



OFFICIAL REPORT
AITHISG OIFIGEIL

Delegated Powers and Law Reform Committee

Tuesday 1 March 2022

Session 6



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DELEGATED POWERS AND LAW REFORM COMMITTEE

7th 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:

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 1 March 2022

[The Convener opened the meeting at 11:30]

Decision on Taking Business in Private

The Convener (Stuart McMillan): Good morning, and welcome to the seventh 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 to decide whether to take agenda items 6, 7 and 8 in private. Is the committee content to take those items in private?

Members indicated agreement.

Evidence

Coronavirus Act 2020 (Alteration of Expiry Date) (Scotland) Regulations 2022 (SSI 2022/40)

Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Amendment Regulations 2022 [Draft]

11:30

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 two Scottish statutory instruments deferred from last week's meeting: the Coronavirus Act 2020 (Alteration of Expiry Date) (Scotland) Regulations 2022, which is a made affirmative SSI, and the draft Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Amendment Regulations 2022, which is an affirmative SSI.

Mr Swinney is accompanied by two Scottish Government officials. Elizabeth Blair is unit head, Covid co-ordination, and Graham Fisher is deputy director of the directorate for legal services. I welcome you all to the meeting.

As the Deputy First Minister knows, this session is a chance for members to ask questions about the two instruments, which were deferred from last week. Obviously, the committee is focused on whether the instruments are correct as a matter of law, including whether the correct procedure has been applied. The COVID-19 Recovery Committee will focus on the wider policy issues. It is likely to take evidence on the instruments on Thursday 17 March.

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

The Deputy First Minister and Cabinet Secretary for Covid Recovery (John Swinney): Thank you, convener, and good morning. I welcome the opportunity to address any points that the committee may have on the two sets of regulations on the agenda.

The Coronavirus Act 2020 (Alteration of Expiry Date) (Scotland) Regulations 2022 will amend the date on which five provisions in the United Kingdom Coronavirus Act 2020 would automatically expire, from 24 March 2022 to 24 September 2022. Changing the expiry date of those powers will ensure that ministers have those powers available if—and only if—their use is needed in relation to coronavirus over the coming months.

Similarly, the Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Amendment Regulations 2022 will amend the date on which the Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Regulations 2020 would automatically expire, from 25 March 2022 to 24 September 2022. Again, changing the expiry date of the regulations will ensure that we keep in place important powers for local authorities to be able to make directions to control local outbreaks of coronavirus.

The Coronavirus Act 2020 (Alteration of Expiry Date) (Scotland) Regulations 2022 were made using the made affirmative procedure. I am aware that that is one of the issues that the committee has raised. I have emphasised previously that the made affirmative procedure is an unusual power granted by the Parliament in situations when action may need to be taken more quickly than the normal affirmative procedure allows for. If that procedure were not available, there would be a risk that necessary measures could not be brought in quickly enough. In this instance, the regulations use the made affirmative procedure because, at the time of laying, our understanding was that that was the only procedure available to us. As the committee is aware, it has since come to our attention that it would, in fact, have been possible to use the affirmative procedure. However, I want to be clear that, even though the made affirmative procedure has been used, we have nevertheless ensured that the Parliament has 40 days for scrutiny of the regulations prior to their coming into force on 24 March 2022, as would have been the case under the affirmative procedure.

The regulations to extend the expiry date of the local authority directions regulations, were laid in draft and follow the affirmative procedure, with an expedited timetable.

Both sets of regulations put back the date on which the key coronavirus provisions would have expired by default. Thus, the regulations protect our ability to put in place any measures that might be considered necessary. We cannot let that ability expire by default, because we might still need such measures.

It is our intention and expectation that we will lift the face-covering requirements and the other remaining baseline measures with effect from 21 March. However, that is dependent on the course of the pandemic between now and then. Even after baseline measures are lifted, Covid will not have gone away and it may have further surprises in store for us. As the strategic framework update states, we cannot rule out the possibility that it might be necessary to impose legal measures once more. Therefore, we must be ready and able

to respond effectively, and it is essential that we have the powers to enable us to do so.

In conclusion, both sets of regulations are essential to ensure that the right powers are available to manage Covid in this next phase of the pandemic, should that be required.

I am happy to address any points from the committee.

The Convener: Thank you, Deputy First Minister. I will start with questions and then hand over to colleagues.

