

*These notes relate to the Coronavirus (Recovery and Reform) (Scotland) Act 2022 (asp 8) which received Royal Assent on 10 August 2022*

# **CORONAVIRUS (RECOVERY AND REFORM) (SCOTLAND) ACT 2022**

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## **EXPLANATORY NOTES**

### **THE ACT: OVERVIEW**

#### **Part 1: Public Health Protection**

##### ***Chapter 1: Modifications of the Public Health etc. (Scotland) Act 2008***

##### ***Section 1: Public health protection measures***

6. **Chapter 1** of Part 1 of the Act provides the Scottish Ministers with a regulation-making power for the purpose of protecting public health in Scotland and a regulation-making power to confer functions about monitoring health risks on local authorities, health boards and other persons.
7. Schedule 19 of the Coronavirus Act 2020 conferred a temporary power on the Scottish Ministers to make similar provision by regulations in respect of coronavirus alone. Part 1 of this Act would give the Scottish Ministers the power to provide for a national public health response to any infectious disease or biological or chemical contamination.
8. New section 86A(1) of the Public Health etc. (Scotland) Act 2008 (“the 2008 Act”) contains the new power for the Scottish Ministers to make regulations for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Scotland. The threat to public health can come from within or from outside Scotland. Subsection (2) clarifies that only infection or contamination which presents or could present significant harm to human health can trigger the use of this power.
9. Subsection (3) of section 86A allows this power to be used in relation to infectious disease or contamination in general, or in response to a specific public health threat; moreover, regulations under the power may make provision of a general nature, make provision contingent on particular circumstances occurring, or make specific provision in response to particular circumstances.
10. Subsection (4) of section 86A gives general examples of provision which might be made by the power in subsection (1), including restrictions or requirements in relation to persons, things or premises in the event of, or in response to, a threat to public health. These restrictions or requirements may be imposed directly in the regulations on the face of the regulations or indirectly and sections 86D and 86E make further provision about that. Subsection (5) gives specific examples of the restrictions or requirements mentioned in subsection (4): a requirement to keep a pupil away from school; a restriction on the holding of an event; or a restriction or requirement relating to the handling, transport, burial or cremation of dead bodies, or the handling, transport or disposal of human remains. This type of measure also includes “special requirements”, which are defined in new section 86G.

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11. The power to make regulations under section 86A cannot be used to respond to a particular infection or contamination unless a public health declaration under section 86B is in force. This restriction does not apply to regulations that are establishing standing preparedness arrangements.
12. A public health declaration is a declaration that the Scottish Ministers think that an infectious disease or contaminant poses a danger to human health and that the using of the power to make regulations under section 86A may be a way of protecting against that danger. Before making a public health declaration, the Scottish Ministers must consult the Chief Medical Officer of the Scottish Administration (“CMO”) or another person that Ministers designate to give advice. For example, if the danger is caused by a contamination rather than an infectious disease, advice from the Chief Scientific Adviser may be more relevant.
13. A public health declaration can come into force in two ways. The usual way is set out in section 86B(2) to (8). After making a declaration, the Scottish Ministers will lay the declaration before the Scottish Parliament. A member of the Scottish Government will then lodge a motion that the declaration be approved and, if it is approved, the declaration can come into force and regulations under section 86A can be made. The Scottish Ministers must publish the declaration and also a notice of the approval of the declaration and when it comes into force.
14. If, while a public health declaration is in force, the Scottish Ministers decide that the tests for making a declaration no longer apply, they must revoke the declaration, tell the Parliament and publish a notice that the declaration has been revoked. The declaration stops applying as soon as it is revoked.
15. The other way a public health declaration can come into force is if the Scottish Ministers think that it is not practicable to get prior Parliamentary approval for a declaration before it comes into force (for example, because the Parliament has been dissolved for an election), the Scottish Ministers may instead follow the process set out in section 86C.
16. Under section 86C, the public health declaration comes into force as soon as it is made by the Scottish Ministers. The Scottish Ministers must lay the declaration before the Parliament and a member of the Scottish Government will lodge a motion that the declaration be approved. If the declaration is not approved by the end of the period of 28 days after the day it is made, it stops applying. It may stop applying earlier if the Parliament comes to an earlier decision not to approve the declaration.
17. New sections 86D to 86F restrict how the power to make public health protection regulations in section 86A(1) can be used.
18. New section 86D makes provision about where the regulations impose restrictions or requirements directly on the face of the regulations. In such cases the regulations may not make provision by virtue of section 86A(4) – that is, provision directly or indirectly imposing restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health – unless the Scottish Ministers consider that the restriction or requirement of this kind is proportionate to what is sought to be achieved by imposing it.
19. Furthermore, where regulations impose restrictions or requirements directly on the face of the regulations, they cannot impose a restriction or requirement mentioned in section 86G(2)(a), (b), (c) or (d) at all: that is that a person submit to medical examination, be removed to a hospital or other suitable establishment, be detained in a hospital or other suitable establishment, or be kept in quarantine.
20. New section 86E makes provision about where the regulations impose restrictions or requirements indirectly via a decision-maker (such as a health board or local authority, or the Scottish Ministers themselves). In such cases the regulations may not make provision by virtue of section 86A(4) unless the regulations provide that a decision to impose a restriction or requirement of this kind may only be taken if the decision-maker

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considers that the restriction or requirement is proportionate to what is sought to be achieved by imposing it.

