



OFFICIAL REPORT  
AITHISG OIFIGEIL

# Delegated Powers and Law Reform Committee

Tuesday 8 March 2022

Session 6



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**Tuesday 8 March 2022**

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**DELEGATED POWERS AND LAW REFORM COMMITTEE**  
**8<sup>th</sup> Meeting 2022, Session 6**

**CONVENER**

\*Stuart McMillan (Greenock and Inverclyde) (SNP)

**DEPUTY CONVENER**

\*Bill Kidd (Glasgow Anniesland) (SNP)

**COMMITTEE MEMBERS**

\*Craig Hoy (South Scotland) (Con)

\*Graham Simpson (Central Scotland) (Con)

\*Paul Sweeney (Glasgow) (Lab)

\*attended

**THE FOLLOWING ALSO PARTICIPATED:**

Steven Macgregor (Scottish Government)

John Swinney (Deputy First Minister and Cabinet Secretary for Covid Recovery)

**CLERK TO THE COMMITTEE**

Andrew Proudfoot

**LOCATION**

The Adam Smith Room (CR5)



**Scottish Parliament**  
**Delegated Powers and Law**  
**Reform Committee**

*Tuesday 8 March 2022*

*[The Convener opened the meeting at 11:32]*

**Decision on Taking Business in**  
**Private**

**The Convener (Stuart McMillan):** Good morning, and welcome to the eighth meeting in session 6 of the Delegated Powers and Law Reform Committee. I remind everyone present to switch mobile phones to silent.

The first item of business is a decision on whether to take agenda items 6, 7 and 8 in private. Is the committee content to take those items in private?

**Members indicated agreement.**

**Coronavirus (Recovery and**  
**Reform) (Scotland) Bill: Stage 1**

11:32

**The Convener:** Under agenda item 2, we will take evidence from the Deputy First Minister and Cabinet Secretary for Covid Recovery, John Swinney MSP, on the Coronavirus (Recovery and Reform) (Scotland) Bill at stage 1.

Mr Swinney is accompanied by a number of officials. In the room are Steven Macgregor, head of the parliament and legislation unit, and Rachel Rayner, deputy legislation co-ordinator in the Scottish Government legal directorate. Joining us online are three policy leads on the bill: Clare Morley, Craig Robertson and Erin McCreadie. I welcome you all to the meeting.

I invite the Deputy First Minister to make some opening remarks.

**The Deputy First Minister and Cabinet Secretary for Covid Recovery (John Swinney):** I welcome the opportunity to make a brief opening statement about the proposed made affirmative powers in the Coronavirus (Recovery and Reform) (Scotland) Bill.

The delegated powers memorandum prepared for the bill set out the details of 15 delegated powers proposed for the Scottish ministers in the bill. Of those, five are capable of engaging the made affirmative procedure, and I expect that the committee will have some questions on that issue.

It is worth emphasising that the default for those powers is the normal affirmative procedure, but we consider that there is justification for having the option of made affirmative procedure when urgent action is necessary. It is also worth emphasising that the prisoner release power is an extended temporary power, rather than making the Covid-specific provision a permanent power.

The committee also now has my full response to its report on the use of the made affirmative procedure. I explained in the covering letter to that response that I was responding in general terms to the committee's recommendations and I hope that the committee has found that to be a helpful explanation of the Government's position. I also said that I would be happy to consider specific recommendations from the committee in more detail in the context of its scrutiny of the Coronavirus (Recovery and Reform) (Scotland) Bill, and I stand ready to do so.

The committee will by now be familiar with my views on the intricacies of subordinate legislation procedures, so rather than repeating those I will happily answer any questions that you have.

**The Convener:** When the committee considers delegated powers in any bill, its first question is always whether or not it is appropriate to delegate the powers in the first place. There are five powers in the bill that would allow the made affirmative procedure to be used, as you have indicated. Can you explain why you considered it appropriate to delegate those powers?

**John Swinney:** In relation to the delegation of powers in the bill, the rationale is to recognise the necessity of us taking sufficiently comprehensive action should we face the challenges of an intensification of the coronavirus pandemic or another comparable incident of similar style and scale. Existing provisions in the Public Health etc (Scotland) Act 2008 give some limited localised powers to deal with what I would describe as localised outbreaks of concern but, when it comes to dealing with a situation of the magnitude that we have been dealing with around Covid, the statute book is ill equipped for such measures.

