

# Education, Children and Young People Committee

## 7<sup>th</sup> Meeting, 2022 (Session 6), Wednesday 2 March 2022

### Coronavirus (Recovery and Reform) (Scotland) Bill

#### Introduction

1. The [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill](#) is a Scottish Government bill that was introduced on Tuesday, 25 January 2022.
2. The COVID-19 Recovery Committee is the lead committee on the Bill.
3. The Education, Children and Young People's Committee is scrutinising Part 2 of the Bill, the education proposals, at Stage 1 of the Parliament's legislative process.

#### Committee meeting

4. The Committee will take evidence from two panels at its meeting on 2 March 2022.

#### Panel 1

- Paul Little, Vice-Chair of the College Principals Group, Colleges Scotland;
- Matthew Sweeney, Policy Manager - Children and Young People, Convention of Scottish Local Authorities (COSLA);
- David Belsey, Assistant Secretary, Educational Institute of Scotland (EIS);
- Diane Stockton, Consultant in Public Health, Public Health Scotland;
- John Edwards, Director, Scottish Council of Independent Schools; and
- Alastair Sim, Director, Universities Scotland.

#### Panel 2

- Megan Farr, Policy Officer, Children and Young People's Commissioner Scotland; and
- Liam Fowley, Vice Chair, the Board, Scottish Youth Parliament.

### Supporting Information

5. A [call for views](#) on the on the Bill closes on 25 February 2022. The responses will be published shortly thereafter.
6. The Committee has received written submissions from the Children and Young People's Commissioner Scotland, Colleges Scotland, COSLA and Universities Scotland. This is provided at **Annexe A** to this paper. A SPICe briefing on the issues being considered at this evidence session, is provided at **Annexe B**.

**Education, Children and Young People Committee Clerks  
28 February 2022**

## Annexe A

# Children and Young People's Commissioner Scotland

## Education, Children and Young People Committee

### Covid-19 Recovery Committee

#### Coronavirus (Recovery and Reform) (Scotland) Bill

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Established by the Commissioner for Children and Young People (Scotland) Act 2003, the Commissioner is responsible for promoting and safeguarding the rights of all children and young people in Scotland, giving particular attention to the United Nations Convention on the Rights of the Child (UNCRC). The Commissioner has powers to review law, policy and practice and to take action to promote and protect rights. The Commissioner is fully independent of the Scottish Government.

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The Covid-19 pandemic created unprecedented challenges for public services and for Scotland as a whole. The response of the Scottish Parliament to the challenge this presented was impressive. Emergency legislation was debated at short notice and in very challenging conditions. As the pandemic progressed, the move to virtual and hybrid sittings ensured that MSPs were able to continue in their role as human rights guarantors, scrutinising not only emergency legislation but continuing the parliamentary process for a wide range of legislation.

The emergency powers put in place in response to the pandemic, in Scotland and the rest of the UK, represent some of the most serious interferences with the human rights of the general population of this country since the Universal Declaration on Human Rights was adopted more than 70 years ago.

As we highlighted in our briefings to MSPs in relation to the UK Coronavirus Act and the two Scottish Coronavirus Acts,<sup>1</sup> international human rights frameworks recognise states' need for flexibility in a time of national emergency. This is acknowledged in Article 15 of the European Convention on Human Rights (ECHR) and Article 4 of the International Covenant on Civil and Political Rights (ICCPR).

However, states' abilities to interfere with human rights in a time of emergency are not unlimited. Any emergency powers must be **lawful, necessary, proportionate and time limited**. They must be limited to the extent strictly required by the situation.

We therefore have considerable concerns about the proposals in this legislation which would place what were **time limited** emergency measures permanently into statute, for use by any future government without prior reference to Parliament.

When introduced in 2020, these powers represented a serious, albeit **necessary** response to an unprecedented situation. We broadly supported their introduction at that time, providing MSPs with a series of briefings as emergency legislation was considered<sup>2</sup>. They were, in the main, **proportionate**, given the life-threatening gravity of the pandemic, and the lack of information about the impact it would have

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<sup>1</sup> CYPSCS. Our Coronavirus Work. <https://cypcs.org.uk/coronavirus/our-coronavirus-work/>

<sup>2</sup> See Our policy work on emergency legislation. <https://www.cypcs.org.uk/coronavirus/our-coronavirus-work/>

on children and young people. That they were introduced via Acts of Parliament ensured they were **lawful**.<sup>3</sup> And they were **time limited** – with the Scottish Government having to return to the Scottish Parliament to renew them after set periods of time.

Both the Scottish and UK Parliaments were able to pass legislation to meet the challenges presented by the pandemic on an emergency basis in March and April 2020. Since that time, both have improved their capacity to operate on a virtual basis and they are doubtless now better prepared for future emergencies as a result. The Scottish Parliament, in particular, is in a very robust position to deal with future emergencies. It is essential that in any future situation in which they are required, emergency powers are subject to sufficient parliamentary scrutiny to ensure they are **necessary** and **proportionate** in the context of the specific situation in which they are to be applied.

Permanent powers which permit serious interference with human rights, by definition, do not meet the requirement to be **time limited**. Even if not used, they may therefore not be lawful under the terms of Article 15 of the ECHR. Rather than having powers ‘on the books’ or ‘just in case’, Government must ensure they have draft legislation prepared, and kept under review, in anticipation of any future emergency. And rather than reacting to the last emergency, they must plan for a range of scenarios. If this planning is conducted in a transparent manner, with public engagement and with appropriate impact assessment, it has the potential to strengthen public confidence and adherence to restrictions in a future emergency. That said, we make specific comment on a number of the provisions below.

### **Education Closures**

We are concerned at the extent of permanent measures relating to the closure (and opening) of educational establishments in Part 2 of this Bill. For example, in section 8, the Bill provides Scottish Ministers with the power, by regulations, to direct educational establishments in a wide range of ways, subject only to Ministers having “regard to advice from the Chief Medical Officer”. The scope of the provisions is illustrated by the case of child minders working in their own homes, who may be subject to regulations made by Ministers over part of their home.

The powers given to Scottish Ministers by Part 2 of the Bill provide the opportunity for substantial interference into children’s right to an education, as well as a wide range of their human rights. The impact that the two extended periods where schools were closed to most children has been well documented over the past two years and we draw the Committee’s attention to our evidence to the Education, Children and Young People Committee earlier this session, together with the work our office has done during the course of the pandemic.<sup>4</sup>

We reiterate our concern that for these to sit “on the books” reduces the opportunity for parliamentary scrutiny, even where regulations are required to be made using the affirmative procedure and be reviewed regularly. We highlighted our concerns about

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<sup>3</sup> Though we note this is not entirely uncontested

<sup>4</sup> CYPCS. Our Coronavirus Work. <https://www.cypcs.org.uk/coronavirus/our-coronavirus-work/>

the use of this procedure in our submission to Delegated Powers and Law Reform's inquiry on this in December 2021.<sup>5</sup>

More importantly, although similar powers were introduced at the beginning of the pandemic, our understanding is that for the large part they went unused. We are therefore unconvinced their inclusion in legislation on a permanent basis is proportionate.

