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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill: Stage 1



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meetings on 23 November and 14 December 2021, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill ("the Bill") at Stage 1.ⁱ
2. At its first meeting to consider the Bill, the Committee agreed to write to John Swinney MSP, Deputy First Minister and Cabinet Secretary for Covid Recovery, with questions on the delegated powers. The Committee considered the Cabinet Secretary's response at its meeting on 14 December 2021. The full correspondence is included in the Annex.
3. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of the Standing Orders.

ⁱ The Bill as introduced as well as all accompanying documents are available [here](#).

Overview of the Bill

4. This Scottish Government Bill was introduced by the Deputy First Minister and Cabinet Secretary for Covid Recovery, John Swinney MSP, on 15 November 2021. The lead committee is the COVID-19 Recovery Committee.
5. The Bill makes temporary modifications to the Public Health etc. (Scotland) Act 2008 (“the 2008 Act”) so that health boards have discretion as to whether to pay compensation for self-isolation in connection with COVID-19, rather than a duty. Further detail of the background to Bill can be found in the accompanying [Policy Memorandum](#).
6. The [Explanatory Notes](#) to the Bill explain that the Public Health etc. (Scotland) Act 2008 contains, at section 56, a duty on health boards to compensate people who are asked in writing by the health board to voluntarily quarantine, or to limit their movements or activities. Section 58 of the same Act sets out a further duty on health boards to compensate carers of those people and carers of people subject to an exclusion order, restriction order or quarantine order. A temporary modification of these duties was contained in paragraph 46 of schedule 21 of the Coronavirus Act 2020 which was a response to the situation caused by the coronavirus (COVID-19) pandemic.
7. The modification made by the Coronavirus Act 2020 changed the duty on health boards to pay compensation to a discretionary power to do so, during times that Scotland is in a “transmission control period” by virtue of a statutory declaration made under paragraph 25 of schedule 21 of that Act. The statutory declaration must be revoked by the Scottish Ministers when they are no longer of the view that COVID-19 is a serious and imminent threat to public health, and that the powers in schedule 21 of the Coronavirus Act 2020 remain a suitable means to reduce transmission. If the statutory declaration is revoked, and accordingly the modifications made by paragraph 46 of schedule 21 of the Coronavirus Act 2020 cease to be of effect, at a time when people are still being asked by health boards to voluntarily self-isolate as a result of the COVID-19 pandemic, health boards will be under an obligation to pay compensation to those people and to their carers.
8. The Bill has the effect that the duty on health boards to pay compensation is reinstated in respect of requests to self-isolate for reasons other than COVID-19. Where the request is made for COVID-19 related reasons, the Bill provides that payment of compensation is discretionary. This modification has effect for an initial period of approximately 6 months from commencement of the Bill. This period is subject to amendment by the Scottish Ministers under the regulation-making powers set out in the Bill. The period may be reduced, or it may be extended by no more than 6 months at a time.

Delegated powers

9. The Bill confers four powers to make subordinate legislation on the Scottish Ministers. The Scottish Government has prepared a [Delegated Powers Memorandum](#) which sets out the reasoning for taking the delegated powers in the Bill and the procedures chosen.
10. At its meeting on 23 November 2021, the Committee was content with the following delegated powers:
 - Section 2(2) – Power to make ancillary provision in connection with the expiry of section 1; and
 - Section 5(2) – Power to make ancillary provision in connection with the expiry of paragraph 46 of schedule 21 of the Coronavirus Act 2020.
11. However, the Committee agreed to write to the Scottish Government to raise questions in relation to the regulation-making powers to vary expiry dates within the Bill, in relation to:
 - Section 3(1) – Power to change the expiry date of section 1 to an earlier date; and
 - Section 3(2) – Power to change the expiry date of section 1 to a later date.