In respect of the first set of regulations—the made affirmative regulations—section 38(2) and part 2 of schedule 17 to the Coronavirus Act 2020 relate to the power of the Scottish ministers to give directions regarding the continuity of education and childcare. Have the powers under that section been greatly used since the act came into being? Do you anticipate those powers being used during the six-month extension?

John Swinney: During the course of the pandemic, on what I consider was a regular basis, the powers were certainly used in respect of observing the requirements that we expected to be in place in order to maintain public health in the education community. At times, they were used to specify what could and could not happen in schools. At the height of the pandemic, the education continuity directions were used to specify that, for example, children of key workers could be educated or supported in schools, whereas other children could not be. At times, the powers were also used to specify our expectations about educational provision.

The powers certainly have been used over the course of the pandemic. On the question whether they will need to be used in the foreseeable future, I point out that they can be used only when there is a public health imperative that enables them to be used. Their existence and significance relate to the fact that, in my view, we must have a statute book that enables us to address the circumstances as we face them.

The Convener: As we progress through the year, if it were recognised that the powers were not needed, would the Scottish Government consider laying regulations to remove those powers?

John Swinney: That would not be our intention. The committee will know that the Government has introduced primary legislation that aims to ensure that the statute book is equipped to deal with the uncertainties that we might have to face on an on-going basis. That is a separate issue, which will be the subject of detailed and familiar parliamentary scrutiny.

The whole point of extending the expiry date of the act through the instrument that is before the committee is to enable the Government to respond to the emerging situation that we face. I have previously been clear with the Parliament that we hope that we will not have to face those situations, but the statute book has to be equipped, should they arise.

The Convener: Thank you, Deputy First Minister.

Graham Simpson (Central Scotland) (Con): Thanks, convener, and thank you for coming along this morning, Mr Swinney.

I want to start by asking you about the made affirmative versus affirmative procedure business, so that we have your comments on the record. In that respect, I will focus on the Coronavirus Act 2020 (Alteration of Expiry Date) (Scotland) Regulations 2022 (SSI 2022/40). Although the instrument was laid under the made affirmative procedure, the Government has now accepted what it did not accept at the start of the process, which is that it could have used the affirmative procedure. In reality, it makes no practical difference, given the timescale that you have allowed, but you accept that you could have used the affirmative procedure in this case.

John Swinney: As a consequence of helpful engagement with the committee's lawyers and the routine dialogue that goes on between lawyers, we have accepted that we could have used the affirmative rather than made affirmative procedure. However, we laid the instrument under the made affirmative procedure because, in our view, that was the only provision available to us.

Graham Simpson: But that was, in fact, incorrect.

John Swinney: We have to be careful about using the words "correct" and "incorrect" when we are talking about legal debate. Such debate is at the heart of reconciling different views and interpretations of legislation; indeed, the courts spend a large amount of time debating the words that we all put on the record in this institution to determine the correct interpretation of law. There has been a debate about the interpretation of parts of the provision, during which the lawyers of this committee put a position to the Government's lawyers, which we accepted.

Graham Simpson: Okay. I thought that it might be useful to go through the instrument in question, which contains a number of provisions, and to hear your thoughts on each of them. I might not cover them all, but I will go through them quickly. Some are quite straightforward.

The first provision relates to the ability to register deaths and stillbirths remotely. Does that

give people a choice? Does it have to be done remotely, or can people still pop into an office to register a death or stillbirth in person?

John Swinney: They can still register in person.

Graham Simpson: So this just gives people the option to register a death remotely.

John Swinney: That is correct.

Graham Simpson: It sounds eminently sensible, like something that you might want to keep in perpetuity.

John Swinney: That is why I am legislating for it in the substantive bill—and why, therefore, I think that the bill is so necessary.

Graham Simpson: The next provision relates to vaccination and immunisation. According to the policy note, the regulations allow people to be vaccinated or immunised against "any disease", not just Covid, by someone who is not a medical practitioner. Can you explain the practicalities around that provision?

John Swinney: Essentially, this is about who can administer the vaccine and ensuring that we have the broadest possible definition in that respect. Normally, our vaccination programmes do not need to be as comprehensive as those that we have just successively gone through and which we will likely have to go through for some time yet, and the provision broadens the pool of people who by law are able to undertake that task. If we did not have that statute in place, the vaccination programme would to all intents and purposes be rendered impractical.

Graham Simpson: Obviously, with the mass vaccination scenario that we have had there needs to be that flexibility.