### **Children in Prison**

Last week there were **14** children in prison (Polmont Young Offenders Institution) in Scotland.<sup>6</sup>

Only **3** of those children have been convicted and sentenced. All of the other children were detained on remand.

Since the start of the first lockdown, an average of **12** untried children have been held in Scottish prisons each week.

In the last ten years, **2** children have died by suicide in prison in Scotland.

No child has been released under the early release provisions in the Coronavirus (Scotland) Act 2020.

While the number of children in prison has declined in recent years, and this is to be welcomed, it is unacceptable that any child be imprisoned in Scotland. We recently wrote to the Cabinet Secretary for Justice and Veterans and the Minister for Children and Young People expressing our concerns that we had heard that a child had been remanded to Polmont YOI for failure to appear at court **as a witness**. We are also aware of potential child victims of trafficking being remanded to prison.

Over the course of the pandemic, the proportion of children on remand has increased. During the first three months of the first lockdown, an average of **41%** of the children in prison were on remand or awaiting sentence. In the last 3 months that figure was **78%**.

At the beginning of the pandemic, the UN Committee on the Rights of the Child warned against the "grave physical, emotional and psychological effect of the ... pandemic on children" and called on States to protect the rights of children. They called for the immediate release of children in all forms of detention.<sup>7</sup> The particular risks to children in prison were highlighted in the Independent Children's Rights Impact Assessment (CRIA) we commissioned in the early stages of the pandemic. The risks associated with increased periods on remand due to delays in court processes and extensions permitted by the emergency measures were clear, even at that stage.<sup>8</sup>

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<sup>5</sup> CYPCS. Inquiry into use of 'made affirmative procedure' during the coronavirus pandemic. [2021]. <https://www.cypcs.org.uk/resources/made-affirmative/>

<sup>6</sup> As at 18 February 2022. SPS. SPS Prison Population. [2022] <https://www.sps.gov.uk/Corporate/Information/SPSPopulation.aspx>

<sup>7</sup> UN Committee on the Rights of the Child. Statement on Children's Rights and the Covid-19 Pandemic. [2020]. [https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/1\\_Global/INT\\_CRC\\_STA\\_9095\\_E.docx](https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/1_Global/INT_CRC_STA_9095_E.docx)

<sup>8</sup> CYPCS. APPENDIX 9: Children in Conflict with the Law and Children in Secure Care: Children's Rights Impact

Children have been disproportionately impacted by many aspects of the pandemic but the impact on children in prison has been particularly stark. We participated in the pre-inspection survey of Polmont YOI carried out by Her Majesty's Chief Inspector of Prisons. The report, published in October 2021, reinforced the views we expressed to the Scottish Parliament's Justice Committee on 25 May 2020, and again on 13 October 2021, that conditions for children in prison were in breach not only of the UNCRC, but also the prohibition on torture, inhuman and degrading treatment or punishment in terms of Article 3 of the European Convention on Human Rights (ECHR). There were serious concerns about children's limited access to mental health and other therapeutic supports; children spending 23 hours a day in their cells; routine strip-searching; authorisation of pain-inducing restraint; lack of purposeful activities including access to work, leisure, libraries and education; lack of family contact; and lack of access to telephones.

Although we are told by the Scottish Prison Service that this situation has improved, we are aware that in the case of an outbreak or new variant, conditions may deteriorate very quickly and not all of these issues can directly be attributed to the pandemic.

At present, children who have not yet been tried cannot benefit from the early release provisions in the Coronavirus (Scotland) Act 2020. Indeed, the extensions to pre-trial and pre-sentence remand periods and adjournment periods which the Scottish Government propose extending in this Bill will result in children being held in prison for longer periods than before the pandemic. Likewise, new sentencing guidelines will not reduce the number of children held on remand.

We believe that, should these temporary justice measures be included within the Bill, section 44 should be amended to ensure that untried children can be considered for early release based on an individualised assessment of risk and their human rights. We also call on the courts and COPFS to do all they can to minimise the use of remand at this time.

### **Additional Provisions**

In the consultation ahead of the publication of this Bill, the Scottish Government proposed to develop and embed new ways of working in public services, building on the innovation which occurred in response to the pandemic. We believe this is something that should continue to be considered. There is the potential to improve services and, importantly, provide increased opportunity for children to participate when decisions are made about them.

However, the Scottish Government must ensure that all measures are compatible with children and young people's legal and human rights, under both domestic legislation, such as the Equality Act 2010, and international law such as the European Convention on Human Rights (ECHR), the UN Convention on the Rights of the Child (UNCRC) and the UN Convention on the Rights of Persons with Disabilities (UNCRPD). Proposals must be accompanied by comprehensive impact assessments including a CRIA.

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Assessment (CRIA). [2020] <https://www.cypcs.org.uk/wp-content/uploads/2020/07/CRIA-appendix-conflict-law.pdf>

For example, online hearings in the Children's Hearings system and in court and tribunal proceedings have the potential to improve the ability of some children and their families to participate in decision making, however during the pandemic they have also presented barriers to individual's rights, to access to justice and to procedural fairness. A decision to hold a hearing online should be based on the individual child's needs, rights and best interests, and not on organisational exigencies.

# Colleges Scotland

## The Coronavirus (Recovery and Reform) (Scotland) Bill

### Introduction

Colleges Scotland is the collective voice for the college sector in Scotland, representing its interests and ensuring that colleges are at the heart of a world class education sector that is recognised, valued and available to all. Colleges Scotland, as the membership body, represents all 26 colleges in Scotland, which deliver both further education and around 24% of the provision of all higher education in Scotland.

On behalf of the college sector in Scotland we welcome the opportunity to provide our views regarding the Coronavirus (Recovery and Reform) (Scotland) Bill to the Scottish Government.

### Context

The last two years have been unprecedented in their impact on the delivery of college-based activity, however, colleges, their students and staff, have responded well by not only having the flexibility to quickly move to remote working and online learning, they have also helped to combat Covid-19 in many different ways.

Colleges the length and breadth of Scotland have manufactured and donated PPE supplies, provided food to local food banks to help support vulnerable students and families in their communities, some have offered buildings for hub use and social support, while others have provided their fleet of vehicles to frontline services. We are immensely proud of the college sector and the role it has played during the pandemic.