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

12. Section 3(1) allows Scottish Ministers to make regulations to alter the expiry date of section 1 to allow the expiry date to be brought forward to an earlier date specified within the regulations and can make different provision for different purposes or areas and to make transitional, transitory or saving provision.
13. The Committee noted that the decision to end the modifications made by this Bill early could have a significant impact, both financially and administratively, upon health boards, the impact of which could also vary significantly according to each individual health board. The Committee therefore asked the Deputy First Minister and Cabinet Secretary for Covid Recovery, John Swinney MSP (the full correspondence is available in the Annex), whether he would consider it appropriate to include a statutory requirement to consult with health boards before regulations under section 3(1) were made.
14. In his response, the Cabinet Secretary stated that he was of the view that it would be appropriate to include a statutory requirement to consult with health boards before regulations under section 3(1) were made. This, Mr Swinney stated, would ensure that health boards are fully briefed and their views considered. The Cabinet Secretary's response also said that this consultation requirement should go further and be a requirement before regulations under section 3(2) are made to expire the

provisions at a later date.

15. The Cabinet Secretary confirmed that a Government amendment would be lodged at Stage 2 to meet this aim. Specifically, the amendment would include a duty on Ministers to consult with health boards and other persons they consider appropriate, in advance of making regulations that would expire the provisions of this Bill earlier than the date set out either on the face of the Bill, or extend those provisions further, through regulations made under sections 3(1) and 3(2).

16. The Committee welcomes the Cabinet Secretary's commitment to lodge an amendment to the Bill at Stage 2 introducing a duty to consult with health boards, and any other persons as the Scottish Ministers consider appropriate, in advance of any regulations under section 3(1) or 3(2) being made.

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

17. As referenced earlier in this report, section 3(2) allows Scottish Ministers to make regulations to alter the expiry date of section 1 so the expiry date can be extended to a later date specified within the regulations. This can be no more than 6 months after the expiry date already provided for and can make different provision for different purposes or areas and to make transitional, transitory or saving provision.
18. Section 4 sets out the relevant Parliamentary procedure for regulations made under section 3. Subsection (2) provides that regulations moving expiry to a later date are subject to the affirmative procedure in the Scottish Parliament. When a draft of regulations to move expiry to a later date is laid before the Scottish Parliament, there is also a duty on the Scottish Ministers, under subsection (3), to lay before the Parliament a statement of their reasons why the regulations should be made.
19. Subsection (4) gives the Scottish Ministers the power to make urgent regulations moving expiry to a later date. If the Scottish Ministers consider that such regulations are required then the affirmative procedure will not apply and when the regulations are made they will be effective immediately. The regulations must be laid before the Scottish Parliament, along with a statement of the Scottish Ministers' reasons for making the regulations. The regulations will cease to have effect 28 days after they are made unless the Parliament approves them by resolution within that period.
20. The Committee asked the Deputy First Minister and Cabinet Secretary for Covid Recovery, John Swinney MSP (the full correspondence is available in the Annex) for further details with regards to the use of the made affirmative procedure where regulations are made under section 3(2). Firstly, whether the made affirmative procedure should be available to change the expiry date of section 1 to a later date, and secondly, the likelihood of the made affirmative procedure being used given the significance of self-isolation in the strategy against the spread of coronavirus.
21. In response, the Cabinet Secretary said that the ability to lay regulations under the

made affirmative procedure was "...vital in a scenario where regulations need to be made urgently." Mr Swinney added:

” This is most likely to occur only where case numbers or isolation policy have substantially reduced the number of people who would be eligible for compensation if the provisions in this Bill expired. In such a situation, it is possible that very close to an expiry date the Covid-19 case numbers or isolation requirements might change and, particularly given the potential for this to happen during a Parliamentary recess, this may require immediate action to extend the expiry date. It is these potential circumstances that give rise to the need to introduce the ‘made affirmative’ procedure.”