11:45

John Swinney: There is an interesting and important point here about the recognition that, in this type of situation, we are dealing with a challenge of a greater magnitude. I do not have authoritative knowledge on the scale of all vaccination programmes, but I would think that the flu vaccination programme is usually the biggest vaccination programme that takes place in the most concentrated period of time. Childhood vaccinations go on all the time, but they are spread over the whole year.

However, as we all know, the Covid vaccination programme was completely different in character. It was to provide that capacity that we made that provision.

Graham Simpson: That is useful. The next section relates to education institutions and childcare premises. Your policy note says:

“To date the power to give “educational closure directions” ... has not been used. It is considered unnecessary to extend this power in addition to the power to give educational continuity directions”.

That is fine; you do not want that power. However, you do want powers to close boarding accommodation and student accommodation. Why do you need those powers?

John Swinney: We need them for reasons of public health. In certain circumstances, we might need to take decisions that relate to the prevalence of the virus and its presence in certain scenarios.

Graham Simpson: You have not, however, used those powers.

John Swinney: We will come back repeatedly to the point about whether the statute book should be equipped to help us to manage a situation that we might have to manage. If we take the argument that has been put to me, which is that we should act only on the basis of precedent, we will never change the statute book on Covid, because we have never experienced anything of the magnitude of Covid.

Graham Simpson: Those are emergency powers that were put in place for a variety of reasons and yet, in this case, you never used them; you relied on guidance. I cannot see why you would require to hang on to powers that, throughout the pandemic, you never used.

John Swinney: We might face a situation in which we have to act to protect public health. We will continue to rub up against the question of the statute book, and it will affect the longer-term legislation that the Parliament considers. With the benefit of our experience of handling the pandemic, do we consider it necessary to have a range of powers at our disposal that would enable us to deal with scenarios that we might face? That is the question that the Parliament must resolve. As I have said to the Parliament on many occasions, things can happen extraordinarily quickly.

Graham Simpson: You are asking for an extra six months for a power that you never used during a pandemic that was, at times, pretty hairy and scary for people—not so much now, thankfully. You want to hang on to powers that were never used while you relied on guidance. I have not heard a justification for that.

John Swinney: I am offering the justification, convener, to the extent that I will end up repeating myself again and again. I have given the justification that I am going to give.

Graham Simpson: I would not wish you to repeat yourself.

I have one more question. I have an issue with that provision, although I can see the validity of those that we discussed earlier. Have you considered, or would you consider splitting up the regulations, so that parliamentarians who feel able to support some of them, but not all, would be able to do so?

John Swinney: I think that that comes into the nature of the way in which we formulate legislation. Mr Simpson raised questions about the earlier regulations on registration of deaths and stillbirths and on vaccination and immunisation, and those are the type of stand-alone provisions in the on-going legislation that members of the Parliament can amend or adjust. As Mr Simpson knows, I keep a very open mind about the amendment of legislation, so there will be space for engagement on those questions. When it comes to regulations, the Parliament is offered the choice as to whether to accept or reject the instruments.

I have not given consideration to separating the instruments, and that opportunity does not arise because of the timescales under which we are now operating, but we have already expired very significant numbers of powers. We have done that openly and clearly to the Parliament when we have judged that there was no compelling reason for us to continue with those powers. That has obviously been the subject of scrutiny by this committee and support from the Parliament.

Graham Simpson: I am not really sure whether that was a yes or a no; I think that it was a no.

Convener, I have not touched on the local authorities instrument. If somebody else wants to pick up on that, that is fine, but I am happy to ask about that instrument if you want.

The Convener: We will take questions from other colleagues first, starting with Craig Hoy.

Craig Hoy (South Scotland) (Con): Good morning, Mr Swinney. I will open with a slightly wider question that relates to two of the instruments that are before us today. In a parliamentary debate last September, you said that the Government was committed to removing regulations when they were no longer necessary. You said that

“regulations and restrictions have been removed when the situation has improved.”—[*Official Report*, 9 September; c 96.]

You acknowledged that today, with regard to the expiry of many of the restrictions and regulations. However, at a point in time when the situation has markedly improved, you are still seeking the extension of many of those powers, such as the power to release prisoners early. Your justification for that is that you believe that those powers are still necessary and proportionate. Could you

perhaps say a little about how you make that assessment about whether something is necessary and proportionate? Has that changed over time?