### Key Comments

## Section 8: Regulations on Continuing Operation of Educational Establishments

Across all of the requirements and restrictions associated with the proposed regulations we would strongly advise that these regulations cannot be delivered at a distance by the Scottish Government working in isolation and would instead need to be delivered in consultation with the college sector.

Throughout the pandemic the college sector has worked consistently with the Scottish Government, through the Covid Recovery Group, and other forums to ensure the safe delivery of learning and teaching activity and to collaboratively respond to, and mitigate, the impact of the pandemic on college operations.

On the basis of this experience, we would advise that the intended provisions which have been proposed within the Bill are not required. By engaging collaboratively with the Scottish Government, including during those crisis periods through new variants, the college sector has been able to adopt a responsive approach in line with the public health requirements to keep students and staff safe, in line with the four harmsmodel.

It would also be important to add that at no stage during the pandemic did the Scottish Government enact the emergency powers which were available to it to compel colleges to abide by the Covid-19 legislation and associated guidance.

### College Delivery

The Scottish Government should be aware of the wide-ranging nature of college curriculum and associated delivery, and of the requirements incumbent on colleges in managing and maintaining their estates.

To give an example of the level of detail that would be required, Dundee and Angus College oversee the welfare and supervision on animals on campus in relation to their Animal Care and Zoology courses.

The Scottish Government could not understand those requirements to the same degree and would have to work with college management and staff to ensure the safety of staff and students whilst maintaining access to college facilities. This would apply not just for learning and teaching activity but for other elements of access for community provision, such as nurseries and early years and childcare settings on college campuses. The Scottish Government, without actively engaging with the college sector, could not possibly make decisions in the absence of college management knowledge and expertise.

The Bill as currently presented would give Ministers the responsibility to implement regulations across these areas of provision. The Scottish Government simply could not manage and maintain these areas of activity and delivery, and as a sector we would hold concerns around safeguarding and appropriate management and supervision of both students and staff.

### Section 10 – Regulations on Student Accommodation

Throughout the pandemic those colleges with student accommodation have engaged with the Scottish Government and other public health partners through the Student Accommodation Group, overseeing the communication of public health guidance and accommodation specific guidance. As per the measures for Section 8 we would advise that this should be the same practice going forward.

In the event of an outbreak which requires management we would suggest it should be for the college in question, working with the Scottish Government and

public health partners to make decisions to contain the outbreak, as opposed to Ministers making decisions for local situations.

## Framework Approach for the College Sector

As the Scottish Government would need to work with the college sector in any eventuality, we would advise that the Scottish Government should look to establish a framework approach for the college sector, with clear expectations and requirements

for institutions to implement in line with their own unique circumstances, as opposed to any prescriptive approach.

Colleges Scotland, on behalf of the college sector, would look to actively collaborate with the Scottish Government in developing and implementing such an approach which can support the effective management and maintenance of public health measures in college-based settings.

## Conclusion

The purpose of this legislation is to assist with the public health response in the event of future pandemics or other public health crisis, both to ensure the continuity of education provision where necessary and to ensure the appropriate safety measures are in place.

However, we would advise that the powers within the Bill as currently presented are unnecessary and our expectation on behalf of the college sector would be that the Scottish Government would continue to engage with the college sector through Colleges Scotland to ensure both the continuity of college-based education provision and to ensure appropriate safety messages are in place.

## Colleges Scotland

## COSLA

### **COSLA's response to the education provisions in the Coronavirus (Recovery and Reform) Bill call for views**

#### **Educational Establishments etc. (Part 2, Chapter 1)**

We support making the powers over continuity directions and to have regard to the advice of the chief medical officer. These will provide Local Authorities with the appropriate legal protection should there be a future pandemic which required the closure of schools.

However, it will be crucial that the Scottish Government engage closely with Local Government in the use of any powers. Both through bilateral discussion on the education directions, and through the CERG (co-chaired by the COSLA Spokesperson and Cabinet Secretary for Education and Skills) on broader advice and guidance for COVID, there has been strong and consistent engagement with Local Government throughout the response to COVID-19.

The direction making powers create the scope for Scottish Ministers to confer additional functions on local authorities, we believe there would be merit in including a mechanism to ensure that Scottish Ministers are required to consult and engage with Local Authorities in the development of any direction.

#### **School Consultations (Part 2, Chapter 2)**

We welcome the changes to the 2010 act consultation – this flexibility was not available to councils, and many had to pause decision making processes as it would have been unsafe to hold public meetings.

We would welcome further detail on the shape of the steps that Local Authorities would have to take to make an application under this process. We also believe that there should be consideration given to an appeals process in the event an authority consider that Scottish Minister haven't considered all factors.

# Universities Scotland

Submission from Universities Scotland, February 2022

## Overview

Universities Scotland welcomes the opportunity to submit evidence to the committee's scrutiny of the Scottish Government's Coronavirus (Recovery and Reform) (Scotland) Bill as the committee considers the measures relating to educational settings.

Experience of management of the Covid-19 pandemic persuades us that a partnership approach between government, the public health authorities and universities, including close student and staff engagement, is a more effective approach than the use of compulsive powers. The Scottish Government and universities have worked successfully in partnership together since the start of the pandemic, in constant dialogue with reference to Frameworks and guidance, navigating our way in the interests of public safety and access to education. This approach has ensured agility of action, better support of students and very high levels of compliance across our community (including where students and universities have adhered to more restrictive guidance than members of the general public/wider society). At no point has the Scottish Government had to use the emergency powers in the existing Coronavirus Act 2020 with regard to higher education.

However, we recognise the case for Ministers to have emergency powers in the event of another severe new public health crisis, even though we hope that these will never have to be used.

If there are to be emergency powers, we want these to be operable in a way that protects public health, takes account of the 'four harms', and will be operable on the ground. We do not think the Bill as currently drafted will achieve that, and we propose that the Scottish Government should amend the Bill during its Parliamentary passage, so that Ministers are setting out a general framework of what needs to be done in a new public health emergency, and universities are able to make the granular judgement about how to apply these e.g. to specific courses, students or facilities.

## Our concerns

We are concerned that the Bill gives Ministers responsibility to make regulations at a level of detail that cannot competently be done by government, because government cannot provide for the wide variety of circumstances in which they would need to be applied in the university environment.

They carry with them a high likelihood of producing perverse unintended effects. As set out in more detail in the annex to this evidence, regulations made under the Bill's provisions would put government in the position of deciding, for example;

- What specific university teaching or research buildings should be open or closed;
- What specific courses should be running in-person, in hybrid form or online;

- Whether students should be moved to another university to continue their studies;
- When students should be academically assessed;
- Whether specific halls of residence should be open or closed.

