

# Coronavirus (Recovery and Reform) (Scotland) Bill

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## 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 (Recovery and Reform) (Scotland) Bill ("the 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 Bill is to embed reforms in Scotland's public services and justice system that, though necessitated by the Covid<sup>1</sup> pandemic, have delivered improvements for service users and improved efficiency. The Bill will also help build resilience against future public health threats. Furthermore, the Bill will continue certain temporary justice system provisions on a longer extension basis as part of the Recover, Renew, Transform<sup>2</sup> programme and as a response to the impact of Covid on Scotland's justice system, most particularly where backlogs have unavoidably built up.
4. Further information about the background and the policy intention behind the Bill and also about the existing temporary Covid legislation is set out in the Policy Memorandum which accompanies the Bill.

### Rationale for Subordinate Legislation

5. The Bill contains 15 delegated powers which are explained in more detail below, with a short explanation of what each power allows, why the power has been taken in

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<sup>1</sup> Covid refers to COVID-19, the disease caused by Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2)

<sup>2</sup> [Justice - vision and priorities: report - gov.scot \(www.gov.scot\)](https://www.gov.scot/resources/documents/2020/12/Justice-vision-and-priorities-report-2020-21.pdf)

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the Bill and why the selected form of parliamentary procedure has been considered appropriate.

6. The Scottish 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 (for example changes in the scientific understanding of how best to counter future pandemics or other public health threats);
- the need to make proper use of valuable parliamentary time; and
- the need to deal with the unexpected, (for example the need to act urgently to deal with a future public health threat).

## Delegated Powers

Section 1 (inserts section 86A(1) into the Public Health etc. (Scotland) Act 2008) – Public health protection regulations

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative or made affirmative

### Provision

7. Section 1 of the Bill amends the Public Health etc. (Scotland) Act 2008 by inserting a new power to make public health protection regulations.

8. Proposed section 86A(1) gives the Scottish Ministers the power to make regulations to make provision 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, whether from risks originating there or elsewhere.

### Reason for taking power

9. The Public Health etc. (Scotland) Act 2008 contains powers, where there is a localised threat to public health, for local authorities and health boards to act to protect public health, such as the power to request a sheriff court order requiring a person to undergo a medical examination or be quarantined.

10. However, in circumstances where the nature of the public health threat is such that a centrally coordinated response is considered to be appropriate, as has been the case during the Covid pandemic, the powers currently in the 2008 Act have not been

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sufficient to facilitate such a response. In such circumstances broader powers are needed to respond effectively to significant threats to public health. It should be noted that a centrally coordinated response should not be taken to mean that the same restrictions and requirements must apply to all parts of the country (or that there would need to be restrictions and requirements in place for the whole of Scotland). As Covid has shown, there may be circumstances where different restrictions or requirements are appropriate for different parts of the country, but still requiring to be coordinated and determined at a national level. These provisions could be exercised in such a way.

11. Delegated powers are appropriate to deal with future public health threats that could pose a significant risk to human health as they are, by their nature, unpredictable and sometimes unforeseeable. In addition to Covid, there have been relatively recent outbreaks of new diseases, SARS and MERS, and instances of contamination, such as Salisbury. It is not possible to elucidate all potential examples, and therefore the provisions provide scope for Ministers to tailor legislation to the appropriate circumstances of any threat as it emerges.

12. The content of any regulations laid using these new public health protection powers will by necessity also depend on the nature of the threat faced; the actions required to control it; and the potential consequences of failing to mount an effective response. The power, therefore, is a broad one so as not to unduly constrain the range of potential responses. It does, however, provide for a range of potential restrictions and requirements that may be imposed, with additional safeguards where this is considered necessary. Examples of restrictions and requirements which may be imposed include, but are not limited to, limits on gatherings; a requirement that a pupil is kept away from school; a requirement that someone abstains from working/trading; or a requirement that buildings or vehicles be disinfected/decontaminated.

## Choice of procedure

13. Section 122(5) of the Public Health etc. (Scotland) Act 2008 is amended to provide that regulations made under section 86A(1) are subject to the affirmative procedure. Section 122(6) of that Act is amended to provide that regulations made under section 86A(1) may be made as “emergency regulations”, which are subject to the made affirmative procedure, if the Ministers consider that the regulations need to be made urgently.