John Swinney: That is the subject of a regular process of review, which, ultimately, involves Cabinet decisions and the statements that the First Minister has made to the Parliament on a regular basis. The process involves analytical work that is undertaken within Government to consider a range of perspectives on the state of the pandemic, such as its seriousness and the level of threat to public health. Essentially, that leads to the production of the “Coronavirus (COVID-19): state of the epidemic” report, which is published on a regular basis and is publicly available.

A group at a senior level within the Government considers that report and explores the four harms—which we have described and which committee members will have heard me talk about before—which are the direct Covid health harm, the non-Covid health harm and the social and economic harms that are caused by Covid. That group is populated by the chief advisers to the Government: the chief economist, the chief social policy adviser, the chief medical officer, the chief scientific adviser, the chief educational officer and the chief social worker. All those individuals consider that material and provide advice to the Cabinet, which makes a judgment about whether regulations are proportionate.

That is, ultimately, a judgment to be made. Indeed, the Government made it explicit last Tuesday, in its strategic framework update, that that is, always has been and always will be a judgment. However, ministers recognise—appropriately, given that all our decisions are justiciable—that we must be satisfied that the stance of regulations being proportionate can withstand legal challenge, should that arise. The Government takes such issues very seriously in its deliberations.

It all leads to a set of decisions that are taken by the Cabinet and then reported to the Parliament. Accordingly, any legislative measures that flow from that are brought to the Parliament in the fashion with which the committee will be familiar.

Craig Hoy: Thank you for that full answer.

Obviously, any measures need to be not only necessary and proportionate, but legal. Last week, we considered measures on Covid passports—indeed, we will do so again this week, but thankfully in relation to the expiration of the present system. We also discussed another potentially contentious SSI last week—the Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No 4) Regulations 2022—

which gives you the power to maintain the wearing of face masks and to reintroduce Covid passports at some point in the future. I wonder whether you can reflect on the evidence that was given by the Government’s business manager, Mr Adam, who told the committee that Covid passports were compliant with the general data protection regulation and that your Government

“would not do anything illegal.”—[*Official Report, Delegated Powers and Law Reform Committee*, 14 September 2021; c 9.]

Now that we know that the Information Commissioner warned ministers that the plan was unlawful, would you like to take the opportunity to correct the record? Can you also tell us when the commissioner’s concerns were first raised with you?

John Swinney: My reading of the Information Commissioner’s communication with the Government indicates that the issues that the Government has to address are about the explanation of the approach that has been taken to information handling, not the information handling itself. The remedial action that the Government has to take is to explain better to members of the public why their information is being handled as it is being handled. The issue is not the means of handling the information.

As to my knowledge of the situation, I became aware of the concerns of the Information Commissioner’s Office on, I think, 28 or 29 September. I would have to verify exactly which day it was, but it was one of those two.

Craig Hoy: Would it not have been better to make the public aware of those concerns at that stage?

John Swinney: I have to make a lot of judgments on the merits of particular stances. Having heard about the issues that were on the minds of the Information Commissioner’s team, and given the necessity of ensuring that we had in place an accessible Covid certification scheme for members of the public—I remind Mr Hoy that that was important for not just domestic but international certification—I judged that the appropriate course of action was to launch the app when we launched it, as we had indicated would be the case.

Craig Hoy: I welcome the fact that the instrument that we will consider this morning withdraws the scheme. If the scheme were to come back in its present form, would it now be compliant with GDPR legislation?

John Swinney: Mr Hoy will be aware of the contents of the Information Commissioner’s letter to us last week. Obviously, the Government will take all necessary steps to ensure that we address those issues, but I stress that they are about the

explanation that is given to the public about the basis on which and the way in which information is handled.

Paul Sweeney (Glasgow) (Lab): I thank the Deputy First Minister for his comments so far. I would rather zoom out from the specifics of the SSI in question, as I have no contention with its contents.

If we bear in mind the committee's recent report and the debate that we had in the chamber last week—I think that it was last week; keeping track of time is giving me a bit of trouble, what with fast-moving events—it is clear that the Government had to address the architecture, particularly given the pandemic and the fact that, on reflection, the system of made affirmative or affirmative instruments might not be perfect or even best suited to current legislative measures. Indeed, the Government could reflect on how the Parliament might best be involved in the process.