These are granular judgements that can only be made competently at institutional level, within a clear expectation from government that the necessary action will be taken by institutions to manage a public health emergency.

As drafted, the Bill groups higher education institutions in the same catch-all category of “educational establishments” despite the major differences that exist between parts of the education sector and the different and complex statutory requirements and regulatory responsibilities they each have to adhere to, even during a public health emergency.

### **Our proposed alternative approach**

We therefore propose that Scottish Government should take an alternative approach, building on what has worked well in practice during the Covid-19 emergency, which would:

- Give Ministers the power to set out a framework of overall requirements at intense stages of a pandemic, e.g. requiring higher education institutions to have a range of non-pharmaceutical interventions in place; and/ or requiring limits to/ prioritisation of who should continue to receive in person teaching.
- Give Ministers a duty to consider the educational and welfare needs of students, as well as the need to manage the public health emergency, when developing guidance or making regulations.
- Give universities the duty to have regard to any guidance from Ministers, either applying to society in general or to higher education in particular.
- If regulations require universities to do things, keep these at a high level of principle so that universities can make competent local decisions (involving staff and student representatives) about how to implement the regulations.

We believe a framework along these lines would be much more effective than any attempt by government to make detailed prescription for what universities should and should not do: no government has the detailed knowledge of the diverse circumstances of institutions and students that would enable them to do that competently.

### **The rationale behind our proposals**

Universities have worked successfully with government and its agencies during the most intense phases of the pandemic to manage the risks. At the start of the pandemic, universities acted with agility in response to a rapidly changing and unprecedented situation, moving teaching online several days ahead of the national lockdown. Legislation was not needed for that to happen, and legislation would not have accelerated the pace at which universities moved to keep their students, staff and wider communities safe.

Scottish Government instead set an overall framework of guidance within which universities have been able to make choices at a granular level about how best to

manage public health risks while enabling learning and research. This has been a successful approach which has enabled universities to make practical decisions informed by their detailed knowledge e.g. of what courses to prioritise for in-person learning, how to manage different parts of their estate, and what research activities to prioritise. These are judgments that government is simply not equipped to make at the necessary level of detail across the diverse range of teaching and research institutions and all of their complex activities.

So, we believe that if emergency powers are required (and we hope they would never need to be used) they should build on what has successfully worked already, i.e. universities making informed local decisions within a clear national framework.

## Universities Scotland Annex

### Specific concerns we have about the Bill's current drafting

#### Section 8: regulations on continuing operation of educational establishments

- Subsection 8(5) gives Ministers a range of powers that cannot be exercised competently by government. For example:
  - 8(5)(a) enables Ministers to “confer additional functions” on universities. Government is not in a position to know what additional functions a university may be able to absorb within its staff and managerial capacity. A power of this nature needs to be exercised through consultation, not direction.
  - This power, and others in this section, could also involve Ministers in imposing functions that are contrary to the powers of the governing bodies of institutions concerned as defined in the legal instruments that define each institution's power and responsibilities, e.g. in Orders in Council or articles of association. What would happen in that instance?
  - We understand that this power may be used to set up vaccination or testing centres in universities. While being entirely supportive of that intention, we do not see the need for such a wide power to enable it – and during the Covid-19 pandemic no emergency statutory powers were needed to achieve this.
- 8(5)(b) enables Ministers to “require an educational establishment to open, to stay open, to reopen, or to open at times when it would not usually be open”. This is inoperable for universities, which must always ‘open’ for a range of purposes. There are a range of functions which need to be carried out around the clock every day of the year e.g. concerning continuing operation of facilities, availability of student support services, statutory obligations for animal welfare, and research experiments that cannot be stopped. Even in the narrower instance of deciding when students can learn in person during a pandemic, the needs of those students who should continue to be prioritised for in-person learning do not fit within specific hours of the day: for instance some students who are balancing study with care responsibilities will be reliant on access to learning in the evening. These judgements need to be made on a course-by-course and student-by-student basis within an overall framework of management of a pandemic, and that can only happen at institutional level in close collaboration between managers, staff and students.
- 8(5)(c) enables Ministers to require a university to “allow specified people or people of a specified description to attend an educational establishment”. Again, this is something that can only be competently defined at institutional level.

- For instance, if during a period of intense public health concern government wished to restrict in-person provision to certain categories of students such as those for whom it was essential to achieve their qualifications, and/or students in the health disciplines, government should set that expectation out at a high level and let institutions implement it in detail. Any government attempt to prescribe in detail who should or should not be studying in-person would inevitably not be able to prescribe the exact range of circumstances for every course in which a student might be prioritised for in-person learning. It would generate unforeseen effects where students on particular courses may be unfairly excluded from the categories defined by Ministers.
- On one reading, 8(5)(c) would also give Ministers the power to direct whom universities should admit to courses, which would be completely inappropriate since this has to be a matter of institutions' own academic judgement about whether a student is likely to succeed in a particular course of study.
- 8(5)(d) enables Ministers to “require specified people” to attend a “a specified educational establishment”. This is clearly inoperable: participation in a university course is an essentially voluntary action and it would be a bizarre infringement on freedom to actually require someone by law to attend a specific university or a specific course. We understand that one intention behind the provision may be to transfer between institutions in the event of local restriction of provision: while this may be well-intentioned it is not a suitable use of regulatory power since Ministers will not know whether a course at the receiving institution has capacity, or meets the diverse needs of the students concerned.
- 8(5)e enables Ministers to “restrict or prohibit access in respect of the whole or a specified part of an educational establishment”. This power cannot be exercised competently by government. Only the managers of an institution (in consultation with staff and students) know their own estates well enough to know what facilities should have access restricted or prohibited in an emergency and how to manage the impact of that on the rest of the estate. And, as set out above, the closure of the whole of university is simply not possible. There are essential teaching and research support functions which must be maintained, whether the majority of students and staff are working from home or not. Again, allowing or requiring institutions to take local action within a national framework would be much more effective, and is in line with how universities, the public health authorities and government have acted successfully during the most intense phases of the pandemic.
- 8(5)(f) enables Ministers to “restrict or prohibit access in respect of the carrying on of all/specified activities”. Again, this judgement is impossible for government to make without detailed knowledge of activities undertaken by an institution in a specific place: restriction or provision of activity in particular

places needs to be done by people with knowledge of the places concerned, within an overall framework set by government.

