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Stuart McMillan MSP  
Convener  
Delegated Powers and Law Reform Committee  
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01 December 2021

Dear Stuart,

**RE: Regulation-making powers in the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill**

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

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

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

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

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

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

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

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

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

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

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

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

Yours sincerely,

**JOHN SWINNEY**

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