12:00

In the spirit of continuous improvement, could there be a way of piloting—of reflecting on this particular SSI and looking for a way of using one of the procedures to pilot an expedited affirmative procedure as a way of fleshing out what that might look like in practical terms? We have already heard in the debate that people would be happy to adapt to meeting irregularly in order to meet the timescales demanded of the situation and that the fact that the Parliament is able to meet virtually or in a hybrid format helps to move forward that practicality.

I invite the Deputy First Minister to reflect on the dispute that has emerged about whether the made affirmative procedure or the affirmative procedure is the most appropriate mechanism in principle and whether a new structure could be designed. I also invite him to consider how we can start that process in a practical way.

John Swinney: Fundamentally, those are issues for the Parliament, although I recognise that the Government has a significant contribution to make to that discussion. The Government would therefore engage willingly and positively in that discussion.

I have been a parliamentarian for just short of a quarter of a century, and I have always recognised the importance of effective parliamentary scrutiny of all the business of Government, whether that is in questioning or in respect of regulations or legislation. However, our parliamentary system has been tested by a very serious public health threat that required us to move in this fashion.

In the debate last week, comments were made—I am paraphrasing here—about the fact

that the made affirmative procedure had hardly been used at all before 2020 and was then used a bit like number 9 buses: there were something like 130 of those instruments at one time. My simple point about that is that we had not had a pandemic before 2020. The Parliament's procedures were tested by the need to move quickly and sharply.

Having said that, there are a lot of days between zero and 40 days. To put it rather crudely, if there is a way of getting us closer to zero days that gives the Parliament the opportunity to scrutinise legislation and equally allows the Government to get on with the measures that are necessary to protect public health, the Government would be very happy to engage in a discussion about that.

There is space for that to happen, but the procedure is perhaps difficult to pilot because we all need to know the basis on which we are bringing forward regulations. As things stand, we have the made affirmative procedure, the affirmative procedure and negative instruments. If we are going to consider expedited procedures, I would be very happy to engage in that process.

The Convener: The procedure for the draft Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No 4) Regulations 2022, which the committee discussed last week, is an example of the expedited affirmative procedure. That procedure was certainly unusual for our committee to undertake. Discussions between our officials, Government officials and parliamentary officials regarding the procedures available to the committee are under way and we will get more feedback in due course.

Does Graham Simpson have something to say on that particular issue? I was going to bring in Bill Kidd.

Graham Simpson: Bring in Bill Kidd. My question was on the other instrument.

Bill Kidd (Glasgow Anniesland) (SNP): I know from what you have said and from what I have heard you say before, Deputy First Minister, that you recognise and appreciate the procedural imperatives that the committee brings forward for the benefit of the Parliament and for good governance.

On the back of what you have been saying, and in acknowledgment of the range of legal necessities that the Scottish Government has to recognise, do you think that it is the immunisation, scientific and health imperatives that come first and foremost for the Scottish Government and that lead to the extensions that we have been talking about? Is the reason for the six-month extension the potential necessity—which we hope there will not be—of having to come back to all this during those six months to deal with another eruption of Covid?

John Swinney: I completely understand why people want to move on from Covid. I am not sure whether I have made this point to the committee before—I might have done; it is difficult to remember not only what day of the week it is, but where you have said particular things—and I cannot remember the date, but it was on a Tuesday in late November that we generally came to the view that things were quite benign. We thought that we were looking forward to a fairly stable Christmas and that things were on the up.

On the Thursday afternoon, Michael Matheson was requested to join a call with UK Government ministers and colleagues in the other devolved Governments to consider placing restrictions on travel to southern African countries because of omicron, and we then received briefings on its spread and transmissibility. Within 48 hours, we had gone from viewing things as benign and thinking that we would have a stable approach to Christmas to having to contemplate measures necessary to prevent transmissibility of what I would say, in retrospect and looking in the rear-view mirror, was an outbreak of Covid that came the closest to overtopping our national health service. All the stuff up to November had been challenging, but it did not come as close to overtopping the NHS as omicron did, and the reason why it came so close was the degree of transmissibility, the volume of infection, the number of hospitalisations and the impact on staff availability. We had not faced that combination with previous variants.

I say that to the committee simply in the hope that we have six benign months ahead of us in relation to Covid. However, I cannot sit here and say that with certainty, and I am trying to put in place the statutory arrangements to ensure that the Government can act fast.

