

# DELEGATED POWERS AND LAW REFORM COMMITTEE

## 6th Meeting, 2022 (Session 6) Tuesday 22 February 2022

### Instrument Responses

#### Coronavirus Act 2020 (Alteration of Expiry Date) (Scotland) Regulations 2022 (2022/40)

On 8 February 2022, the Committee asked the Scottish Government:

1. The instrument is laid under made affirmative procedure in terms of section 95(2) and (6) of the Coronavirus Act 2020. The Policy Note states that “provisions in the Act (section 95) only allow this procedure to be used and not the use of the draft affirmative procedure”.

Section 95(2) provides that regulations made by the Scottish Ministers under section 90(2) must be laid before the Scottish Parliament as soon as reasonably practicable after being made. However, section 95(5) provides that subsection (2) [of section 95] does not apply “*if the regulations have been subject to the affirmative procedure* (see section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010)”.

It would appear that this provision is similar to the choices of procedure provided for in section 5(3) of the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 and paragraph 1 of schedule 7 of the European Union (Withdrawal) Act 2018. Notably, in cases where affirmative procedure is not mandated to apply in respect of the relevant powers, there is a choice of negative or affirmative procedure applying to those powers, which in both cases is expressed as “*(if they have not been subject to the affirmative procedure)* subject to the negative procedure”. It would appear that these references to affirmative procedure are not to the mandatory application of the affirmative procedure, but instead to a choice of affirmative procedure in circumstances where the negative procedure is not otherwise applied.

It is also to be noted that the [UK Delegated Powers Memorandum](#) for the clause containing the power that came to be contained in section 90 of the 2020 Act indicates that the intention was for there to be a choice of procedure between made affirmative and affirmative procedure applying to the power to extend the expiry date exercised by the Minister of the Crown or the devolved authorities (the Scottish Ministers in Scotland) – see the foot of page 84 and paragraphs 413 to 415 on page 85.

In light of the above, please explain why it is considered that section 95 only allows made affirmative procedure to be used and not affirmative procedure.

2. Regulation 2(a) of the instrument extends the expiry of section 18(2) and Part 2 of schedule 13 of the UK 2020 Act to 24 September 2022. Part 2 of schedule 13 is made up of paragraphs 10 to 16. Section 89(1) provides that the 2020 Act expires at the end of the period of 2 years beginning with the day on which it is passed, subject to subsection (2) and section 90. Section 89(2)(s) excludes “paragraphs 8, 9, 15, 16 and 30 of Schedule 13, and section 18 and paragraphs 1, 10 and 17 of that Schedule so far as relating to those paragraphs.”
  - a. Is there an error insofar as regulation 2(a) of the instrument refers generically to Part 2 of schedule 13 of the 2020 Act, given that paragraphs 10, 15 and 16 in Part 2 of schedule 13 are excluded from the expiry provisions in section 89?
  - b. While it would appear that regulation 2(a) would meaningfully extend the expiry of paragraphs 11, 12, 13 and 14 of schedule 13 to 24 September 2024, what is considered to be the effect of the provision insofar as it extends the expiry of paragraphs 10 (definition of “1965 Act”), 15 (transitional provision) and 16 (direction on deadline for delivery of a relevant document) to 24 September 2022?

On 11 February 2022, the Scottish Government responded:

1. Having considered the wording of the legislation again, the Scottish Government acknowledges that section 95(5) does give us a choice of procedure, between the affirmative and made affirmative procedures.

We accept that we misunderstood the provision and erred in taking the view that only the made affirmative procedure was available to us for these Regulations. Given that we were working on the basis that the only procedure that was available was made affirmative, we sought to give Parliament as much time as possible and in particular to allow the 40 days in the standing orders that applies to committee reporting on an affirmative instrument, prior to the instrument coming into force.

Given that there is a choice of procedure offered by section 95(5), and there is no precondition attached to the use of either procedure, the use of made affirmative procedure does not affect the validity of this instrument.

We will amend the policy note for the Regulations accordingly.

2(a). We agree regulation 2(a) read on its own implies that the transitional provisions in paragraphs 15 and 16 of schedule 13, and section 18(2) and paragraph 10 of that schedule so far as relating to those paragraphs 15 and 16 are also extended to 24<sup>th</sup> September. The Scottish Government thanks the Committee for drawing this matter to their attention.

