

Education, Children and Young People Committee

**8th Meeting, 2022 (Session 6), Wednesday 9
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 took evidence from stakeholders at its meeting on [2 March 2022](#).
5. At this meeting, the Committee will take evidence from the Cabinet Secretary for Education and Skills and Scottish Government officials.

Supporting Information

6. A call for views regarding the specific provisions in the Bill closed on 25th February 2022 and those responses have been [published](#).
7. A SPICe briefing on the issues being considered at this evidence session, is provided at **Annexe A**.

**Education, Children and Young People Committee Clerks
4 March 2022**

Annexe A

The logo for SPICe, featuring the letters 'SPICe' in a white, sans-serif font on a dark purple background.

The Information Centre
An t-Ionad Fiosrachaidh

Education, Children and Young People Committee

9 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.

Last week the Committee heard from a panel of stakeholders and the Commissioner for Children and Young People. This week the Committee is taking evidence from the Cabinet Secretary for Education and Skills.

This paper is looking at Part 2 of the Bill, which concerns powers to make regulations on the functioning of educational establishments, boarding and student accommodation (chapter 1); and amendments to the Schools (Consultation) (Scotland) Act 2010. The Cabinet Secretary for Education and Skills, or her future equivalent, might be expected to exercise the powers proposed under the bill, but she did not introduce the Bill. The Bill was introduced by John Swinney MSP on 25 January 2022.

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](#). A copy of the SPICe briefing on Part 2 of the Bill was included as an annexe to the Committee's briefing paper for the meeting on 2 March 2022.

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.

This paper is intended to reflect the evidence the Committee and Parliament has received in relation to Part 2 of the Bill.

Part 2, Chapter 1 Educational Establishments etc.

Overall approach

The Scottish Government's [consultation on the Bill](#) sought views on extending or 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 Coronavirus Act 2020](#) and [Part 2 of schedule 17 of the UK Act](#). Specifically, the consultation mentioned Education Closure Directions and Education Continuity Directions.

The Bill restates and would make permanent some, but not all, powers in those parts of the 2020 Act. 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 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.

The [Scottish Association of Social Work's submission](#) 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 ... Government must take steps to weigh up harms and consequences of closing educational establishments and such decisions should not be taken lightly or as a matter of first resort unless in extreme circumstances."

The NASUWT's submission expressed "serious concerns" about making some of the powers in the 2020 Act permanent. It said—

"Granting these powers to Scottish Ministers to use with relatively few constraints on their ability to act, in circumstances they largely determine and with no ready means of challenging them, would not be acceptable to the NASUWT, nor would it meet the principles of the rule of law.

"While in Scotland it might be said that Ministers have, in practice, not abused these powers to date, this provides no long-term certainty of system-wide confidence. There is no guarantee that any incumbent Ministers or government would use new permanent powers appropriately."

John Edward from SCIS noted that the Scottish Government has [established a public inquiry to examine the handling of the COVID-19 pandemic in Scotland](#). He argued that legislating for future pandemics might be better done after the conclusion of that inquiry. Megan Farr argued that there is a risk that the Bill seeks to address the current but not necessarily the next emergency.

The Committee has heard a number of alternative legislative options. Some of these are set out in the following three sections.

Framework approach

The Committee heard opposition about the proposed approach on 2 March from Universities Scotland and Colleges Scotland.

Universities Scotland noted that the powers drafted in the Coronavirus Act 2020 were drafted hurriedly and responded to the situation in March 2020. Alasdair Sim suggested that the Bill is an opportunity best determine what powers a Government might need in any future pandemic and how those powers could be framed. Universities Scotland suggested an approach that provided for regulation making powers but with less granular detail. Its submission set this out in the following four bullets:

- 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.

Draft Emergency Legislation

The Committee discussed the collaborative approach the Scottish Government had taken with stakeholders during 2020 and 2021. A number of witnesses, including Megan Farr from the Commissioner for Children and Young People noted that the Bill would provide powers for any future Government. The implication is that the test should not be whether the current Government would use the powers appropriately and take decisions collaboratively, but whether any Government would do so.

CYCPS' submission argued that—

“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.