We are trying to complete the statute book to ensure that adequate powers are available and that there is a scheme of delegation in place that is appropriate to deal both with the necessity of parliamentary scrutiny and with the necessity of urgent action, should that be required, given the circumstances that we face.

**The Convener:** The fifth delegated power, at paragraph 24(1) of the schedule to the bill, is the power to release a person early from a prison or young offenders institution. It is related only to Covid, as you indicated, whereas the other four powers are to be permanent. Can you explain the reasoning behind that?

**John Swinney:** The reasoning behind which—

**The Convener:** The reasoning behind why you limited the delegated power on the release of prisoners to being only for Covid.

**John Swinney:** We did that because of the necessity of the situation in relation to Covid, which might require us to take particular steps, as we had to do during the Covid pandemic. As a general rule of thumb, that was not envisaged as a power that was appropriate to be included in legislation of this type on a long-term basis.

**The Convener:** While recognising that any primary legislation would likely have to be expedited, that could provide greater options for parliamentary scrutiny while also taking into account the specific nature of the current situation. Can you set out how you decided to include delegated powers in the bill, rather than introduce primary legislation at the point of necessity?

**John Swinney:** It essentially relates to predictability. We can be pretty certain that we will face further challenges in the form of a pandemic

in the years to come. What we cannot be certain about is the exact presentation of the challenges that will come from that. We are trying to create an approach that equips the statute book with the necessary powers to enable us to act in all circumstances where we face a national public health emergency. That approach also provides sufficient scope for us to tailor the interventions and the specifics of legislation that we put in place to reflect those circumstances—which, of itself, would be subject to parliamentary scrutiny, either through the affirmative process or, depending on the necessity and urgency, the made affirmative process.

Essentially, in principle, it is about trying to endow the statute book with the necessary powers and responsibilities, to be exercised after full and proper parliamentary consideration, and leave scope for us to adapt and adjust to the challenge as it presents itself, while still enabling parliamentary scrutiny as to whether those measures are appropriate in any given circumstance. Even with the made affirmative procedure, there is scope for parliamentary scrutiny, albeit once the measures have come into force.

**The Convener:** Thank you. I will hand over to Graham Simpson.

**Graham Simpson (Central Scotland) (Con):** Hello again, Mr Swinney.

**John Swinney:** Good morning.

**Graham Simpson:** Having gone through the letter that the committee received from you yesterday, it seems to me that its general tone, and your view, appears to be that the Scottish Government is not doing much wrong in respect of the made affirmative procedure. Considering the committee's report and the debate that we had in the chamber, I was—I will be honest—disappointed when I read the letter, as you do not seem to accept much of what the committee said. If you think that I have got that wrong, please say so.

**John Swinney:** To be blunt, convener, I think that Mr Simpson has got it wrong. My response to the committee, whether in giving evidence, in contributing to debates or in the correspondence that I have exchanged with you, has, broadly, been along the same lines. The nature of the pandemic is such that it has required us to act at pace, which is why we have had to use the made affirmative procedure on a number of occasions. That has been done of necessity.

When I was before the committee last week, Mr Sweeney raised the possibility of using a hybrid option that combines made affirmative and affirmative procedure. I am happy to engage on that, as I confirmed in my submission to the

committee yesterday; I am happy to confirm that again now. Nevertheless, if, in a public health emergency, which is a very difficult scenario, ministers were faced with a choice between whether to act today or wait 40 days for parliamentary scrutiny, I am afraid to say that I would consider acting today, because people might die if I did not. My response to the committee is set in that context.

In that response, I accept a number of other points. I indicate that I think that the Government operates

“to high standards of drafting”.

If there are issues with drafting and we do not get it right, we accept, confront and address that. If the committee believes that there are areas where we have not done that, I am, as I said in my submission, happy to consider those.

In my response, I go on to talk about the specific issue of the consolidation of instruments, for which the committee had asked. In principle, I am sympathetic to that approach, but there are a lot of practical issues, including the resources that are required to consolidate all the instruments while we are dealing with a public health emergency. Nevertheless, in principle, I would welcome such an approach.