22. The Cabinet Secretary nevertheless emphasised that the Scottish Government's intention is to use the affirmative procedure if possible. Mr Swinney added that inclusion of the made affirmative procedure was "...an option of last resort, should the modification need to be extended in an urgent timeframe."
23. The Committee notes that the modifications of this Bill, if expired too early, could impact significantly upon health boards both in terms of the administrative burden of dealing with such applications and in terms of financial impact in making payment for such claims. Should this situation arise for the health boards, it would have the effect that service users would feel this impact in terms of the services that they receive from health boards who have already been under significant pressure due to the pandemic response.
24. The Committee nevertheless considers that the made affirmative procedure is a process to only be used in cases of urgency. The use of this procedure impacts significantly on the ability of Parliament to conduct effective and proportionate scrutiny of subordinate legislation. It is of importance that regulations that continue to modify the rights of individuals to access compensation when they are asked to self-isolate by a health board are only in place for as long as is necessary. Any extensions to the power to change the expiry date of section 1 to a later date should therefore be given the appropriate Parliamentary time and consideration prior to being extended where possible. For that reason, the affirmative procedure, providing the highest level of scrutiny, would be appropriate to be used when extending the expiry date of the modifications introduced by this Bill.
25. The Committee notes the clear requirement, and expectation, that the affirmative procedure be used to extend the expiry date of section 1 of this Bill. It nevertheless acknowledges that there is however an inherent risk on health boards in there being no ability to make use of the made affirmative procedure in circumstances of genuine urgency. The Committee emphasises that the made affirmative procedure should not be used to replace the appropriate planning and making of subordination by the Scottish Government to allow appropriate Parliamentary scrutiny. That being said, the Committee accepts that there remains a level of uncertainty about what the future of the pandemic may bring, in terms of increasingly transmissible variants such as Omicron and potentially sharp changes in case numbers.
26. The Committee considers that a requirement to produce a statement of reasons for the making of the regulations, regardless of which procedure is used to extend the expiry date of section 1, is appropriate and is provided for in the Bill. Additionally, as noted earlier in this report, there is a commitment from the Scottish Government that it will lodge an amendment to the Bill which would introduce a duty to consult

health boards and any other persons the Scottish Ministers consider appropriate prior to regulations being made under this power, or under section 3(1) of the Bill. These additional requirements have the effect of 'hemming in' the made affirmative procedure to some extent.

27. While the Committee finds it difficult to see when the Scottish Ministers would need to use the urgent procedure, in light of the commitment to consult and requirement to lay a statement of reasons, alongside the potential need to act urgently while the pandemic is ongoing, having an option to exercise the power urgently is considered appropriate.

28. The Committee is therefore content with the power in section 3(2) in principle, and is content that it is subject to the affirmative procedure, or where it is urgent, the made affirmative procedure.

Annex

Letter to the Deputy First Minister and Cabinet Secretary for Covid Recovery

At its meeting yesterday the Delegated Powers and Law Reform Committee considered the delegated powers in the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill.

The Committee would be grateful if you could provide some additional information in relation to the following powers.

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

As you know, section 3(1) allows Scottish Ministers to make regulations to alter the expiry date of section 1 to allow the expiry date to be brought forward to an earlier date specified within the regulations and can make different provision for different purposes or areas and to make transitional, transitory or saving provision.

The Committee noted that the decision to end the modifications made by this Bill early could have a significant impact, both financially and administratively, upon health boards, the impact of which could also vary significantly according to each individual health board.

In light of the above, do you consider that a statutory requirement to consult with the health boards in advance of regulations being made under section 3(1) would be appropriate here?

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

Section 3(2) allows Scottish Ministers to make regulations to alter the expiry date of section 1 so the expiry date can be extended to a later date specified within the regulations, which can be no more than 6 months after the expiry date already provided for and can make different provision for different purposes or areas and to make transitional, transitory or saving provision.

The Committee noted that the Parliament should normally have the opportunity to scrutinise the effect of the ongoing modifications against the context of the pandemic at the time the regulations are made via the use of the affirmative procedure.

However, section 3(2) also allows the made affirmative procedure to be used to extend the expiry date where the Scottish Ministers consider that the regulations need to be made urgently. The Delegated Powers Memorandum for the Bill states that as the pandemic situation is constantly evolving, it may not be possible for Scottish Ministers to reach a view on whether the expiry date should be extended sufficiently in advance of the expiry

date to allow time for regulations to be progressed through the affirmative procedure, particularly if the Parliament is in recess.