CYCPS suggested that there may be grounds for concern about the compatibility with the European Convention of Human Rights. The Bill as introduced, received [statements of legislative competence](#) from the Presiding Officer and the Deputy First Minister. The policy memorandum discussed potential impacts on rights of regulations made under this part. An extract of the PM is included in the Annexe to this paper.

CYCPS' submission suggested that the Government ought to develop draft emergency legislation as part of wider contingency planning for future pandemics. This process, CYCPS argued that this would allow for planning to cover a range of scenarios and that "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."

As noted above, the Policy Memorandum explored this option. It said—

"While this approach may be feasible, it would be unusual, and it is not certain that it would be possible to introduce the draft provisions via emergency legislation with the urgency required by the circumstances of a developing public health crisis."

Relationship with local authority powers

The EIS supported extension of the emergency powers under the 2020 Act. [Its submission](#) stated—

"Whilst the EIS believes that the Scottish Government's powers around school closures should be extended, it argued in a previous submission 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 EIS and COSLA stated that education authorities do not have the power to close schools unilaterally on public health grounds. The EIS suggested that the Bill should provide for such a power in addition to the powers of Ministers to do so.

The existing provisions relating to school closure and public health referred to during the session are in regulation 6 of the [Schools General \(Scotland\) Regulations 1975](#). These regulations state:

"Where a health board competent person advises an education authority that, in order to prevent the spread of disease or other danger to health, a school under their management should be closed temporarily or that certain pupils be excluded from that school for a specified time or, where that school is a boarding school, that the pupils should be confined to the school premises for a specified time, the education authority shall forthwith close that school or exclude or confine the said pupils, as the case may be, accordingly."

[The Schools General \(Scotland\) Amendment Regulations 1987](#) amended Regulation 5 of the [Schools General \(Scotland\) Regulations 1975](#) to set the minimum number of school days to 190 per year. The duty is a qualified one though. The regulations say:

"An education authority shall, except where prevented by circumstances outwith their control, secure that every school under their management shall be open for at least [190 days]."

The extent to which an education authority could rely on the caveat "prevented by circumstances outwith their control" to close a school to secure the health and safety of staff

and pupils is not clear. Conversely, [West Lothian Council's submission](#) questioned how regulations which would require schools be open would interact with an education authority closing a school “where necessary, having regard to the availability of staff and health and safety of staff/pupils”.

COSLA's submission stated—

“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. ... 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.”

Educational establishments

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. This could include areas of childminders' homes.

Section 8 is intended to support the continuity of education by providing for regulation-making powers which would create duties on educational establishments. 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.

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 differently to different types of establishment.

Stakeholders from the Further and Higher Education sectors expressed unease about the level of direction these powers would allow for in their sectors. 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 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.”

Ministers would have wide discretion in how regulations would be drafted. The powers in the 2020 Act have not applied to Colleges, Universities or independent schools. Regulations made under this section could apply to specific institutions, to a particular type of education establishment, or to all education establishments.

Student and boarding accommodation

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”.

The regulations could require managers of student or boarding accommodation to assist residents to follow health advice, guidance or restrictions (such as to self-isolate). At times in the pandemic, [there were reports](#) of students facing difficulties to comply with self-isolation rules with their communal living arrangements.

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.

Processes for regulations under Chapter 1 of Part 2

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 satisfied, in view of that advice, that making the regulations is a necessary and proportionate action”.

Should ministers consider the regulations to be required urgently, then regulations may come into force immediately, under the ‘made affirmative’ procedure. 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)

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”.

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.”

Megan Farr from the office of the Children and Young People’s Commissioner Scotland and Liam Fowley from the SYP both argued for the voices of young people to be involved in decision making.

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”.

Part 2, Chapter 2 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 and suggested that hybrid meetings should be considered.

Members explored with witnesses whether a commitment to making best endeavours to consult with the widest possible number of parents/carers and other members of the community could be included in the Bill.

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

3 March 2022

Note: Committee briefing papers are provided by SPICe for the use of Scottish Parliament committees and clerking staff. They provide focused information or respond to specific questions or areas of interest to committees and are not intended to offer comprehensive coverage of a subject area.

The Scottish Parliament, Edinburgh, EH99 1SP www.parliament.scot

ANNEXE – Extract from the Policy memorandum

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)