The substance of the Government’s response is designed to be helpful. I suspect that Mr Simpson was looking for me, in that submission, to abandon my belief in the necessity of the made affirmative procedure. I am afraid that I cannot do that, however, because I would be endangering the lives of members of the public if I did so.

11:45

**Graham Simpson:** I would not expect you to do that. I am trying to get to a point where we move on from our report and your response. The committee said that, when you use the made affirmative procedure, there should be a statement as to why you believe that the matter is urgent. In your response, you say:

“My view is that the Scottish Government already provides a clear explanation of its rationale for urgency”.

However, you go on to say that you are

“happy to work with the Committee to consider how that could be better codified in practice”.

I am keen to find out how we can work together to get to a point at which you provide something that is, in my view, better than what you do at the moment, and we have a proper explanation of why something is urgent.

**John Swinney:** I think that what we have set out in the response is entirely appropriate. It is a point of fact that the Government makes a

statement about why we consider that the made affirmative procedure is required, because something is of an urgent nature. We set out the rationale for that. However, in the response, I go on to say:

“I am happy to work with the Committee to consider how that could be better codified in practice for current and future made-affirmative powers.”

That is an indication of my willingness. I think that we are giving that explanation but, if the committee says to me, “Well, if you did it this way, and covered that detail and these points,” and makes suggestions of that type, I will happily consider how we do that.

**Graham Simpson:** We can maybe look at that.

A general question is that the bill covers a wide range of areas, from education, tenancy rights and justice to health matters. Why did you put all that in one bill and not split it up? Some things in the bill are quite far reaching. For example, on tenancy rights, you could argue that what is in the bill has nothing to do with public health and everything to do with tenancy rights and changing rental law in this country. Why not introduce a separate bill on that? Work is already going on in the area and consultations are out there. Why not do it in that way?

**John Swinney:** Obviously, choices are available to ministers in the formulation of legislation. One issue that I considered, along with my ministerial colleagues, was whether we should do exactly what Mr Simpson has talked about and put the measures in their compartments in different pieces of legislation, or whether we should take the route of consolidating the legislative change that is required as a consequence of the pandemic. Essentially, the purpose of the bill is to equip the statute book, across a range of legislative questions, with the capacity to handle a pandemic, should one come our way again.

There is an arguable case for either point. We could either compartmentalise and do it in a number of pieces of legislation, or take the consolidation route. I opted to take the consolidation route, because I felt that, in the aftermath of the pandemic, there was a rational basis for us to update the statute book to learn the lessons from our experience and put in place the changes that are required.

There is a different character to some of the proposals in the bill. For example, the justice provisions in part 5 are titled “Temporary justice measures”. They are there simply because, if we do not make those changes, the implications for the exercise of judicial responsibilities will be significant. However, they are not permanent changes. They are there to put in place a

framework that it is envisaged will operate until 2025. Some of the other provisions are about powers that we may use if we face a pandemic, but we will not use them if we do not face one.

Other provisions are relatively straightforward. Indeed, I think that when I was at committee last week, Mr Simpson said that some of the changes that we were making in relation to digital access were perfectly straightforward and reasonable propositions. The argument is simply between consolidation in the aftermath of a pandemic or multiple pieces of legislation that stand alone. Of course, there would be a significant delay in getting around to introducing a number of those because of the other legislative burdens that the Parliament wrestles with.

Lastly, the relevant point is that the bill is primary legislation, so the Parliament can scrutinise every single letter in it.

**Graham Simpson:** It can indeed, but it covers such a wide area. The Education, Children and Young People Committee has already taken evidence that included a view that some of the education provisions may be unlawful. If the bill goes through, you run the risk of facing legal challenge. Even if it was just a narrow legal challenge relating to the education part, the whole thing could fall. From my point of view, I do not like the bill, full stop. From your point of view, you want to get it through, but the whole thing could fall because you have decided to lump it together and there might be a legal challenge.