14. The affirmative procedure has been chosen as the appropriate procedure since, given the wide-ranging nature of the power, it is appropriate that an increased level of scrutiny and opportunity for debate is afforded to the Scottish Parliament. It should be noted that there may be circumstances where the Scottish Ministers consider that because of the urgency it is necessary to depart from the affirmative procedure – for example in circumstances where immediate action is considered to be necessary in order to try to contain the spread of an infectious disease. The provisions allow for the use of made affirmative procedure in such instances.

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15. The made affirmative procedure would only be used in circumstances where there is an urgent need for action; and may be relied upon to remove restrictions or requirements no longer considered to be proportionate, as well as to impose restrictions or requirements as part of a public health response. As is the case now for regulations made under schedule 19 of the UK Act to respond to the Covid pandemic, when exercising these new powers the Scottish Ministers would consider carefully, based on the circumstances at the time, whether regulations were needed urgently, and the use of the made affirmative procedure was justified.

16. By way of example, should an incident such as the Salisbury poisoning happen in Scotland, and be as widespread as to need a strategic, centralised response, it is entirely conceivable that the Scottish Ministers would be required to act so urgently to protect public health that using the made affirmative would be appropriate. In recognition of the role of the Scottish Parliament in scrutinising measures taken using these powers, any regulations made using the made affirmative procedure will cease to have effect at the expiry of the period of 28 days, beginning with the day on which the regulations were made unless, before the expiry of that period, the regulations have been approved by a resolution of the Scottish Parliament. The Scottish Ministers propose that this balances the need for parliamentary scrutiny with the potential need to respond urgently to the serious, and time sensitive, public health threats posed by an incidence or spread of infection or contamination.

17. Conversely, and again by way of example only, regulations made to enhance resilience and preparedness for a future threat i.e. not in direct response to a public health threat and therefore not as time sensitive, would likely follow the usual affirmative procedure.

18. As mentioned above, there are potentially unlimited threats to public health, and the Scottish Ministers need the tools to tackle all threats appropriately. While the affirmative procedure is the default, it is considered crucial that the Scottish Ministers have the flexibility to react quickly to an emerging or ongoing public health threat. The availability of the made affirmative procedure where regulations are needed urgently ensures that Ministers have the most flexible and robust powers available to protect the health of the citizens of Scotland.

## Section 1 (inserts section 86H into the Public Health etc. (Scotland) Act 2008) – Public health monitoring measures

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

### Provision

19. Proposed section 86H provides that the Scottish Ministers may by regulations make provision conferring on local authorities, health boards or other persons functions in relation to the monitoring of public health risks.

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### Reason for taking power

20. The provisions contain a power to confer functions on bodies responsible for safeguarding public health, such as local authorities, health boards and environmental health organisations, to monitor public health risks. This power would allow for such functions to be conferred in a range of scenarios where early monitoring may be useful – for example, monitoring could cover identification of environmental changes or reported symptoms within a local population that could be the warning signs of a contaminant, or could require the reporting of symptoms potentially resulting from an as yet unknown source of infection. Its aim is to ensure that risks to public health are kept under observation to maximise the chances that threats can be detected at an early stage.

### Choice of procedure

21. Regulations made under this power will be subject to negative procedure.

22. The choice of negative procedure and attendant level of scrutiny is considered appropriate given the nature of the power: to confer functions on certain bodies to undertake public health monitoring. This choice of procedure reflects the limited scope of the power.

## Section 7(1) – Guidance on public health measures

Power conferred on: The Scottish Ministers

Power exercisable by: Guidance

Parliamentary procedure: None

### Provision

23. A new power will enable the Scottish Ministers to issue statutory guidance to relevant authorities in relation to protecting public health and ensuring the continuity of education.

### Reason for taking power

24. The purpose of the power is to enable the Scottish Ministers to issue advice to relevant authorities, i.e. the relevant operators of educational establishments and the relevant managers of a school boarding establishment or student accommodation. That will allow the Scottish Ministers to provide relevant authorities with further clarity about the requirements upon them in relation to ensuring continuity of education in the context of measures being required to protect public health. Relevant authorities must have regard to such guidance.

### Choice of procedure

25. Guidance issued by the Scottish Ministers is not subject to parliamentary procedure. However, any guidance issued under these provisions must be published.