- 8(5)(g) enables Ministers to “require measures to ensure safe standards of hygiene, and other measures to protect public health, to be put in place”. While this is an entirely reasonable thing to do manage a public health emergency, it should be done by local application of national guidance.
- 8(5)(h) enables Ministers to “require the alteration of term dates, holiday dates or examination dates”. It is for each university to decide its own term dates: each university will have multiple entry, assessment and exit points within each academic year and no two annual cycles will be identical. If there is a public health emergency that requires a restriction of in-person provision that should be done directly through national guidance with local implementation, and potentially by travel restrictions, rather than by Ministers telling universities what their term dates are. Altering term dates risks the perverse effect that even digital provision could be postponed, to the detriment of students’ learning. Neither can government competently tell universities what their examination dates should be: universities operate a wide range of assessment at different times of the year, much of which is related to the external requirements of professional regulatory bodies. Universities have also made arrangements during the pandemic for assessments to be conducted digitally when that is necessary for public health reasons. If a public health emergency means that in-person examinations cannot take place, it must be for institutions to decide on a course-by-course basis what assessment arrangements to put in place, and when.
- 8(5)(i) enables Ministers to require universities to take “actions in general terms, or particular actions” that ministers consider appropriate. This power is so widely conceived that it is impossible to offer a meaningful response, but potentially it opens up the possibility for Ministers to require universities to do something that is not within their capacity, which they believe to be inappropriate or damaging, or which is outside the powers defined in their founding documents.

More generally, the powers in this section of the Bill are also inconsistent with universities’ status as autonomous charitable bodies. While we recognise the need for emergency powers to address public health emergencies, these should be framed in a way that enables autonomous institutions to decide how to implement them.

### **Section 10: regulations on student accommodation**

Again, universities understand the need for effective public health measures during the pandemic. Effective measures are already in place involving universities, health boards, Public Health Scotland and the Scottish Government in the management of outbreaks in student accommodation, and statutory powers appear unnecessary.

Section 10, similarly to section 8, puts Ministers in the position of making decisions which should be made locally as part of incident management. It is for the university and the public health authorities to take urgent and specific action if that is needed to contain or manage an outbreak, rather than for Ministers to make specific regulations about specific accommodation.

Ministers should also be aware that:

a) most students do not live in purpose-built student accommodation so would not be within the scope of the proposed power; and

b) many of the students who do live in purpose-built student accommodation have nowhere else to go for instance because they are international students who cannot return home during pandemic restrictions or are estranged from their families and student accommodation is their only home. So, there is a risk of a perverse effect of centralised Ministerial action making students homeless.

### **Section 12: procedure for regulations**

As we have highlighted throughout this evidence, national government is not able to make regulations competently about every circumstance of local management of a pandemic by universities. Government simply does not have the granular level of knowledge to do so.

If any such powers are to be exercised, there must be a specific duty on Ministers to consult the managers of any affected institution before making regulations. That is necessary to prevent regulations from being made that have not taken account of institutions' own views on how best to achieve the intended objectives of the regulations.

## Annexe B

**SPICe**

**The Information Centre**  
An t-Ionad Fiosrachaidh

# **Education, Children and Young People Committee**

**2 March 2022**

## **Coronavirus (Recovery and Reform) (Scotland) Bill**

### **Introduction**

The Committee has agreed to undertake a short piece of work on the Coronavirus (Recovery and Reform) (Scotland) Bill.

This week the Committee shall hear from two panels—

#### Panel 1

- Paul Little, Vice-Chair of the College Principals Group, Colleges Scotland;
- Matthew Sweeney, Policy Manager - Children and Young People, Convention of Scottish Local Authorities (COSLA);
- David Belsey, Assistant Secretary, Educational Institute of Scotland (EIS);
- Diane Stockton, Consultant in Public Health, Public Health Scotland;
- John Edwards, Director, Scottish Council of Independent Schools; and
- Alastair Sim, Director, Universities Scotland.

#### Panel 2

- Megan Farr, Policy Officer, Children and Young People's Commissioner Scotland; and
- Liam Fowley, Vice Chair, the Board, Scottish Youth Parliament.

Next week the Committee will take evidence from the Cabinet Secretary for Education and Skills.

This paper reflects some of the submissions that have been received at the time of writing.

## Bill briefing and accompanying documents

The Bill and its accompanying documents are published on the Parliament's website here: <https://www.parliament.scot/bills-and-laws/bills/coronavirus-recovery-and-reform-scotland-bill/introduced> Members can collect hard-copies of the Bill documents outside SPICe.

The Bill is wide-ranging and SPICe has published two briefings on the Bill. One covers [Criminal Justice, Courts and Legal Aid](#), and the other covers : [Health, Education, Public Services and Housing](#).

The [Education section covers Chapters 1 and 2 of Part 2 of the Bill](#) and is reproduced in the Annexe to this paper. Members may wish to read the Annexe before reading the remainder of this paper.

Chapter 1 of Part 2 of the Bill contains sections which provide for :

- A duty on managers of educational establishments to have regard to public health advice issued by the Chief Medical Officer.
- The power for Ministers to issue statutory guidance on public health measures.
- The power for Ministers to make regulations in relation to:
  - continuing operation of educational establishments
  - school boarding accommodation and
  - student accommodation.

Chapter 2 of Part 2 of the Bill would amend the Schools (Consultation) (Scotland) Act 2010 enabling ministers to give directions relating to making documents available and holding public meetings as part of statutory consultation processes.

## Consultation

The Scottish Government's [consultation on the Bill](#) sought views on making permanent "powers to make directions to close educational establishments, and to ensure continuity of education" contained within [Part 2 of schedule 16 of the UK Act](#) and [Part 2 of schedule 17 of the UK Act](#). Specifically, the consultation mentioned Education Closure Directions and Education Continuity Directions. The consultation also sought views on making new provisions in relation to allowing for virtual public meetings under the Schools (Consultation) (Scotland) Act 2010.

The Bill's provisions include additional elements to those mentioned in the consultation, namely: powers in relation to boarding accommodation and student accommodation; and additional potential changes to consultation procedures under the Schools (Consultation) (Scotland) Act 2010.

The [analysis of responses to the Scottish Government's](#) consultation. This noted that—

“In total, 2,905 valid consultation responses were received ... The vast majority of responses – 2,775 or 96% - were from individuals. The remaining 4% comprised 130 organisational responses from 124 organisations.” (p5 & p6)

A large majority of the respondents disagreed with the proposals in the consultation in relation to education. However, the analysis noted—

“A public consultation means anyone can express their views; individuals and organisations with an interest in the topic are more likely to respond than those without. This self-selection means the views of consultation respondents do not necessarily represent of the views of the population.” (p6)

The analysis reported that a majority of the organisations that responded supported the two education proposals in the consultation. In terms of the proposals to make the powers under the 2020 Act permanent or for them to be extended, 60% responses from organisations supported one or other of these actions. 37.5% of organisations supported permanence, and 22.5% supported extension. 32.5% opposed the suggestion and 7.5% were unsure. Including individual responses, 85.4% opposed both extension and permanence.