**John Swinney:** There is always a risk of legal challenge. The bill incorporating the United Nations Convention on the Rights of the Child into Scots law is a standalone bespoke provision that looks to incorporate the UNCRC into our domestic legislation. One provision of that has been challenged by the United Kingdom Government because it does not want the provisions of the UNCRC to be applied in areas in which it has historically legislated.

That is one part of a compartmentalised bill, so Mr Simpson's whole argument is totally undermined by the practice of his colleague, the Secretary of State for Scotland. He has done exactly what Mr Simpson is talking about on one compartmentalised theme bill. There is no substance to the view that Mr Simpson is putting to me.

**Graham Simpson:** You are in front of me and he is not. I am asking you about your bill.

I have two more short questions. I will put something to you because of your response to the convener's question about the power to release people from prison early. He said—rightly—that that related just to Covid but that the rest of the bill is rather wider. I will read out something that you

say in the delegated powers memorandum; I am not really commenting on it, but I found it curious. In your justification for using delegated powers, you say:

"In addition to Covid, there have been relatively recent outbreaks of new diseases, SARS and MERS, and instances of contamination, such as Salisbury."

The Salisbury situation was limited to Salisbury. Why is that in there?

**John Swinney:** It is there simply as an example to indicate that there are threats and challenges to public health that could have widespread effect. The other examples are of significant outbreaks of new diseases, which have to a greater or lesser extent had an effect on our society but have had a much greater effect on other societies. That does not mean that they will not have a similar and comparable effect here. Having the capacity and ability to respond to circumstances that we face is an important point of the legislation.

**Graham Simpson:** In my final question, I will go back to what I asked you about last week—the regulations to close school boarding and student accommodation. Last week, we spoke about your desire for that power to last for an extra six months, even though the Government has never used it. Now you want to have that power permanently. How do you justify having that power permanently when it has never been used or needed?

**John Swinney:** That goes back to a point of principle about the purpose of the statute book, which is there for a variety of reasons—to codify and define the rule of law in relation to certain provisions, to provide for clarity on the law in scenarios that happen, have happened and might happen and to provide crystal-clear information to individuals and organisations about their obligations. Those are just three points about the statute book's purpose. There are provisions in statute that relate to events and circumstances that have never happened, but they provide us with the capacity to deal with such situations should they happen.

On the logic of Mr Simpson's argument, we should have no civil contingencies legislation, because we have not had to face a civil contingency issue. I argue that the pandemic was pretty close to a civil contingency, which provides the justification for having powers in the statute book that we might never use. If we were to face a situation when we did not have powers in place, that would get us into tricky territory.

The bill is about that fundamental issue. The fundamental issue that I disagree with Mr Simpson about is whether the statute book should be prepared for the different eventualities that might come our way.



**Graham Simpson:** I am sorry, convener—I asked about a specific aspect of the bill, and I do not think that the Deputy First Minister has addressed that point. The point is—

**John Swinney:** That is my justification. There might be a need for us to take action to close or restrict access to boarding school accommodation. We may have to—

**Graham Simpson:** There has never been a need for that. You have relied on guidance. Why can you not rely on that?

**John Swinney:** What if we encountered an unwilling partner?

**Graham Simpson:** Like who? Who would be unwilling? You have relied on guidance.

**John Swinney:** I simply want to have clarity in the statute book so that we know, should we face such circumstances, that we have the ability to act.

**Graham Simpson:** Move on, convener.

**Paul Sweeney (Glasgow) (Lab):** We are keen for the bill to be as shovel ready as possible, given any eventuality. The committee really wanted to make it clear that it should be a statutory requirement for a Scottish minister to provide a written statement prior to any instrument coming into force. However, the five powers as drafted in the bill do not clearly provide for such a statement. Might the Deputy First Minister consider including a clear, incontrovertible and explicit requirement to provide such a statement? We would really appreciate that adjustment.

**John Swinney:** We can consider that adjustment and would be likely to move towards it. The recent Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill took an approach in which we took explicit responsibility for setting out the rationale for the necessity of acting with urgency. I am therefore happy to consider what you suggest. It strikes me as a change that the Government would be likely to embrace, given what we did in that bill.