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## Section 8(1) – Regulations on continuing operation of educational establishments

Power conferred on: The Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative or made affirmative

### Provision

26. Section 8(1) provides the Scottish Ministers with powers in relation to educational establishments, to enable them to take necessary and appropriate action to protect public health and ensure the continuity of educational provision, and mitigate against some of the wider harms that can be caused by threats to public health. The provisions confer a power on the Scottish Ministers to make regulations to require specific actions to be taken in relation to the continuing operation of educational establishments for a specified period. Such regulations may apply to one or more relevant operators of an educational establishment in Scotland, such as those managing schools, early learning and childcare providers, out of school care providers, further education institutions, and higher education institutions. They may include such provision, and are subject to such safeguards, as are outlined below.

27. The power is broad in scope in order to enable Ministers to take the actions required to meet the public health threat faced and take the actions required to ensure the continued provision of education in the context of such a threat. To that end, regulations may confer additional functions on an educational establishment relating to the provision of education or (only where an education authority or a further or higher education institution is concerned) the use of an educational establishment's premises for the purpose of protecting public health, for example for testing or vaccination; require the alteration of term dates and of opening times; direct service provision; or restrict or prohibit access to an educational establishment's premises (or part of such premises). The restriction or prohibition of access may be framed in terms of specified activities. Furthermore, the regulations may require actions to be taken by educational establishments in general terms, or may require particular actions to be taken by them. Regulations may include any supplementary, transitional, transitory or saving provision.

28. Section 8(4) also provides that regulations under this section may include provision to the effect that any failure to comply with a duty or time limit relating to education is to be disregarded to the extent the failure is attributable to the regulations. Therefore, where regulations under this section contain such provision, they effectively override other legal requirements on educational establishments while in force to the extent required by the regulations.

29. In terms of section 8(3) of the Bill, Ministers must have regard to any advice from the Chief Medical Officer about protecting public health, and may only make regulations if they are satisfied that, in view of the Chief Medical Officer's advice, it is necessary and proportionate to do so for or in connection with the continued provision of education. Regulations must be reviewed within 21 days of being made, with a further review required every 21 days.

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## Reason for taking power

30. As Covid has shown, the nature of a public health threat is difficult to pre-determine, and the impacts of a public health response can have significant implications for educational establishments, children and young people and their families. In order to respond to future public health threats which might pose a significant harm, the Scottish Ministers must, therefore, have robust and flexible powers to respond appropriately in relation to education, while ensuring that meaningful safeguards are built into use of those powers through the applicable regulation-making procedure. Where it is necessary to introduce measures to protect public health, it is also critical that relevant operators of educational establishments put in place measures to ensure the continuity of education of children and young people.

## Choice of procedure

31. Regulations made under these powers would be subject to the affirmative procedure. This has been chosen as the appropriate procedure in order to ensure appropriate Parliamentary scrutiny and oversight in respect of the broad range of restrictions and requirements that Ministers may impose. It should be noted that there may be circumstances where the Scottish Ministers consider that because of the urgency it is necessary to depart from the affirmative procedure. The provisions also allow for the use of made affirmative procedure in such instances, and the different scrutiny provisions that apply to it. The Scottish Ministers may be required to act quickly in response to rapidly changing circumstances. The timescales involved in the usual draft-affirmative procedure may not allow action to be taken sufficiently quickly, and therefore a form of made affirmative procedure is appropriate to enable the Scottish Ministers to make regulations with immediate effect. The made affirmative procedure would only be used in circumstances where there is an urgent need for action; and may be relied upon to remove restrictions or requirements no longer considered to be proportionate, as well as to impose restrictions or requirements as part of a public health response. As is the case now for regulations made under schedule 19 of the UK Act to respond to the Covid pandemic, when exercising these new powers the Scottish Ministers would consider carefully, based on the circumstances at the time, whether regulations were needed urgently, and the use of the made affirmative procedure was justified.

## Section 9(1) – Regulations on school boarding accommodation

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative or made affirmative

## Provision

32. Section 9 confers a power on the Scottish Ministers to make regulations in relation to boarding school accommodation. This will allow Ministers to require those managing a “school boarding establishment”, which covers residential provision at or arranged by a school including school hostels, to temporarily close the establishments under their management for a specified period. The regulations may also require that reasonable

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steps are taken to provide support for pupils to assist their compliance with any restriction or requirement relating to the protection of public health imposed by virtue of an enactment or rule of law, their following of any guidance or advice from a public authority relating to the protection of public health, or their response to a particular request or recommendation from a public authority relating to the protection of public health (for example, a recommendation for a pupil or group of pupils to self-isolate).