The Committee would welcome further detail on why you consider that the made affirmative procedure should be available to change the expiry date of section 1 to a later date? In addition, given the significance of self-isolation in the strategy against the spread of coronavirus, how likely is it that the made affirmative procedure would be required to be used?

Given the expedited timetable for the Parliament's consideration of this Bill, I would be grateful for a response by **Wednesday 1 December 2021**. I look forward to hearing from you.

Stuart McMillan MSP, Convener

Response from Deputy First Minister and Cabinet Secretary for Covid Recovery

Thank you for your letter of 24 November, in which you asked for some additional information on the regulation-making powers to vary expiry dates within the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill.

The policy context of the COVID-19 pandemic has been, by its nature, highly volatile – with high rises and sharp falls in cases occurring over the span of weeks or months. This makes concrete prediction with regard to future conditions in the pandemic relatively difficult. A large increase in cases, as we are seeing in Europe at the moment, or a new, highly transmissible variant of concern, could change that context significantly.

Statutory requirement to consult with health boards in advance of regulations being made under section 3(1)

You outlined that, in the Committee's view, the decision to expire the modifications to the Public Health etc. (Scotland) Act 2008 ("the 2008 Act") early could have a significant impact on health boards. In addition, you asked whether I would consider it appropriate to include a statutory requirement to consult with health boards before regulations under section 3(1) were made.

I am of the view that this would be appropriate in order to ensure that health boards are fully briefed and their views considered. In my view, this requirement to consult should go much further, and would also be appropriate before regulations under section 3(2) are made.

I am prepared to commit that the Scottish Government would consult and engage with health boards, before a decision to extend, or expire early, these provisions were made. Therefore I am willing to accept that a statutory requirement to consult with health boards would be appropriate.

I am happy, therefore, to commit that a Government amendment will be lodged with a view to amending the Bill, to include a duty on Ministers to consult with health boards and other persons they consider appropriate, in advance of making regulations that would expire the provisions of this Bill earlier than the date set out either on the face of the Bill, or extend those provisions further, through regulations made under sections 3(1) and 3(2).

Made affirmative procedure in relation to extension of expiry date and likelihood of this needing to be used

In addition, you asked for further detail about the use of the made affirmative procedure in certain cases where regulations are made under section 3(2). Section 3(2) enables the Scottish Ministers to make regulations to change the expiry date of section 1 to a later date. That later date can be no more than six months after the expiry date currently specified in the Bill or within regulations.

I note the Committee's observation that the Parliament would normally have the opportunity to scrutinise the effect of the ongoing modifications at the time of the use of the affirmative procedure. I agree that this is important. Indeed, that is why as drafted, there is a requirement for the use of an affirmative procedure, if possible. The intention behind this was to ensure that Parliament had as much ability to scrutinise the requirement for an extension as possible. The inclusion of the 'made affirmative' option within this Bill is considered as an option of last resort, should the modification need to be extended in an urgent timeframe.

The inclusion of the ability to lay regulations under the 'made affirmative' procedure here is vital in a scenario where regulations need to be made urgently. This is most likely to occur only where case numbers or isolation policy have substantially reduced the number of people who would be eligible for compensation if the provisions in this Bill expired. In such a situation, it is possible that very close to an expiry date the Covid-19 case numbers or isolation requirements might change and, particularly given the potential for this to happen during a Parliamentary recess, this may require immediate action to extend the expiry date. It is these potential circumstances that give rise to the need to introduce the 'made affirmative' procedure.

I hope the above is helpful in providing the additional information you seek. I look forward to our forthcoming evidence sessions, and should you require anything further from me, please do not hesitate to contact me. I have copied this letter to the Minister for Parliamentary Business, Cabinet Secretary for Health, Minister for Public Health, Women's Health and Sport and to the Lord Advocate, for awareness.

John Swinney MSP, Deputy First Minister and Cabinet Secretary for Covid Recovery