12:00

**Paul Sweeney:** That is positive—thank you. I noted what was in the letter that you sent to the committee yesterday, especially in respect of the expedited affirmative procedure that we discussed. I welcome the Government's indication that it will explore the idea of developing that protocol. Can we tie that to the Coronavirus (Recovery and Reform) (Scotland) Bill in a way that would help to inject some pace into the protocol's development? It is fine to say in a hypothetical sense that we could develop it in due course, but perhaps it would be worth while to

establish the protocol during the bill process, so that it can be tested.

There are examples of the made affirmative procedure being used in the past couple of years, and we could ask what we would have done if we had used an expedited procedure. How would we model it? Between the committee and the Government—along with the Parliamentary Bureau, if necessary—we could establish what that could look like, so that a more balanced approach would be taken in such a future scenario. We could then reach an equilibrium and codify it to some extent in the bill process. That could be a way of anchoring the idea in some way so that it is firmer.

**John Swinney:** I am wholly committed to exploring that third way, if calling it that is not too offensive. I am very happy to do that. I might take some advice from Steven Macgregor, after saying what I am about to say, but I think that the challenge is that we would need input from the Standards, Procedures and Public Appointments Committee's perspective on standing orders. The undertaking would then become slightly broader. I am not familiar with that committee's workload and whether it could address that question on the same timescale as that for the scrutiny of the bill. However, if we proceed with the timetable for the bill, that will in no way dampen the Government's willingness to participate in a discussion about putting in place an alternative procedure that is somewhere between made affirmative and expedited. I am very happy to look at how we might apply that. Does Steven Macgregor want to add anything?

**Steven Macgregor (Scottish Government):** There are different ways of doing this. We can do it by using a protocol, which would give us more flexibility. We have previously done that in relation to European Union legislation, and it would mean that we did not need to amend the bill.

If we are creating a whole new procedure in legislation, that is much more complicated and would probably take a bit more time. It would also probably involve the Standards, Procedures and Public Appointments Committee and other interests.

**Paul Sweeney:** We have established some options in principle. It might be worth taking that away as an action to look at liaising with the Standards, Procedures and Public Appointments Committee, and we could maintain correspondence about what might be an appropriate measure. In effect, we have agreed on the desirability of the outcome, so it is a question of what is the most practical mechanism for delivering it—whether that is a protocol or something that is more formalised. I guess that this committee will need to reflect on that and take

a view, but it might be worth continuing the discussion later.

**John Swinney:** Some of that discussion could be influenced by the first question that Mr Sweeney put to me, which was about the nature of any undertaking and explanation that the Government gives about the use of the made affirmative procedure, for example, which can have certain characteristics that give a demonstrable reason why that procedure should be used in a particular circumstance.

**The Convener:** I have been trying to clarify the timescale for stages 2 and 3 of the bill. Do you have that information to hand?

**John Swinney:** I do not have that information to hand. The Government is working with the parliamentary timetablers on the passage of the legislation but, depending on the nature of the process that we go through, I suspect that we may find ourselves in a different timescale.

**The Convener:** I appreciate that.

**Paul Sweeney:** It is important to establish that the desire is to develop the capability in the Parliament, because a gap has—rightly—been identified and I think that the Government agrees with that. Necessity is the mother of invention, so let us try to use this as a lessons-learned exercise. There is a bit less urgency for driving the bill forward, so in that sense we can take the time to get it right. If there is a degree of flexibility—it seems that a firm timetable has not been established—perhaps we can work collaboratively with the interest groups in the Parliament and the Government to come to an agreement. If that could be agreed in principle today, that would be a good thing.

**John Swinney:** As I have indicated, the Government will certainly happily co-operate with all those processes.

**Craig Hoy (South Scotland) (Con):** I have two or three general questions before I go on to specific questions on the delegated measures. The bill will be on the statute book beyond the present Government's time and, although I would not want to question this Government's character or motivations, we are giving future Governments considerable powers. A lot of that rests on the definition of a public health emergency or threat. We know about Covid, but will you give us other examples of where a public health emergency or threat might arise?