(b) It is agreed that regulation 2(a) extends the expiry of paragraphs 11, 12, 13 and 14 of schedule 13 to 24 September 2022, in accordance with the policy intention. (There appears to be a typographical error in the question referring to 2024.) We do not, however, consider that the instrument has a wider effect than intended or that there is a concern with its effect or vires. The lead-in to regulation 2 makes clear

explicitly that the instrument (and so regulation 2(a)) only extends the relevant provisions “when they would otherwise expire by virtue of section 89 of the Act”. As

those provisions do not have an expiry date, in accordance with section 89(2)(s) of the 2020 Act, regulation 2(a) has no effect on the duration of paragraphs 15 and 16 of schedule 13, and section 18 and paragraph 10 of that schedule so far as relating to those paragraphs.

We would propose nonetheless to amend the policy note for the instrument to add an explanation of the effect of regulation 2(a) and section 89(2)(s).

### **Forensic Medical Services (Self-Referral Evidence Retention Period) (Scotland) Regulations 2022 (2022/Draft)**

On 3 February 2022 the Scottish Government was asked:

The instrument is made under the enabling power in section 8(1)(b) of the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021. Section 8 will be commenced by SSI 2022/24 on 1 April 2022. The instrument is therefore made in exercise of a power that is not in force at the time of making it.

Section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that where an Act of the Scottish Parliament confers power to make a Scottish instrument or establish bodies corporate (among other things), that power may be exercised during the pre-commencement period if it is necessary or expedient to do so for the purpose of bringing the Act into force or giving full effect to the Act at or after the time when the provision conferring the power comes into force.

In the absence of any explanation, please explain why the anticipatory exercise of power is considered necessary or expedient under section 4 of the 2010 Act.

On 8 February 2022 the Scottish Government Legal Directorate responded:

Following the precedent set in *Usher v Barlow* (1952 Ch 255), it is considered expedient to rely on the anticipatory exercise of powers in order to bring this instrument into force at the same time as section 8(1)(b) of the FMS Act. That section empowers the Scottish Ministers to set a period in regulations, after which a health board must ensure that evidence collected during a self-referral forensic medical examination (FME) and stored by them is destroyed. To bring the FMS Act into force without the expiry period for the retention of evidence being specified by the Scottish Ministers would arguably not give full effect to the Act because it would allow health boards to retain evidence, without clarity as to the time limits for retention (except in circumstances where the person who underwent the examination requests it to be destroyed under section 8(1)(a)). This may lead to uncertainty and confusion for both health boards and individuals who have undergone a FME. Relying on the anticipatory exercise of powers avoids the potential for any such confusion. It will help provide certainty to health boards and individuals as to how long evidence will be stored for, from the date that the new statutory duties in the FMS Act come into force on 1 April 2022.

**Forensic Medical Services (Modification of Functions of Healthcare Improvement Scotland and Supplementary Provision) Regulations 2022 (2022/Draft)**

On 3 February 2022 the Scottish Government was asked:

The instrument is made under the enabling powers in sections 13(4)(a) and 19(3)(a) of the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021.

Section 19(3)(a) was commenced the day after the 2021 Act received Royal Assent, on 21 January 2021. Section 13(4) will be commenced by SSI 2022/24 on 1 April 2022. While the ancillary power in section 19(4) is in force, the enabling power in section 13(4) is not. The instrument is therefore made in exercise of a power that is not in force at the time of making it.

Section 4 of the Interpretation and Legislative Reform (Scotland) Act 2010 provides that where an Act of the Scottish Parliament confers power to make a Scottish instrument or establish bodies corporate (among other things), that power may be exercised during the pre-commencement period if it is necessary or expedient to do so for the purpose of bringing the Act into force or giving full effect to the Act at or after the time when the provision conferring the power comes into force.

In the absence of any explanation, please explain why the anticipatory exercise of power is considered necessary or expedient under section 4 of the 2010 Act.

On 8 February 2022 the Scottish Government responded:

Following the precedent set in *Usher v Barlow* (1952 Ch 255), it is considered expedient to rely on the anticipatory exercise of powers in order to bring this instrument into force at the same time as the enabling power section 13(1) of the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Act 2021 (“the FMS Act”). Section 13(1) enables the Scottish Ministers to confer functions on specified bodies including Healthcare Improvement Scotland (“HIS”). The functions conferred on HIS are needed to ensure effective delivery of the service under the FMS Act and place that service in the same position as health care functions. The Regulations therefore provide for the oversight of those functions by HIS when the Act is brought fully into force and to give full effect to the Act. Included in the functions is a power for HIS to inspect any service provided under the 2021 Act. Relying on the anticipatory exercise of powers provides certainty that this oversight is available from the date that the FMS Act comes into force.