33. Section 9(4) provides that regulations under this section may include provision to the effect that any failure to comply with a duty or time limit relating to education is to be disregarded to the extent the failure is attributable to the regulations. Therefore, where regulations under this section contain such provision, they effectively override other legal requirements on educational establishments while in force to the extent required by the regulations.

34. Regulations may further include such provision as is mentioned in section 9(5), including access restrictions framed in relation to premises or activities, or provision requiring appropriate actions to be taken.

35. In terms of section 9(3) of the Bill, Ministers must have regard to any advice from the Chief Medical Officer about protecting public health, and may only make regulations if they are satisfied that, in view of the Chief Medical Officer's advice, it is necessary and proportionate to do so for or in connection with protecting public health. Regulations must be reviewed within 21 days of being made, with a further review required every 21 days.

### Reason for taking power

36. As Covid has shown, the nature of a public health threat is difficult to pre-determine, and the impacts of a public health response can have significant implications for educational establishments, pupils/students and their families. Pupils in boarding school accommodation reside in a communal living environment, and some will have travelled from other parts of the United Kingdom or from abroad to attend the school which may mean public health requirements and welfare considerations may vary from those applicable to non-residential provision. In order to respond to future public health threats which might pose a significant harm the Scottish Ministers must, therefore, have robust and flexible powers to respond appropriately in relation to school boarding establishments, while ensuring that meaningful safeguards are built into the regulation-making process.

### Choice of procedure

37. Regulations made under these powers would be subject to the affirmative procedure. This has been chosen as the appropriate procedure in order to ensure appropriate Parliamentary scrutiny and oversight in respect of the broad range of restrictions and requirements that Ministers may impose. It should be noted that there may be circumstances where the Scottish Ministers consider that because of the urgency it is necessary to depart from the affirmative procedure. The provisions also allow for the use of made affirmative procedure in such instances, and the different scrutiny provisions that apply to it. The Scottish Ministers may be required to act quickly



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in response to rapidly changing circumstances. The timescales involved in the usual draft-affirmative procedure may not allow action to be taken sufficiently quickly, and therefore a form of made affirmative procedure is appropriate to enable the Scottish Ministers to make regulations with immediate effect. The made affirmative procedure would only be used in circumstances where there is an urgent need for action; and may be relied upon to remove restrictions or requirements no longer considered to be proportionate, as well as to impose restrictions or requirements as part of a public health response. As is the case now for regulations made under schedule 19 of the UK Act to respond to the Covid pandemic, when exercising these new powers the Scottish Ministers would consider carefully, based on the circumstances at the time, whether regulations were needed urgently, and the use of the made affirmative procedure was justified.

## Section 10(1) – Regulations on student accommodation

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative or made affirmative

### Provision

38. Section 10 confers a power on the Scottish Ministers to make regulations in relation to student accommodation. This will allow Ministers to require those managing student accommodation to take reasonable steps to restrict or prohibit access to premises for a specified period. The regulations may also require a relevant manager of student accommodation premises to provide support for students in order to assist their compliance with any restriction or requirement relating to the protection of public health imposed by virtue of an enactment or rule of law, their following of any guidance or advice from a public authority relating to the protection of public health, or their response to a particular request or recommendation from a public authority relating to the protection of public health (for example, a recommendation for a student or group of students to self-isolate).

39. Section 10(4) provides that regulations under this section may include provision to the effect that any failure to comply with a duty or time limit relating to education is to be disregarded to the extent the failure is attributable to the regulations. Therefore, where regulations under this section contain such provision, they effectively override other legal requirements on educational establishments while in force to the extent required by the regulations.

40. Regulations may further include such provision as is mentioned in section 10(5), including access restrictions framed in relation to premises or activities, or provision requiring appropriate actions to be taken.

41. In terms of section 10(3) of the Bill, Ministers must have regard to any advice from the Chief Medical Officer about protecting public health, and may only make regulations if they are satisfied that, in view of the Chief Medical Officer's advice, it is necessary and proportionate to do so for or in connection with protecting public health. Regulations

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must be reviewed within 21 days of being made, with a further review required every 21 days.