**John Swinney:** We do that in the delegated powers memorandum, and I rehearsed that with Mr Simpson. Fundamentally, judgments on such questions are informed by advice that the Government receives from its chief medical officer, who has a role in statute to provide such advice to

Government. The chief medical officer's views already drive a number of provisions that are in statute and have nothing to do with the bill. The chief medical officer takes a view that is based on his or her professional assessment of the situation that we face, and I would argue that that is exactly as it should be, so that we are influenced by high-quality, independent clinical and epidemiological advice about the situation that we face.

I make the point in trying to answer Mr Hoy's question—I understand exactly why it was asked—that it almost invites me to define the indefinable, because we do not know what might come our way. If we did not feel that over the past two years, we certainly have felt it over the past two weeks in relation to the awful situation in Ukraine.

The construction of our statute book on many public health issues, which often hinges on the chief medical officer's advice, is designed to give us the ability to interrogate and interpret events as they unfold and then come to a view on what merits the necessary action by ministers. The challenge of any part of legislation is to make sure that that advice can be offered, that it can be considered by ministers and that Parliament can exercise accountability over that judgment.

**Craig Hoy:** Do you accept that it is difficult to legislate on a Donald Rumsfeld approach of known knowns and known unknowns? There has to be some specificity, so is there more that you could do in the bill to flesh out what you mean by a public health emergency or threat? It could otherwise be open to misinterpretation by future Administrations.

**John Swinney:** Ultimately, the Parliament has to satisfy itself that it has the right legislative arrangements in place to deal with any given scenario. The statute book includes a number of strong characteristics, not least of which is the ability of the chief medical officer, for example, to offer his view on the situation that we face. That has influenced the judgment that was made on the construction of the bill. It is a matter for the Parliament to scrutinise and consider whether it believes that appropriate descriptions and explanations are in place in the legislation, and the Government will then consider that further.

**Craig Hoy:** The Parliament will do that, but the courts might also scrutinise the legislation or the implementation or enactment of that legislation at some point.

What seems to distinguish the bill and the measures that it would effect is that we are passing it into law on a permanent basis. We could have tried to challenge many of the measures that have been brought in during the pandemic, but article 15 of the European

convention on human rights gave you the safeguard and the certainty that the measures could not be challenged, because it says that Governments can act

“in exceptional circumstances ... in a limited and supervised manner,”

free

“from their obligations to secure certain rights and freedoms under the Convention.”

One element is the “limited and supervised” aspect, but passing the bill as permanent legislation will mean that you lose the time-limited element. Are you certain that article 15 would give safeguards if the bill was passed into law?

**John Swinney:** I think that it would, because the powers that are envisaged in the bill can be used only should certain scenarios arise that are in themselves compatible with article 15. The powers are not routine or everyday, and the statute book has other powers in place that can be used only in given circumstances, which could come into the same scope as Mr Hoy outlined.

Without such powers, we would end up with a statute book that was ill prepared for certain emergency circumstances. Given what we have gone through in the past two years and the way in which we have had to address those issues in extremis, that would not be a desirable outcome.

If I think back to the passage of the coronavirus legislation in the previous parliamentary session, although there was a lot of parliamentary good will to get the legislation passed, there were quite a lot of complaints about the fact that we were not doing that in slow time. We would be better to do this carefully, in slow time, and put it into statute but make sure that it can be used only in extremis.

**Craig Hoy:** I have a couple of specific questions about the measures. You referred to the fact that the Government takes advice from the chief medical officer on protecting public health, and the regulations will flow from that. In relation to education and educational establishments in particular, there does not appear to be any requirement in the bill for any assessment to take place of the impact of an instrument made under the powers that may be exercised through the made affirmative procedure. Do you agree that it is important that those affected understand the impact of the regulations and that the information is accessible, clear and published in a timely manner? Would you consider amending the bill so that a requirement for such a process is included in it?

**John Swinney:** I will take that point away and reflect on it. My first reaction to all the requirements and points that Mr Hoy has put to me is to say that I would have judged them to be

covered by the variety of impact assessments that we are required, by other statute, to do in any given circumstance. I would have thought that all those existing obligations—to undertake a business and regulatory impact assessment where appropriate or an equalities impact assessment where necessary; there are other statutory requirements—would catch the point that Mr Hoy has put to me. However, I will take that point away to satisfy myself that no gap exists there, because I accept the sentiment unreservedly.