There will be a public inquiry into the handling of Covid, and one of the first issues that Lady Poole will consider is the preparations for the pandemic. I constantly have to make judgments on how prepared we are as, a Government and as a country, for certain eventualities. That is my ultimate responsibility with regard to resilience. As a result, the legislation that is brought to the committee and to the Parliament on this matter is about ensuring that we have the necessary preparations in place to deal with the situation that we might face. I hope that it will not happen, but the legislation will be there to be implemented.

Graham Simpson: The other instrument that you have come before the committee to speak about relates to powers for councils with regard to premises, events and public outdoor spaces. Can you explain what those powers actually are? Given that you are about to remove pretty much all the restrictions on our daily lives—face coverings

will be the final one to go—why on earth would councils require to hang on to those powers for another six months?

John Swinney: In essence, it would be to provide the capacity to deal with outbreak management. That is the most appropriate way to express it. Back in 2020, during the development of the pandemic, we saw certain outbreaks fuelling the spread of the virus. During that early part, we tried to isolate those outbreaks as much as we possibly could. Some of them were in workplaces, some were in venues and some were in localities. We tried to take measures that would insulate the rest of the country from those outbreaks, to avoid the virus spreading through the community. Local authority powers and actions in the work that we do with environmental health officers, for example, are critical to enabling that.

Graham Simpson: The instrument gives councils a power over public outdoor spaces, and we could describe parks in that way. Why would councils need powers to do anything in public outdoor spaces for the next six months?

John Swinney: We might have to identify areas as being related to outbreaks, or we might have to restrict access to them if we are trying to prevent the spread of the virus in the same way as we had to do, regrettably, during the pandemic.

Time and again, we are going to come back to the crucial point: do we want a statute book that is fit to handle such circumstances or do we want to have to do things in a hurry? Mr Sweeney has, quite fairly, said to me that we need a process of thinking through what we need to do in certain circumstances. I am simply asking whether, on the basis of our past experience, we want to prepare the statute book for that. That is the crucial point.

Graham Simpson: Another crucial point is about whether we want to cede emergency powers to a Government or to councils and to let them become the norm.

John Swinney: The Government and local authorities have a whole range of different emergency powers on the statute book. They were given to us by the Parliament to be exercised only when there is a justification for exercising them. This is no different.

Graham Simpson: If you have that range of powers, why do you need these?

John Swinney: No, I mean generally—in life. We have plenty of powers that we can use in emergency situations, but, when it came to the handling of a pandemic of this nature, we found out the hard way that the statute book was not equipped to handle such things. I am now trying to remedy that.

The Parliament will have the opportunity to accept or reject the regulations, and, under the legislation that I am introducing, the Parliament will also have the opportunity to consider whether it is proportionate and appropriate to ensure that our statute book contains these provisions. That is not to say that the powers are being exercised every day of the week, because they are not. There has to be particular justification for their use. The Parliament has to consider whether the powers should be there to be used if they are required.

Graham Simpson: Thank you.

The Convener: There are no further questions for you, Deputy First Minister. I thank you and your officials for coming to the committee this morning.

12:14

Meeting suspended.

12:24

On resuming—

Instruments subject to Made Affirmative Procedure

The Convener: Under agenda item 3, we are considering two Scottish statutory instruments.

Coronavirus Act 2020 (Alteration of Expiry Date) (Scotland) Regulations 2022 (SSI 2022/40)

The Convener: As well as holding the evidence session with the Deputy First Minister just now, the committee previously exchanged written correspondence with the Scottish Government. That correspondence can be read in paper 1 for this meeting and it led to the Scottish Government revising its policy note. Do members wish to make any further comments on the regulations?

Graham Simpson: That was a very useful session that we had with the Deputy First Minister just now.

The instrument deals with a number of areas. I could be content with some of them, but there is one that I am really not comfortable with, which is the power to close student accommodation and boarding accommodation. As we heard during the earlier discussion, the power has never been used during the entire pandemic—the Government has relied on guidance—so I can see no justification for hanging on to it for another six months. I do not think that Mr Swinney made a compelling argument for doing so. If the Government did not use a power—which was an emergency power—during the height of the pandemic, I can see no justification for hanging on to it now that we are in a much better place than we have been.

The instrument throws up the issue of what happens when we, as parliamentarians, are asked to approve instruments that contain a number of provisions, some of which we like and some of which we do not. There needs to be some flexibility in the system to allow us all to pick and choose. If that could be reported to the lead committee, that would be useful.