### Reason for taking power

42. As the Covid pandemic has shown, the nature of a public health threat is difficult to pre-determine, and the impacts of a public health response can have significant implications for educational establishments, pupils/students and their families. Given the nature of student accommodation, which will entail residents living in a communal environment, a great number of whom will have travelled from different parts of the country and some of whom will have travelled from abroad, the public health requirements and welfare considerations may vary from those applicable to the general public. In order to respond to future public health threats which might pose a significant harm the Scottish Ministers must, therefore, have robust and flexible powers to respond appropriately in relation to student accommodation, while ensuring that meaningful safeguards are built into the regulation-making process.

### Choice of procedure

43. Regulations made under these powers would be subject to the affirmative procedure. This has been chosen as the appropriate procedure in order to ensure appropriate Parliamentary scrutiny and oversight in respect of the broad range of restrictions and requirements that Ministers may impose. It should be noted that there may be circumstances where the Scottish Ministers consider that because of the urgency it is necessary to depart from the affirmative procedure. The provisions also allow for the use of made affirmative procedure in such instances, and the different scrutiny provisions that apply to it. The Scottish Ministers may be required to act quickly in response to rapidly changing circumstances. The timescales involved in the usual draft-affirmative procedure may not allow action to be taken sufficiently quickly, and therefore a form of made affirmative procedure is appropriate to enable the Scottish Ministers to make regulations with immediate effect. The made affirmative procedure would only be used in circumstances where there is an urgent need for action; and may be relied upon to remove restrictions or requirements no longer considered to be proportionate, as well as to impose restrictions or requirements as part of a public health response. As is the case now for regulations made under schedule 19 of the UK Act to respond to the Covid pandemic, when exercising these new powers the Scottish Ministers would consider carefully, based on the circumstances at the time, whether regulations were needed urgently, and the use of the made affirmative procedure was justified.

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## Section 11(2) – Guidance on compliance and enforcement

Power conferred on: The Scottish Ministers

Power exercisable by: Guidance

Parliamentary procedure: None

### Provision

44. The power enables the Scottish Ministers to issue guidance to accompany any regulations that are issued under sections 8(1), 9(1) and 10(1), respectively.

### Reason for taking power

45. The purpose of the power is to enable the Scottish Ministers to issue guidance in support of any regulations that are made under this Chapter. This guidance will cover matters included within any such regulations and provide further clarification to relevant authorities, i.e. the relevant operators of educational establishments and the relevant managers of a school boarding establishment or student accommodation, about the requirements being placed upon them. A relevant authority must have regard to such guidance issued by the Scottish Ministers.

### Choice of procedure

46. Guidance issued by Scottish Ministers is not subject to parliamentary procedure. Any guidance issued under these provisions must be published.

## Section 14 (inserted section 11ZA of the Schools Consultation (Scotland) Act 2010) – School consultations: meetings and documents

Power conferred on: The Scottish Ministers

Power exercisable by: Directions

Parliamentary procedure: None

### Provision

47. The effect of the provisions is to create a process by which education authorities may, on application, be given a direction to relieve them of the requirement to hold in-person public meetings and to make available paper copies of relevant consultation documents at council offices or other locations, in relation to consultations required under the Schools (Consultation) (Scotland) Act 2010 (“the 2010 Act”). Where an education authority is by ministerial direction relieved from their duty to hold an in-person public meeting, they would have to hold a ‘virtual’ meeting by remote means instead.

48. Under the process these amendments to the 2010 Act will establish, Ministers may only give a direction on application by an education authority, and where Ministers are

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satisfied that giving the direction is necessary and proportionate for or in connection with the protection of public health. Directions may relate to one or more relevant proposals made by an education authority.

## Reason for taking power

49. Such provisions are needed during the remainder of the current pandemic, and in the event of a future public health emergency, where holding an in-person public meeting risks the transmission of infection and danger to public health or where paper copies cannot be provided because places are closed. Public meetings are a key aspect of the statutory consultation process established under the 2010 Act. However, postponements of statutory consultation activity could lead to significant delays to re-organisations of the school estate or changes to school infrastructure, for example, in implementing school building projects which often have long lead-in times. These delays could also have associated costs and negatively impact on the quality of educational experience of young children and school pupils.