12:15

**Craig Hoy:** The measures in the bill on early release from prison and young offenders institutions are exceptional because they specifically relate to Covid and they are time limited. I go back to your opening remarks. If you want a statute that is fit for purpose, why would you not want to have the capacity to release prisoners early in another pandemic situation, or beyond 2025?

**John Swinney:** That is simply because those measures are not ordinary elements of policy that we would want to have in place.

**Craig Hoy:** Nor is shutting an educational boarding facility.

**John Swinney:** That might be a necessity of its time. However, we do not particularly want to release prisoners out of the necessity of the time.

**Craig Hoy:** Logic dictates one or the other. Either you want a statute book that gives you the capacity to do such things in certain defined circumstances or you do not. Mr Simpson and I are challenging the whole nature of the bill, because you are effectively passing into law certain powers that you would like to keep in the future—you tell us that you require them—and others that you say you are happy to let fall in 2025. By your own logic, you would surely want to keep in place the capacity to release prisoners.

**John Swinney:** No. Essentially, the matter of necessity kicks in on those questions. For example, we had to face the necessity to move to a situation in which our schools did not function in the way to which we were accustomed. We would want to avoid the necessity of releasing prisoners early, because courts have decided that prisoners must serve particular sentences. No particular rationale exists as to why that provision should be there in perpetuity, because it conflicts with fundamental elements of our legislative framework and the expectations of members of the public about the nature of those circumstances and how we handle them.

**Craig Hoy:** Are you saying that it is politically unpalatable to extend the legislation beyond those points?

**John Swinney:** I am simply saying that the Government would not ordinarily want to have the necessity of undertaking that in an emergency.

**Craig Hoy:** If your first priority is to safeguard the public, including those who are in prison, surely you would want to keep that power on the statute book to utilise at some point in the future.

**John Swinney:** Essentially, we are codifying where we can do that and where we believe that we have the basis of so acting to enable us to exercise those powers.

**Craig Hoy:** I am not sure that I necessarily follow the logic of that position.

Mr Simpson referred to the measures on private sector tenancies. The draft strategy consultation paper “A New Deal for Tenants” is out for consultation until 15 April 2022. I am slightly at a loss in working out why provisions that effectively pre-empt that consultation are included in the bill. Would it not be far better to remove those provisions from the bill and include them in future housing legislation, so that you can be cognisant of the consultation responses?

**John Swinney:** That goes back to the question whether, in principle, we are taking a consolidated route to the handling of the issues that have arisen around the pandemic or taking all those issues out element by element and putting them into the policy development work that we undertake on wider questions around housing and tenancies. I and other ministers have made the choice to put together a bill that, in essence, tries to update the statute book in light of the pandemic experience, instead of taking the compartmentalised approach.

**Craig Hoy:** Finally, are you not putting the cart before the horse with the particular measure in section 37? Would it not be better to pause, wait for the consultation, and then come back with further primary legislation as and when it is required?

**John Swinney:** I do not think that we are doing that because of all the reasons that I have just given. We have reflected on the experience of the pandemic, taken account of the experiences, and formulated a legislative proposition that gives us the powers to act in certain circumstances. Obviously, if there is further legislative change—I imagine that there will be further tenancy-related changes in the years to come—there will be the opportunity to reflect on any provisions when that legislation is being considered by Parliament.

**Bill Kidd (Glasgow Anniesland) (SNP):** You have covered a great range of things that I was thinking of asking about. I would like to look at the

committee’s principle that there should be a statutory requirement that any instrument that is made using the affirmative procedure must contain a sunset provision. Will you outline your approach in setting such review requirements? How does the Scottish Government decide what the sunset provision should be—how far it may go?

**John Swinney:** Obviously, there is an argument for sunset provisions. The difficulty is that we cannot, for example, predict the moment at which we might face a pandemic, how long it will go on for, or whether—to be blunt—it will coincide with the intricacies of parliamentary sitting arrangements. We could find ourselves in a situation in which we have a gap in the statute book because Parliament is not sitting, but there would be a necessity for us to undertake particular provisions. It is about taking an orderly approach to ensuring that the statute book is in a fit state to respond to different challenges.