On the basis that I do not like one of the provisions, I will vote against the instrument, but I would much rather have the ability to pick off any provisions that I do not like. However, that option is unfortunately not available to us. On that basis, I will vote against it.

Craig Hoy: I echo what Mr Simpson said, and I draw attention to the Deputy First Minister's response in relation to why the powers need to be extended and how we come to a decision on the basis of their being necessary and proportionate. I

thought that he gave a very full response in relation to that, but he said that it all comes down to the judgment of the minister at the end of the day.

In the light of the fact that the particular provision on boarding accommodation that Mr Simpson referenced was not used throughout the height of the pandemic or at the most extreme periods, I think that it may fail that test of being necessary. On that basis, I am minded to vote against the instrument.

Bill Kidd: I have listened to what has been said and I can sort of understand an element of it. At the same time, I am very worried about throwing babies out with the bath water. There is a lot of stuff in the instrument that is necessary and I will vote in favour of keeping it.

Paul Sweeney: I note the concerns that have been raised by colleagues and I have some sympathies with the point about superfluous provisions that are highly unlikely to be used, which means that there are questions about whether it is essential include them in the SSI. That opens up a wider discussion about quality assurance in such legislation, which we have to consider, bearing in mind the committee's recent report. However, on the balance of probabilities, I do not think that it is a major risk if we permit the provisions to continue for another six months.

The Convener: Is the committee content with the instrument?

Members: No.

The Convener: There will be a division on whether we wish to make no recommendations in relation to the Coronavirus Act 2020 (Alteration of Expiry Date) (Scotland) Regulations 2022.

For

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)
Sweeney, Paul (Glasgow) (Lab)

Against

Hoy, Craig (South Scotland) (Con)
Simpson, Graham (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 2, Abstentions 0.

The committee therefore agrees to make no recommendation. However, members' concerns about the instrument have been expressed and will be noted on the record. A report will be published and sent to the lead committee, and those concerns will be noted in it.

Also under this agenda item, no points have been raised on the following instrument.

Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No 5) Regulations 2022 (SSI 2022/74)

The Convener: Is the committee content with the instrument?

Members *indicated agreement.*

Instruments subject to Affirmative Procedure

12:31

The Convener: Under agenda item 4, we are considering four instruments.

Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Amendment Regulations 2022 [Draft]

The Convener: No points have been raised on the instrument. Given the evidence that we heard earlier from Mr Swinney in relation to the regulations, do members have any comments to make?

Graham Simpson: As we heard earlier, the instrument extends the powers given to councils for another six months in relation to premises, events and public outdoor spaces. Given where we are with the health situation, I cannot see a justification for councils hanging on to those powers for another six months. In the circumstances, I will vote against the instrument.

The Convener: Is the committee content with the instrument?

Members: No.

The Convener: There will be a division on whether we wish to make no recommendations in relation to the draft Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Amendment Regulations 2022.

For

Kidd, Bill (Glasgow Anniesland) (SNP)
McMillan, Stuart (Greenock and Inverclyde) (SNP)
Sweeney, Paul (Glasgow) (Lab)

Against

Hoy, Craig (South Scotland) (Con)
Simpson, Graham (Central Scotland) (Con)

The Convener: The result of the division is: For 3, Against 2, Abstentions 0.

The committee therefore agrees to make no recommendation. However, members' concerns have been expressed and will be noted on the record. A report will be published and those concerns will be noted in it.

Also under this agenda item, no points have been raised on the following instruments.

Equality Act 2010 (Specific Duties) (Scotland) Amendment Regulations 2022 [Draft]

Coronavirus (Scotland) Acts (Amendment of Expiry Dates) Regulations 2022 [Draft]

Local Government Finance (Scotland) Order 2022 [Draft]

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

Instruments subject to Negative Procedure

12:34

Meeting continued in private until 12:56.

12:34

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

Non-Domestic Rates (Coronavirus Reliefs) (Scotland) Regulations 2022 (SSI 2022/47)

Non-Domestic Rates (Relief for New and Improved Properties) (Scotland) Regulations 2022 (SSI 2022/49)

Council Tax Reduction (Scotland) Amendment Regulations 2022 (SSI 2022/52)

Coronavirus (Scotland) Acts (Early Expiry of Provisions) Regulations 2022 (SSI 2022/64)

The Convener: Is the committee content with the instruments?

Members *indicated agreement.*

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