## Choice of procedure

50. The use of directions will mean that the Scottish Ministers can act quickly and specifically in response to an application from an education authority to be relieved of the requirement to hold in-person public meetings and to make available paper copies of relevant consultation documents at council offices or other locations, in relation to consultations required under the 2010 Act. As such, the Scottish Government does not consider it practical for a parliamentary procedure to apply to such a direction, which would be a limited and targeted response to a particular set of circumstances.

## Section 36 (inserted paragraph 12(4)(b) of schedule 3 of the Private Housing (Tenancies) (Scotland) Act 2016) – Private residential tenancies: pre-action protocol

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

## Provision

51. This power enables the Scottish Ministers to prescribe the pre-action protocol, a landlord's compliance with which the Tribunal can consider when determining whether eviction is reasonable in the circumstances. This provision applies to private residential tenancies under the Private Housing (Tenancies) (Scotland) Act 2016. Similar powers in relation to private residential tenancies are currently contained in paragraph 12 of schedule 3 of the 2016 Act (temporarily modified by schedule 1 of the Coronavirus (Scotland) (No.2) Act 2020 – the "Second Scottish Act"). Those powers have been exercised via the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/304). Those regulations prescribe a number of measures which a landlord may take in order to assist a tenant who is struggling to pay their rent.

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The landlord's compliance with those measures is to be taken into account by the Tribunal should the landlord seek eviction on grounds of rent arrears.

## Reason for taking power

52. This delegated power relates to the introduction of a pre-action protocol. The introduction of such a protocol on a permanent basis is considered to be appropriate and proportionate as it makes it clear that private landlords should support tenants who are struggling with rent arrears and are at risk of being evicted (while recognising that non-compliance with the protocol should not always be a bar to eviction). The actions that will be provided for under the protocol will provide greater protections for those in the private rented sector, and reflect what was already in place for the in the social sector to support tenants. It is considered appropriate that the details of the protocol should be set out in subordinate legislation as the nature of the information and the level of detail that will likely be included would be disproportionate to include on the face of the 2016 Act. It may also be appropriate for the protocol to be updated periodically in light of experience or changing standards, and the protocol being set out in regulations more readily facilitates this.

## Choice of procedure

53. The affirmative procedure is considered appropriate given that the regulations would have the effect of introducing a range of measures which a landlord will normally be expected to take in order to attempt to preserve a tenancy where the tenant is struggling to pay their rent. As the landlord's compliance with these measures is to be taken into account by the Tribunal in assessing whether eviction is reasonable and therefore the potential consequence of non-compliance is significant, it is appropriate that greater parliamentary scrutiny is applied when the measures are determined.

## Section 37 (inserted section 18(4A)(b) of the Housing (Scotland) Act 1988) – Assured tenancies: pre-action protocol

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

## Provision

54. This power enables the Scottish Ministers to prescribe the pre-action protocol, a landlord's compliance with which the Tribunal can consider when determining whether eviction is reasonable in the circumstances. This provision applies to assured tenancies under the Housing (Scotland) Act 1988. Similar powers in relation to assured tenancies are currently contained in section 18 of the Housing (Scotland) Act 1988 (as temporarily modified by schedule 1 of the Second Scottish Act). As with private residential tenancies, those powers have also been exercised via the Rent Arrears Pre-Action Requirements (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/304) as described above.

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## Reason for taking power

55. This delegated power relates to the introduction of a pre-action protocol. The introduction of such a protocol on a permanent basis is considered to be appropriate and proportionate as it makes it clear that private landlords should support tenants who are struggling with rent arrears and are at risk of being evicted (while recognising that non-compliance with the protocol should not always be a bar to eviction). The actions that will be provided for under the protocol will provide greater protections for those in the private rented sector, and reflect what was already in place for the in the social sector to support tenants. It is considered appropriate that the details of the protocol should be set out in subordinate legislation as the nature of the information and the level of detail that will likely be included would be disproportionate to include on the face of the 1988 Act. It may also be appropriate for the protocol to be updated periodically in light of experience or changing standards, and the protocol being set out in regulations more readily facilitates this.

## Choice of procedure

56. The affirmative procedure is considered appropriate given that the regulations would have the effect of introducing a range of measures which a landlord will normally be expected to take in order to attempt to preserve a tenancy where the tenant is struggling to pay their rent. As the landlord's compliance with these measures is to be taken into account by the Tribunal in assessing whether eviction is reasonable and therefore the potential consequence of non-compliance is significant, it is appropriate that greater parliamentary scrutiny is applied when the measures are determined.

