedure provides an appropriate level of parliamentary scrutiny and efficient use of parliamentary time.

This document relates to the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill (SP Bill 6A) as introduced in the Scottish Parliament on 15 November 2021

Section 3(1) – Power to change the expiry date of section 1 to an earlier date

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

10. Section 3(1) empowers the Scottish Ministers to make regulations to amend the expiry date of section 1 (set out in section 2) so that section 1 expires at an earlier date specified in the regulations. Section 3(4) enables the Scottish Ministers to make different provision for different purposes or areas and to make transitional, transitory or saving provision, in the regulations.

Reason for taking power

11. This power has been taken to allow the Scottish Ministers to expire the modifications to the 2008 Act at an earlier date than the date specified in section 2. This is to ensure that the modifications only remain in place for as long as it is appropriate to distinguish coronavirus from other infectious diseases, in relation to which compensation must be paid by health boards under sections 56 and 58 of the 2008 Act. Factors that will be taken into account by the Scottish Ministers when determining whether it remains appropriate for the modifications to remain in place include:

- whether people are still being asked, under public health guidance, to self-isolate in certain circumstances due to coronavirus;
- whether alternative financial support for people self-isolating remains available either through the existing self-isolation support grant (SISG) or another mechanism;
- whether the expiry of the provisions would present a significant resource burden on territorial health boards.

12. The ancillary power will allow the Scottish Ministers to make any transitory, transitional or saving provision that is necessary to ensure a smooth transition between the modified regime under sections 56 and 58 of the 2008 Act, provided for by this Bill, and the default regime when the modifications end.

Choice of procedure

13. Section 4(1) provides that regulations made under section 3(1) are subject to the negative procedure. An earlier expiration date would have the effect of removing the modifications to the 2008 Act at an earlier date than anticipated during the passage of the Bill. In effect, an earlier expiration would be a return to the *status quo*, as it was prior to the coronavirus pandemic. It is therefore considered appropriate that the scrutiny offered by negative procedure achieves the best balance of parliamentary time and resource on the one hand, and the nature of the content of the regulations on the other.

This document relates to the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill (SP Bill 6A) as introduced in the Scottish Parliament on 15 November 2021

14. Section 4(2A) requires the Scottish Ministers to consult with territorial health boards and any other person they consider appropriate before making regulations under section 3(1).

Section 3(2) – Power to change the expiry date of section 1 to a later date

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative or made affirmative

Provision

15. Section 3(2) allows the Scottish Ministers to make regulations to amend the expiry date of section 1 (set out in section 2) so that section 1 expires at a later date, which is to be specified in the regulations. Section 3(4) enables the Scottish Ministers to make different provision for different purposes or areas and to make transitional, transitory or saving provision, in the regulations.

Reason for taking power

16. This power has been taken to allow the Scottish Ministers to expire the modifications to the 2008 Act at a later date than the one specified in section 2. The Scottish Ministers may not extend the expiry date by more than six months at a time. This power is needed to ensure that the modifications remain in place for as long as is considered necessary to achieve the policy aims of the Bill. As with early expiry, factors that will be taken into account by the Scottish Ministers when determining whether the modifications need to remain in place beyond the expiry date in section 2 include:

- whether people are still being asked, under public health guidance, to self-isolate in certain circumstances due to coronavirus;
- whether alternative financial support for people self-isolating remains available either through the existing self-isolation support grant (SISG) or another mechanism;
- whether the expiry of the provisions would present a significant resource burden on territorial health boards.

17. When laying regulations to extend the expiry date before the Scottish Parliament, the Scottish Ministers must also lay before the Parliament a statement of their reasons why the regulations should be made. The statement will likely discuss the reasons for the ongoing need for the modifications and the Scottish Ministers' considerations. Accordingly, the statement will likely be of interest to the Parliament when scrutinising the draft regulations.

18. The ancillary power will allow the Scottish Ministers to make any transitory, transitional or saving provision that is necessary to ensure a smooth transition between the

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modified regime under sections 56 and 58 of the 2008 Act, provided for by this Bill, and the default regime when the modifications end.

Choice of procedure

19. Section 4(2) provides that regulations made under section 3(2) are subject to the affirmative procedure. Section 4(2A) requires the Scottish Ministers to consult with territorial health boards and any other person they consider appropriate before laying regulations under section 3(2).

20. Section 4(4) provides that regulations under section 3(2) may be made as “emergency regulations”, which are subject to the made affirmative procedure, if Ministers consider that the regulations need to be made urgently. If emergency regulations are made, the Scottish Ministers must lay before the Parliament a statement of their reasons for making the regulations and their reasons for making the regulations urgently. The consultation requirement in section 4(2A) does not apply when making emergency regulations.

21. A later expiration date would have the effect of prolonging the modifications to the 2008 Act. While Parliament will have approved the modifications when the Bill is passed, it is considered that Parliament should have a further opportunity to scrutinise the effect of the modifications against the context of the pandemic at the time the regulations are to be made. However, it is acknowledged that the pandemic situation is constantly evolving and it may not be possible for Ministers to reach a view on whether the expiry date should be amended to a later date sufficiently in advance of the expiry date to allow time for the regulations to go through the affirmative procedure, particularly if Parliament is in recess. It is therefore considered that the scrutiny offered by the affirmative procedure is appropriate, however in the event that the Scottish Ministers consider that regulations need to be made urgently, the made affirmative procedure can be followed. This allows greater scrutiny than the negative procedure but ensures that regulations can be made more urgently should there be a need to do so.

Section 5(2) – Power to make ancillary provision in connection with the expiry of paragraph 46 of schedule 21 of the Coronavirus Act 2020

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

22. Section 5(2) provides the Scottish Ministers with the power to make, by regulations, transitional, transitory or saving provision in connection with the expiry of paragraph 46 of schedule 21 of the Coronavirus Act 2020 (“paragraph 46”). (Section 5(1) provides that paragraph 46 expires when the Act comes into force, to the extent that it has not already

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expired.) Section 2(3) provides that regulations under section 2 may make different provisions for different purposes or areas.

Reason for taking power

23. This power is considered necessary to allow the Scottish Ministers to make provision to deal with possible circumstances where a request to self-isolate is made in relation to a disease other than coronavirus before paragraph 46 expires, but some or all of the loss is suffered at a time after its expiry (when the duty to pay compensation applies). In order to provide clarity in relation to such circumstances, it may be necessary to make regulations to make transitional, transitory or saving provision in connection with the expiry of paragraph 46, as appropriate. The power may also provide some assistance in dealing with any unexpected issues or consequences related to expiry of paragraph 46.

Choice of procedure

24. Section 5(4) provides that regulations made under section 2 are subject to the negative procedure. This approach is typical for ancillary powers of this type. The regulations may make detailed provision and such detail is appropriate for inclusion in secondary legislation subject to the negative procedure. The negative procedure provides an appropriate level of parliamentary scrutiny and efficient use of parliamentary time.

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