

# Delegated Powers and Law Reform Committee

## 7th Meeting, 2021 (Session 6)

Tuesday, 1 March 2022

### SSI cover note

#### Purpose

1. At its meeting on [Tuesday 22 February 2022](#), the Committee agreed to defer its consideration of the following instruments until its next meeting:
  - [Coronavirus Act 2020 \(Alteration of Expiry Date\) \(Scotland\) Regulations 2022 \(SSI 2022/40\)](#); and
  - [Health Protection \(Coronavirus, Restrictions\) \(Directions by Local Authorities\) \(Scotland\) Amendment Regulations 2022 \(SSI 2022/draft\)](#)
2. This is to allow the Committee to take evidence from the Deputy First Minister and Cabinet Secretary for Covid Recovery, John Swinney MSP.

#### Background to the instruments

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

3. The instrument is made under section 90 of the UK Coronavirus Act 2020. It extends the expiry date of the following provisions of the 2020 Act that apply in Scotland from 24 March 2022 to 24 September 2022:
  - Section 18(2) and Part 2 of schedule 13 – permitting remote registration of deaths and still-births;
  - Section 36 – removing the requirement for vaccinations and immunisations of persons against any disease to be delivered only by or under the direction or control of a medical practitioner;
  - Section 37(2) and certain provisions of Part 2 of schedule 16 – permitting Scottish Ministers to give a “boarding accommodation closure direction” to the relevant manager of a school boarding establishment or a “student accommodation closure direction” to the relevant manager of student accommodation, as well as related duties to have regard to any advice relating to the incidence or transmission of coronavirus from the Chief Medical Officer;
  - Section 38(2) and Part 2 of schedule 17 – powers for Scottish Ministers to give “educational continuity directions” relating to the continuity of education and childcare;
  - Section 49 and schedule 19 – the power to make health protection regulations for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Scotland.

4. The instrument is subject to the made affirmative procedure. It was laid on 3 February 2022 and, subject to parliamentary approval, will come into force on Thursday 24 March 2022.
5. In correspondence with the Scottish Government, the Committee sought clarification on:
  - the statement in the [original accompanying Policy Note](#) that only the made affirmative procedure was available for this instrument; and
  - the extension of the expiry, by regulation 2(a) of the instrument of “Part 2 of schedule 13” of the 2020 Act.
6. The full text of the Committee’s questions, and the Scottish Government’s response, can be read in the **Annex**.
7. Following the Committee’s questions and as outlined in the Scottish Government’s response, a [revised Policy Note](#) for the instrument was subsequently published.

**Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Amendment Regulations 2022 (SSI 2022/draft)**

8. This instrument is made under paragraph 1(1) of schedule 19 of the Coronavirus Act 2020. It amends the [Health Protection \(Coronavirus, Restrictions\) \(Directions by Local Authorities\) \(Scotland\) Regulations 2020 \(SSI 2020/262\)](#) (“the Directions Regulations”) by extending the date on which they expire from 25 March 2022 to 24 September 2022.
9. This instrument is subject to the affirmative procedure. The instrument was laid in draft on 9 February 2022 and, if approved by the parliament, will also come into force on Thursday 24 March 2022.
10. The [Policy Note](#) for the instrument outlines that the policy objectives for the Directions Regulations are to support local outbreak management and to respond to cases in the community, ensuring that local authorities have powers to take direct measures where necessary and proportionate in relation to premises, events, and public outdoor spaces. The Policy Note adds that the proposed extension of the Directions Regulations “ensures that powers to support this are able to remain in place beyond 25 March 2022, with an expiry date of 24 September 2022”. The Policy Note indicates that this extension is in line with the extended expiry date of the power to make regulations in paragraph 1(1) of schedule 19 of the Act under SSI 2022/40.

## Additional information

11. The Committee will also consider at the meeting, under agenda items 4 and 5, the following two instruments which seek to amend the expiry dates of the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No. 2) Act 2020 and expire certain provisions of these Acts. These are:

- [Coronavirus \(Scotland\) Acts \(Amendment of Expiry Dates\) Regulations 2021 \(SSI 2022/draft\)](#)
  - The affirmative instrument was laid in draft on 23 February 2022. If approved by the Parliament, it will come into force on Wednesday 30 March 2022. More details can be found in the instrument's [Policy Note](#).
- [Coronavirus \(Scotland\) Acts \(Early Expiry of Provisions\) Regulations 2022 \(SSI 2022/64\)](#)
  - This negative instrument was also laid on 23 February 2022. Subject to annulment, it will come into force on Tuesday 29 March 2022. More details can be found in the [Policy Note](#) for the Regulations.

12. The lead committee for all four instruments is the COVID-19 Recovery Committee. It is anticipated that these will be considered at its meeting on Thursday 17 March 2022.

**February 2022**

## Correspondence with the Scottish Government

### Coronavirus Act 2020 (Alteration of Expiry Date) (Scotland) Regulations 2022 (SSI 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).