Of those who supported the proposals to make permanent the powers in the 2020 Act, the ability to move quickly responding to a future pandemic was highlighted. Those that did not support the proposal highlighted the harm caused by closing educational establishments. In terms of the proposal in relation to the Schools (Consultation) (Scotland) Act 2010 a key issue raised was a concern about digital exclusion.

The Scottish Parliament's call for views on the Bill closes on 25 February. At the time of writing submissions had not been published.

## **Key issues**

### ***The extent to which statutory powers are necessary***

The Policy Memorandum (para 93) states—

"This part of the Bill is designed to ensure that the Scottish Ministers have powers at their disposal 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. These may be required, for example, in relation to the current pandemic and other circumstances where action is necessary to protect

public health. These powers are subject to safeguards to ensure that they are used only when necessary, and in a proportionate manner. The provisions apply to all types of schools (i.e. public, grant-aided and independent schools), early learning and childcare settings, out of school care settings, and higher education and further education institutions."

During the current pandemic the Scottish Government has given ten Education Continuity Directions under powers in the 2020 Act. Despite having the potential to direct any educational establishment, these ECDs only ever created (temporary) duties on Education Authorities.

The Scottish Government's Consultation statement stated—

"While Scottish Ministers had the power to give educational continuity directions to higher and further education institutions, independent or grant-aided schools sectors, private and voluntary and independent (PVI) day care of children settings, none of the directions that were issued applied to these sectors. However, all adhered to the guidance issued by the Scottish Government and closed their in-person provision in the same way as the education authority run schools and day care of children settings which were subject to the directions (and maintained these restrictions even where they were being relaxed for schools and day care of children settings). Whilst these powers have not been used previously, maintaining these in relation to all types of educational establishment would mean that Ministers have the appropriate powers to ensure all types of educational establishment take the necessary action to address infection risk if that is required."

The Policy Memorandum explored alternative approaches. In terms of the Bill overall, the two other approaches explored by the PM were to allow all temporary powers to expire or to make permanent (or extend further) all of the current temporary powers (paras 26 and 27). In terms of the education-related provisions, there were two further options explored. The first was to 'hold in reserve' a draft emergency bill which could be introduced as emergency legislation; the second was to make the powers exercisable by direction.

Writing particularly in relation to how these powers could affect higher education institutions, Edinburgh Napier University's submission stated—

"Following the collective collaborative approach between the higher education sector and the Scottish Government and having signalled its intent to replicate the Covid response approach in education to manage future public health emergencies where that is appropriate, we do not believe the proposed provisions to be necessary to achieve the policy objectives of the Bill."

Colleges Scotland's submission made similar comments. It noted that the sector had worked closely with the Government to "respond to, and mitigate, the impact of the pandemic on college operations". Colleges Scotland's submission stated—

"On the basis of this experience, we would advise that the intended provisions which have been proposed within the Bill are not required. By engaging collaboratively with the Scottish Government, including during those crisis periods through new variants, the college sector has been able to adopt a

responsive approach in line with the public health requirements to keep students and staff safe, in line with the four harms model.”

The EIS’s submission stated—

“Whilst the EIS believes that the Scottish Government’s powers around school closures should be extended, [we argue] that the extension should not be indefinite as set out in this Bill. The EIS believes that extending such powers to issue regulations indefinitely could upset the balance of power between local authorities and the Scottish Government. Furthermore, having such provisions permanently could allow a future government to use such school closure provisions in ways not currently intended or envisaged.”

The Scottish Association of Social Work was supportive of the Government having these powers. Its submission stated—

“It is recognised that central government needs to take difficult decisions to protect the population against public health threats. In the case that an educational establishment needs to be closed for a period of time in the interests of public health, it is correct that the government has the remit to make this decision, particularly if it needs to be taken without delay. In particular, staff and young people who are especially vulnerable in instances of a public health emergency, such as those with underlying health conditions or who have a disability, should not be put at risk when attending their work or place of education.”

## ***Educational establishments and student and boarding accommodation***

Regulations made under section 8 as well as the duty to have regard to the CMO’s advice or statutory guidance (sections 6 or 7) apply to educational establishments. Managers of school boarding establishments or student accommodation premises also must have regard to advice and guidance under sections 6 and 7.

As noted above, the definition of an Educational Establishment includes “all types of schools (i.e. public, grant-aided and independent schools), early learning and childcare settings, out of school care settings, and higher education and further education institutions” as well as any education and training establishments approved by the SQA as being suitable for presenting persons for SQA qualifications.

Regulations made under this section could apply to specific institutions, to a particular type of education establishment, or to all education establishments.

Section 8(5)(iii) provides that regulations could determine that premises could be used ‘for the purpose of protecting public health’. This power would be limited to premises of an education authority (ie local authority), further education or higher education institution. This appears to be the only occasion where the bill provides for different powers to apply to different types of establishment.

The regulations could include a wide range of provisions, these are:

- to confer additional functions on education establishments, such as education at a different level or stage than they would normally;
- require education establishments to be open or conversely to restrict access, including closing;
- change term dates or examination dates;
- require education establishments to allow “specified people or people of a specified description” access to their premises, including for the purposes of receiving education there;
- require public health measures.

Ministers have wide discretion in how regulations would be drafted.

The submission to the Committee from Universities Scotland raised concerns about these powers. It said—

“We are concerned that the Bill gives Ministers responsibility to make regulations at a level of detail that cannot competently be done by government, because government cannot provide for the wide variety of circumstances in which they would need to be applied in the university environment.”

The EIS’ submission stated—

“The EIS would have liked to have seen an explicit delegation to local authorities to also make decisions to close schools or move to remote platforms in the interests of safety based on local circumstance.”

Sections 9 and 10 provide for Ministers to make regulations in relation to school boarding accommodation and student accommodation respectively.

The definition of school boarding refers to the definition in the [Public Services Reform \(Scotland\) Act 2010](#). That is residential accommodation for the purpose of or in connection with the pupil's attendance at a school, and provided (directly or indirectly) by the managers of the school.

The Bill itself defines student accommodation. Section 10 (6) states—

“‘student accommodation’ means residential accommodation which has been built or converted for the purpose of being provided to students”

Sections 9 and 10 are drafted similarly. They provide for Ministers to make regulations requiring managers of these accommodation types to “to take reasonable steps to restrict or prohibit access to the premises for a specified period” or to provide support to the residents to follow public health regulations, advice or guidance.

Again, regulations under 9 or 10 could apply to specific residential premises, to a particular type of residential premises, or to all student residential premises or all school boarding premises.