21. In addition, where regulations impose restrictions or requirements indirectly, section 86E(2) prohibits them from enabling the imposition of a special restriction or requirement (as defined in new section 86G) unless certain conditions are met. Those conditions are that there is a serious and imminent threat to public health when the regulations themselves are made, or that the decision to impose the restrictions or requirements is expressed in the regulations to be contingent on there being such a threat at the time at which that decision is made.
22. New section 86F provides that the regulations (whether making direct or indirect provision) cannot be used to make a person undergo medical treatment, including vaccination.
23. New section 86G defines “special requirements” for the purposes of this Part. These include requirements relating to persons, as well as requirements relating to seizure and disinfection of things, and the closing and disinfecting of premises. Where regulations enable the imposition of a requirement to submit to medical examination, section 35 of the 2008 Act will apply: the effect of this is that a health care professional authorised to undertake a medical examination must not use invasive or intrusive procedures unless they are necessary to achieve the purpose for which the examination is being carried out. However, if that professional needs to carry out such procedures, the least invasive and least intrusive procedures practicable must be used.
24. New section 86H makes further provision about the regulations, providing (among other things) that the regulations can create offences and other means of enforcement of any restrictions or requirements imposed by virtue of the regulations; can provide for appeals and reviews of decisions taken by virtue of the regulations; and can modify primary legislation. Subsection (3) sets out the maximum penalties which can be imposed if offences are created. Subsection (4) requires that the regulations provide for a right of appeal to the sheriff against any decision taken under the regulations by virtue of which a special restriction or requirement is imposed in relation to a person, thing or premises.
25. New section 86I makes provision about the review of public health protection regulations made under section 86A(1). In general, where the regulations make provision mentioned in section 86A(4) – that is, provision directly or indirectly imposing restrictions or requirements on or in relation to persons, things or premises in the event of, or in response to, a threat to public health – the Scottish Ministers must review the regulations every 3 weeks. This duty to review regulations every 3 weeks does not apply to regulations which are only making general provision or provision which is contingent. This would include standing preparedness arrangements as mentioned in paragraph 11 above.
26. Where regulations under section 86A(1) enable a special restriction or requirement to be imposed indirectly, i.e. by virtue of a decision taken under the regulations, the regulations must provide for the review of that restriction or requirement at specified intervals by a person named in the regulations. Furthermore, where regulations under section 86A(1) enable the imposition of detention or quarantine, the specified intervals for review must be 3 weeks or less, and the regulations must require the detention or quarantine to be reviewed without an application having to be made to the decision-maker who imposed it.
27. New section 86J gives power to the Scottish Ministers to make regulations in order to confer functions on local authorities, health boards or other persons in relation to the monitoring of public health risks. Regulations under this section will be subject to the negative procedure by virtue of section 122(4) of the 2008 Act.

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28. The effect of subsection (3) of section 1 is that public health regulations under section 86A(1) will be subject to the affirmative procedure (the standard affirmative procedure, set out in section 29 of the Interpretation and Legislative Reform (Scotland) Act 2010, is sometimes known as the draft affirmative procedure). However this does not apply if the Scottish Ministers consider that the regulations need to be made urgently: in such cases they can come into effect immediately, but will cease to have effect after 28 days of being made unless they have been approved by a resolution of the Scottish Parliament before the expiry of that period. This is known as the made-affirmative procedure.
29. Subsection (3) of section 1 inserts 3 new subsections into section 122 of the 2008 Act. New subsection (11) means that if regulations under section 86A(1) make provision modifying an Act of the Scottish Parliament or an Act of Parliament, the regulations cannot be made using the made-affirmative procedure set out in paragraph 28. Instead, such regulations will be subject to the affirmative procedure.
30. New subsection (12) means that where regulations are made using the made-affirmative procedure set out in paragraph 28 the Scottish Ministers must explain why the regulations need to be made urgently and the regulations have to include a date for them to expire - a “sunset” provision. Under subsection (13), regulations do not have to include a “sunset” provision if they are amending existing regulations which already contain one.