**Bill Kidd:** When you introduce legislation for consideration by the Parliament, is a sunset provision—if we are allowed to call it that—considered at that time, as opposed to waiting to see how things are going to develop?

**John Swinney:** It would have to be considered at that time. Obviously, there are certain arrangements in the bill that mean that if, for example, the made affirmative procedure is applied but the Parliament does not support or endorse the provision, it will lapse after a given period of time. Those provisions are built into legislation at the time of its design. However, there is the provision for ministers to consider any other provisions of that nature that might come forward and which members might wish to add to the bill during its passage.

**Graham Simpson:** I want to go back to the point about freeing prisoners early, because I am genuinely struggling to understand the logic of your position, Mr Swinney. Obviously, we do not want to be in the position of freeing people early, but your position appears to be that, if that is Covid related, we should consider doing that, and if it is not Covid related, we should not consider it.

Earlier, I read out a quote from your delegated powers memorandum. I will read out another bit:

“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.”

Your rationale for the entire bill is that the powers are needed because we do not know what will happen in the future; that could be the stuff that you listed in that document or something else. However, when it comes to releasing prisoners early, you want to restrict that power just to Covid-

related matters. There appears to be no logic to that.

**John Swinney:** The logic is quite simply that we do not want to take a policy approach in any circumstances that envisages releasing prisoners early. We have had to do that once, in May 2020. Although the Covid threat is still hanging over us, we do not think that that provision for that policy element should be available to us on an on-going basis. However, in other aspects of the bill, we must have a range of options at our disposal to help us to deal with the public health emergency. That is the simple distinction that I would make.

**Graham Simpson:** It is an illogical position. It would be more logical to remove that provision entirely from the bill.

**John Swinney:** Mr Simpson is free to lodge an amendment to that effect.

**Graham Simpson:** I might well do that, in order to help you out. I will leave it there.

**The Convener:** Do colleagues have any final questions before we move on?

As no one has indicated that they have further questions, I thank the Deputy First Minister and Cabinet Secretary for Covid Recovery and his officials for appearing in front of the committee.

I suspend the meeting briefly to allow the cabinet secretary and his officials to leave the table.

12:27

*Meeting suspended.*

12:27

*On resuming—*

## **Instruments subject to Affirmative Procedure**

**The Convener:** Under agenda item 3, we are considering one instrument.

### **Prohibition of Smoking Outside Hospital Buildings (Scotland) Regulations 2022 [Draft]**

**The Convener:** Is the committee content with the instrument?

**Graham Simpson:** Did the instrument appear in the committee papers a couple of weeks ago, or was that something similar?

**The Convener:** We cannot recall the instrument being in the papers before. This is the first time.

Is the committee content with the instrument?

**Members** *indicated agreement.*

## Instruments subject to Negative Procedure

12:28

**The Convener:** Under agenda item 4, we are considering six instruments, on which no points have been raised.

**Town and Country Planning (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2022 (SSI 2022/66)**

**Registration Services (Fees, etc) (Scotland) Amendment Regulations 2022 (SSI 2022/68)**

**National Assistance (Sums for Personal Requirements) (Scotland) Regulations 2022 (SSI 2022/70)**

**National Assistance (Assessment of Resources) Amendment (Scotland) Regulations 2022 (SSI 2022/71)**

**National Assistance (Assessment of Resources) Amendment (Scotland) (No 2) Regulations 2022 (SSI 2022/72)**

**Prisons and Young Offenders Institutions (Coronavirus) (Scotland) Amendment Rules 2022 (SSI 2022/73)**

**The Convener:** Is the committee content with the instruments?

**Members** *indicated agreement.*

## Instruments not subject to Parliamentary Procedure

12:28

**The Convener:** Under agenda item 5, we are considering two instruments, on which no points have been raised.

**Planning (Scotland) Act 2019 (Commencement No 6 and Transitional Provision) Amendment Regulations 2022 (SSI 2022/67 (C 5))**

**Prescription (Scotland) Act 2018 (Commencement, Saving and Transitional Provisions) Regulations 2022 (SSI 2022/78 (C 6))**

**The Convener:** Is the committee content with the instruments?

**Members** *indicated agreement.*

12:28

*Meeting continued in private until 13:14.*

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