Regulations made under sections 8, 9 or 10 must be time limited for “a specified period”. Section 11 provides that regulations made under sections 8, 9 or 10 may “provide for the carrying out and enforcement of restrictions and requirements”.

## *Processes for regulations under Chapter 1 of Part 2*

As set out in the Annexe, there are two procedures for regulations made under sections 8, 9 or 10. Either the affirmative procedure or the ‘made affirmative’ procedure. This is a key change to the powers as they stand under the 2020 Act. The Education Continuity Directions have been simply directions, with no Parliamentary procedure attached.

Prior to making regulations, ministers must have regard to any advice from the CMO “or from another person designated for the purposes of [Section 6] by the Scottish Ministers, about protecting public health.” Ministers must be “must be satisfied, in view of that advice, that making the regulations is a necessary and proportionate action”.

Regulations would need to be reviewed every 21 days.

In the current pandemic, the Scottish Government identified 4 harms of the pandemic. These are the direct impact of COVID-19, other health impacts, societal impacts, and economic impacts. To support policy making in education, the Scottish Government has convened various groups with a range of interests and expertise. It is not clear whether the CMO’s advice would need to take account of the wider harms of, for instance, closing school buildings.

The Scottish Association of Social Work’s submission noted that should school buildings be closed, pupils’ access to social work could be restricted and families be under additional pressures. It said—

“Protecting public health is a necessary justification for closing educational establishments but, the government must consider all associated harms when making any decision.”

Edinburgh Napier University’s submission stated—

“If any such powers are to be exercised, there must be a specific duty on ministers to consult the managers of any affected institution before making regulations. That is necessary to prevent regulations from being made that have not taken account of institutions’ views on how best to achieve the intended objectives of the regulations. The necessity of this consultation does not appear to explicitly feature on the face of the Bill.”

The EIS submission noted that there is evidence that school closures and online learning had widened existing inequalities. The Policy Memorandum discusses some of the equality impacts (paras 110-112) and stated—

“Future regulations could have various impacts, and these may be more acute for individuals with some protected characteristics. It is likely, however, that not all types of educational establishment will be affected at the same time or in the same way and this will depend on the nature of a future health emergency. The overarching purpose of the powers is to help to prevent the spread of infection and therefore those subject to its provisions will, along with wider society, benefit from this policy ...

“Future regulations would be accompanied by an Equality Impact Assessment which will provide a more detailed assessment of the likely impacts arising at that time.”

In terms of the wider impact and balance of rights, the Policy Memorandum stated—

“These provisions have the potential to interfere with the following ECHR rights:

- Article 8 right to respect for private and family life;
- Article 11 freedom of assembly
- Article 14 non-discrimination;
- Article 1 of Protocol 1 protection of property (“A1P1”); and
- Article 2 of Protocol 1 right to education (“A2P1”).

“These provisions confer powers on the Scottish Ministers to make regulations. Any interference with the above rights would have to be justified, and there are safeguards in place which will ensure that that will be the case. The regulations would be in pursuit of the legitimate aims of protecting public health and safety. The Scottish Ministers will be required to have regard to the advice of the Chief Medical Officer for Scotland before exercising these powers, and Ministers must be satisfied in that context that making the regulations is a necessary and proportionate action. The use of these powers would be subject to Parliamentary scrutiny. These requirements will safeguard against the arbitrary and disproportionate exercise of these powers.

“Furthermore, in exercising the powers conferred by these provisions, the Scottish Ministers will be required to act compatibly with the ECHR rights, and the Equality Act 2010 will continue to apply. In relation to each of the rights, when exercising the powers the Scottish Government will need to consider the extent to which the provisions would interfere with that right is justified and lawful. The Scottish Government does not consider that the provisions breach ECHR rights. The powers will be exercised on a temporary basis and for an emergency period, and in a proportionate and evidence-based way, based on the nature and severity of the public health threat.” (paras 118-120)

## *School consultations*

The provisions under Chapter 2 or Part 2, would allow ministers to relax certain parts of the statutory consultation process for relevant proposals under the Schools (Consultation) (Scotland) Act 2010. This would enable certain functions to be undertaken digitally, most notably the requirement for a public meeting. Ministers would do this by giving a direction about one or more relevant proposal, following an application from a local authority.

The EIS' submission described printed documents and public meetings as essential parts of the consultation process. It also echoed others' concerns about the possibility of digital exclusion. The EIS' submission stated—

“However, where it is unsafe due to public health considerations to use printed media or hold in-person public meetings then the proportionate use of this provisions is prudent.

“One aspect that should be included is the use of hybrid meetings, as virtual meetings may be more accessible to some people. Hybrid meetings may reduce the number of people attending in person, thereby mitigating the risks cited.”

**Ned Sharratt, Senior Researcher (Education, Culture), SPICe Research**

**24 February 2022**

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## **ANNEXE – Extract from the Bill Briefing**

### ***Educational establishments and school consultations***

Chapters 1 and 2 of Part 2 of the Bill provide for powers for Ministers to make regulations and directions affecting educational establishments during this or a future pandemic. Powers under these chapters include:

- Making regulations which could set conditions on the functioning of educational establishments or certain types of accommodation, including potentially restricting access to educational establishments.
- Giving directions on how local authorities could undertake statutory consultations about certain proposals in relation changes to schools.

### ***Educational establishments and student and boarding accommodation***

Chapter 1 of Part 2 of the Bill provides for duties and powers in relation to a range of education establishments and accommodation for students and pupils.

The Policy Memorandum (para 93) states—

"This part of the Bill is designed to ensure that the Scottish Ministers have powers at their disposal 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. These may be required, for example, in relation to the current pandemic and other circumstances where action is necessary to protect public health. These powers are subject to safeguards to ensure that they are used only when necessary, and in a proportionate manner. The provisions apply to all types of schools (i.e. public, grant-aided and independent schools), early learning and childcare settings, out of school care settings, and higher education and further education institutions."

The majority of the provisions in this Chapter of the Bill reflect some (but not all) of the powers the Scottish Government currently has under schedules 16 and 17 of the Coronavirus Act 2020.

### ***Permanence of Powers in the Coronavirus Act 2020***

The Bill provides for Ministers to make regulations which could have a similar effect to directions provided for in schedules 16 and 17 of the Coronavirus Act 2020. [The Consultation on the Bill](#) stated:

"The proposal is to make permanent provisions in the UK Act that relate to education, namely the duty on all operators of educational establishments to have regard to the advice of the Chief Medical Officer for Scotland ("CMO"), and the powers for Scottish Ministers to give directions in relation to the closure of educational establishments and the continuity of educational provision during the remainder of the current pandemic and future pandemics."

The Scottish Government [issued ten Education Continuity Directions](#) ("ECDs") through 2020 and early 2021 to place duties on local authorities to take a range of actions in response to the pandemic, including restricting access to schools for pupils.