## Section 39(1) – Power to suspend and revive

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

## Provision

57. This delegated power relates to the temporary justice measures in the schedule of the Bill. Power is conferred on the Scottish Ministers to make regulations suspending (temporarily deactivate) particular temporary provisions. Power is also conferred on the Scottish Ministers to revive (reactive) suspended measures. By virtue of section 42(1) power is conferred to make different provision for different purposes.

58. Section 39(2) provides that the legal effect of suspension is equivalent to repeal (permanent deactivation).

## Reason for taking power

59. The Scottish Government considers it important to have powers to suspend temporary provisions in addition to the power to section 41 power to expire provisions later mentioned in this Memorandum. Where provisions are expired they cannot be

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revived and could only be legally reactivated through fresh primary legislation, hence where a temporary measure is not needed but might be needed in future it is appropriate that there is a power to suspend. This will help ensure that the temporary provisions are only in force when needed.

60. Equivalent powers are contained in section 11(1) of the Coronavirus (Scotland) Act 2020 (the “First Scottish Act”) and section 8(1) of the Second Scottish Act.

## Choice of procedure

61. It is considered that the negative procedure is appropriate given that the Scottish Parliament will have 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 40(3) – Expiry

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative

## Provision

62. This delegated power also relates to the temporary justice measures in the schedule of the Bill. Power is conferred on the Scottish Ministers to make an SSI to extend the temporary measures beyond their initial expiry date of 30 November 2023 to 30 November 2024, and thereafter by a subsequent SSI to 30 November 2025 which is a longstop date. By virtue of section 42(4) a statement of reasons as to why the SSI should be made must be laid before the Scottish Parliament at the same time as any draft regulations.

## Reason for taking power

63. As the Policy Memorandum explains, the temporary justice measures are in the Scottish Government’s view required to handle the impact of Covid on the justice system, most particularly in relation to the backlog of court cases. It is recognised that court modelling will be refined and revised on a regular basis and that 30 November 2025 represents an appropriate point at which to consider the necessity for the temporary justice measures, recognising therefore that provision is made for the temporary justice measures to be extended until then, if necessary, and subject to annual approval by the Scottish Parliament. The formal statement of reasons requirements ensures that the Scottish Parliament is apprised of the Government’s justification for seeking an extension.

64. Should the temporary measures needed extending from the end of 30 November 2024 to end of 30 November 2025 then the SSI to provide for this will be laid after summer recess in 2024.

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65. Broadly equivalent powers are contained in section 12 of the First Scottish Act and section 9 of the Second Scottish Act, as amended by the Extension and Expiry Act. Extensions under those Acts are for 6 months at a time whereas as mentioned extensions under the Bill are for a year at a time.

### Choice of procedure

66. The affirmative procedure is considered appropriate given that the regulations would have the effect of extending the legal effect of the schedule beyond the initial expiry date that the Parliament would have agreed to in passing the Bill.

## Section 41 – Power to bring expiry forward

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative

### Provision

67. This delegated power also relates to the temporary justice measures in the schedule of the Bill. Power is conferred on the Scottish Ministers to make regulations expiring particular temporary measures ahead of their expiry date by virtue of section 40(1). By virtue of section 42(1) power is conferred to make different provision for different purposes.

### Reason for taking power

68. The Scottish Government has a commitment to expiring temporary provisions enacted to respond to the Covid pandemic when they are no longer necessary or appropriate. Annex A to the Policy Memorandum sets out a number of temporary measures in the first and second Scottish Acts that have already been expired in line with this policy, under expiry powers in those Acts. To enable this policy to continue the new delegated power described is required.

69. Since, as mentioned, the section 40(3) power extends temporary justice measures in the Bill “en bloc” the Scottish Government anticipates that where seeking to extend measures that remain required, any that are not required would be specifically expired using the section 41 power. Thus they would not be extended at the same time as the measures that the Government considers required at that point.

70. Equivalent powers are contained in section 13 of the First Scottish Act and section 10 of the Second Scottish Act.

### Choice of procedure

71. 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



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keep provisions of the schedule in force any longer than is necessary. The negative procedure still ensures appropriate scrutiny by the Scottish Parliament.

## Section 45(1) – Ancillary provision

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Negative, or affirmative if amending an Act

### Provision

72. Power is conferred on the Scottish Ministers regulations containing supplementary, consequential, transitional, transitory or saving provision. Regulations may modify Acts and make different provision for different purposes.

### Reason for taking power

73. The Scottish Government considers it to be appropriate for the full range of ancillary powers to be available to facilitate the transition from the current temporary legislation to the new legislative arrangements provided for in the Bill (permanent measures in the main body of the Bill, and a new legislative basis for temporary justice measures in the schedule). As well as interactions between primary legislation, the power will allow for interactions with secondary legislation to be handled.

74. These powers will also be important in the event of Ministers expiring, suspending or reviving temporary justice measures to allow a smooth transition from the temporary provisions back to the previous law.

### Choice of procedure

75. It is considered that the negative procedure is appropriate given that the Scottish Parliament will have 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. Where primary legislation is amended, the affirmative procedure is appropriate.

## Section 46(2) – Commencement

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Laid, no procedure

### Provision

76. Power is conferred on the Scottish Ministers make regulations appointing commencement days for the different provisions of the Bill (except for sections 45 to 47 which come into force on the day after Royal Assent – see section 46(1)). By virtue of

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subsection (3) regulations may include transitional, transitory or saving provision and make different provision for different purposes.

### Reason for taking power

77. Most of the measures in the Bill originate in temporary legislation, the expiry dates for which in the course of 2022 are not settled at the point of introducing the Bill. To deliver a policy of continuing temporary measures without a gap there requires to be appropriate delegated power to commence new permanent or temporary measures at the appropriate times and with any appropriate ancillary provisions that are needed to smooth the legislative transition.

78. For wholly new measures, it is also appropriate for Ministers to have powers to provide for commencement, at the point that measures are ready to be implemented.

### Choice of procedure

79. It is standard for commencement powers to be subject to laid only procedure.

## Paragraph 24(1) of the schedule – Power to release early from prison or young offenders institution

Power conferred on: The Scottish Ministers

Power exercisable by: Regulations made by Scottish statutory instrument

Parliamentary procedure: Affirmative or made affirmative

### Provision

80. Paragraph 24(1) of the schedule confers a power on the Scottish Ministers to provide by regulations for a person of a description specified in the regulations to be released early from prison or a young offenders institution (for brevity, subsequent references to prison include young offenders institutions and references to prisoners should be read accordingly). The Scottish Ministers can only exercise this power if they are satisfied that it is a necessary and proportionate response to the effects of Covid 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.

### Reason for taking power

81. A Covid outbreak may result in a significant reduction in available prison staff (due to illness, or contact with an infected person), or impose other public health restrictions on the operation of prisons, which will have a significant impact on the prison regime locally and overall. An outbreak of Covid in a prison could result in an increased requirement for prisoners to be kept isolated, and an increase in the need for special protective measures to be taken. These risks to the operation of prisons – either individually or cumulatively – can be alleviated by the early release of prisoners, as this can increase available capacity within the prison estate. The power to authorise the

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early release of specified groups of prisoners will enable the Scottish Ministers to act quickly, effectively and proportionately to relieve the pressure on the prison estate caused by Covid outbreaks to ensure the security and good order of prisons, and/or the health and wellbeing of prisoners and prison staff. Apart from the provisions under the First Scottish Act, which are time-limited, there is currently no other power for Scottish Ministers to order the release of groups of prisoners in such a way.

## Choice of procedure

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

83. The Scottish Ministers may be required to act quickly in response to rapidly changing circumstances in prison. The timescales involved in the usual draft-affirmative procedure may not allow action to be taken sufficiently quickly, and therefore a form of made affirmative procedure is appropriate to enable the Scottish Ministers to make regulations with immediate effect. Regulations made subject to the made-affirmative procedure could only provide for the release of a prisoner who would, in any event, be released within 180 days of making the regulations. The early release of a limited number of prisoners who are due to be released shortly is considered to present a much lower risk to the public in comparison to the significant risk to the effective operation of prisons and the risk to the health of prison staff and prisoners. It is considered that this justifies the use of an expedited procedure in relation to such prisoners where the situation is urgent and it is necessary to make the regulations without their being subject to the affirmative procedure.

84. In the event that the power to release prisoners needs to be exercised, the regulations which will be prepared for each individual release process will allow the Scottish Ministers to implement a release action that is appropriate and proportionate for the circumstances being addressed.

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## Delegated Powers Memorandum

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