The [analysis of responses to the Scottish Government's](#) consultation noted that of the 2,676 responses that gave a view on proposals to make permanent powers under the 2020 Act, 92.7% opposed. All but 40 of those responses were from individuals. The analysis stressed that the responses to the consultation are not necessarily representative of the population as a whole.

The analysis (p9) stated—

"The most common theme among those supporting permanence [of the powers in the 2020 Act] was that the provision would help the Scottish Government respond quickly if the need to close educational establishments arose again in this or any future pandemic."

And—

"Those opposing extension or permanence commonly explained this on the basis of the harm caused by closing educational establishments. Many respondents pointed to the disruption that school closures caused for children and young people's learning, both in terms of curricular education and the wider social and life skills developed through face-to-face education. Several voiced concerns about remote and online learning, suggesting that it is not as effective as face-to-face learning. Inequalities in access to devices, internet and a quiet space to study were highlighted as having the potential to exacerbate the attainment gap between children and young people in affluent and less affluent areas."

## ***Section 8: Regulations on continuing operation of educational establishments***

This section would provide Ministers with the power to make regulations on the operation of educational establishments.

The power would allow for a great deal of flexibility in which educational establishments the regulations could apply to and what may be required of those educational establishments. The Explanatory Notes (para 40) state that the regulations could include:

"the conferral of 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; the alteration of term dates and of opening times; the direction of service provision; the restriction or prohibition of 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"

### ***Sections 9 and 10: Regulations on school boarding accommodation and student accommodation***

Sections 9 and 10 provide for regulations to be made in relation to school boarding accommodation and student accommodation. The Explanatory Notes (paras 42 and 47) state that these regulations—

"... may require the restriction or prohibition of access to [student and boarding] accommodation premises (or part of such premises). The restriction or prohibition of access may be framed in terms of specified activities (for example, access could be permitted only for urgent [student or pupil] welfare reasons or for the carrying on of activities which are necessary for the continuing provision of education). Furthermore, the regulations may require actions to be taken by the managers of [student and boarding] accommodation in general terms, or may require particular actions to be taken by them."

The regulations may require the managers of student or boarding accommodation to provide support to enable residents to comply with any legal requirements in relation to public health (e.g. to self-isolate).

These regulations reflect the powers to give a "boarding accommodation closure direction" and a "student accommodation closure direction" under [Schedule 16 of the Coronavirus Act 2020](#). (paras 10 and 11)

### ***Duty to have regard to public health advice and guidance***

The Bill would require operators of educational establishments (including early learning and childcare settings, schools, colleges, and further and higher education institutions), as well as relevant managers of school boarding accommodation and student accommodation, to have regard to advice on protecting public health from the Chief Medical Officer. This duty again reflects the duties under the Coronavirus Act 2020.

In addition, the Bill would provide for the power for Ministers to issue statutory guidance about protecting public health and ensuring the continuity of education.

Operators of educational establishments would be required to have regard to such guidance.

## ***Procedure and enforcement***

Before making regulations under Chapter 1 of Part 2 of the Bill, Ministers must have regard to any advice from the Chief Medical Officer and be satisfied that making regulations is a necessary and proportionate action for or in connection with protecting public health.

There are two procedures in the Bill for regulations under this part. The first is under the [affirmative procedure](#).

However, should ministers consider the regulations to be required urgently, then regulations may come into force immediately. Under this procedure the regulations would cease to be in force after 28 days (longer if Parliament is in recess for longer than 4 days) unless agreed by Parliament. Should Parliament not agree to the regulations, Ministers would not be prevented from making further regulations under either procedure.

The rationale for this ‘made affirmative’ procedure is set out in the Delegated Powers Memorandum. This states—

"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." (para 31)

Ministers would be required to review regulations made under this chapter at least every 21 days.

The regulations may make provision for the carrying out and enforcement of restrictions and requirements contained in them. It is not clear what the scope of “enforcement” could be.

## ***Delegated Powers and Law Reform Committee report on the made affirmative procedure***

On 10 February, the Delegated Powers and Law Reform Committee (“DPLRC”) published [a report on its inquiry into use of the made affirmative procedure during the coronavirus pandemic](#). This report noted that prior to the pandemic, the made affirmative procedure was used infrequently. Since the start of the pandemic over 120 instruments were laid using that procedure.

The DPLRC made recommendations in a number of areas in relation to future use of the made affirmative procedure. It sought clarity on how Ministers determine whether

a situation is suitably urgent and recommended that Ministers provide a statement to Parliament which provides a “consistent level of detailed justification and evidence as to why the Scottish Ministers consider the regulations need to be made urgently.”

In terms of new legislation which would provide for such a procedure being utilised, the DPLRC suggested a set of principles as the basis of its scrutiny where legislation includes such provision. These principles included, “legislation making provision for the made affirmative procedure must be very closely framed and its exercise tightly limited” and “primary legislation [should include] a requirement to provide an explanation and evidence for the reasons for urgency in each case where the procedure is being used”.

The DPLRC also noted that some witnesses to its inquiry suggested that the use of the made affirmative procedure “should be seen as part of a broader context with a shift in the balance of power between Parliament and the Government over generations”.

## ***School consultations***

Chapter 2 of Part 2 relates to duties under the [Schools \(Consultation\) \(Scotland\) Act 2010](#). The 2010 Act provides for statutory duties on local authorities to consult should they wish to make certain changes to schools. These changes, termed “relevant proposals” in the 2010 Act, are set out in [Schedule 1 of the 2010 Act](#), and include:

- Closing a school
- Establishing a school
- Moving a school
- Changing the catchment of a school

Chapter 2 would amend the 2010 Act and provide that local authorities could ask Ministers to allow the statutory consultation process to be amended. Ministers would be able to allow these changes by issuing directions. Such a direction could include one or more of the following—

- Remove the requirement to publish papers and consultation reports on proposed changes to education provision in printed form
- To treat the duties to make proposal papers and consultation reports available for public inspection as duties to make the documents available in a manner they consider appropriate instead
- To meet the duty to hold a public meeting by holding the meeting using remote facilities (including by telephone or by video conferencing software).

Before issuing a direction, Ministers must be satisfied that doing so is a necessary and proportionate action for or in connection with the protection of public health.

The [analysis of responses to the Scottish Government's consultation](#) found that large numbers of those who gave a view (85.6%) opposed these measures. The analysis stated (p13) —

"A common theme among both respondents who supported the proposal and those who opposed it related to digital exclusion. Several respondents noted that people who do not have access to internet-connected devices, who lack the skills to take part online, or who live in areas with poor internet connectivity could be excluded from virtual meetings."