



Universities Scotland’s submission to the Education, Children and Young People Committee’s inquiry into the Coronavirus (Recovery and Reform) (Scotland) Bill

Overview

Universities Scotland welcomes the opportunity to submit evidence to the committee’s scrutiny of the Scottish Government’s Coronavirus (Recovery and Reform) (Scotland) Bill as the committee considers the measures relating to educational settings.

Experience of management of the Covid-19 pandemic persuades us that a partnership approach between government, the public health authorities and universities, including close student and staff engagement, is a more effective approach than the use of compulsive powers. The Scottish Government and universities have worked successfully in partnership together since the start of the pandemic, in constant dialogue with reference to Frameworks and guidance, navigating our way in the interests of public safety and access to education. This approach has ensured agility of action, better support of students and very high levels of compliance across our community (including where students and universities have adhered to more restrictive guidance than members of the general public/wider society). At no point has the Scottish Government had to use the emergency powers in the existing Coronavirus Act 2020 with regard to higher education.

However, we recognise the case for Ministers to have emergency powers in the event of another severe new public health crisis, even though we hope that these will never have to be used.

If there are to be emergency powers, we want these to be operable in a way that protects public health, takes account of the ‘four harms’, and will be operable on the ground. We do not think the Bill as currently drafted will achieve that, and we propose that the Scottish Government should amend the Bill during its Parliamentary passage, so that Ministers are setting out a general framework of what needs to be done in a new public health emergency, and universities are able to make the granular judgement about how to apply these e.g. to specific courses, students or facilities.

Our concerns

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.

They carry with them a high likelihood of producing perverse unintended effects. As set out in more detail in the annex to this evidence, regulations made under the Bill’s provisions would put government in the position of deciding, for example;

- What specific university teaching or research buildings should be open or closed;
- What specific courses should be running in-person, in hybrid form or online;
- Whether students should be moved to another university to continue their studies;
- When students should be academically assessed;
- Whether specific halls of residence should be open or closed.



These are granular judgements that can only be made competently at institutional level, within a clear expectation from government that the necessary action will be taken by institutions to manage a public health emergency.

As drafted, the Bill groups higher education institutions in the same catch-all category of “educational establishments” despite the major differences that exist between parts of the education sector and the different and complex statutory requirements and regulatory responsibilities they each have to adhere to, even during a public health emergency.

Our proposed alternative approach

We therefore propose that Scottish Government should take an alternative approach, building on what has worked well in practice during the Covid-19 emergency, which would:

- 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.

We believe a framework along these lines would be much more effective than any attempt by government to make detailed prescription for what universities should and should not do: no government has the detailed knowledge of the diverse circumstances of institutions and students that would enable them to do that competently.

The rationale behind our proposals

Universities have worked successfully with government and its agencies during the most intense phases of the pandemic to manage the risks. At the start of the pandemic, universities acted with agility in response to a rapidly changing and unprecedented situation, moving teaching online several days ahead of the national lockdown. Legislation was not needed for that to happen, and legislation would not have accelerated the pace at which universities moved to keep their students, staff and wider communities safe.



Scottish Government instead set an overall framework of guidance within which universities have been able to make choices at a granular level about how best to manage public health risks while enabling learning and research. This has been a successful approach which has enabled universities to make practical decisions informed by their detailed knowledge e.g. of what courses to prioritise for in-person learning, how to manage different parts of their estate, and what research activities to prioritise. These are judgments that government is simply not equipped to make at the necessary level of detail across the diverse range of teaching and research institutions and all of their complex activities.

So we believe that if emergency powers are required (and we hope they would never need to be used) they should build on what has successfully worked already, i.e. universities making informed local decisions within a clear national framework.



Annex

Specific concerns we have about the Bill's current drafting

Section 8: regulations on continuing operation of educational establishments

- Subsection 8(5) gives Ministers a range of powers that cannot be exercised competently by government. For example:
 - 8(5)(a) enables Ministers to “confer additional functions” on universities. Government is not in a position to know what additional functions a university may be able to absorb within its staff and managerial capacity. A power of this nature needs to be exercised through consultation, not direction.
 - This power, and others in this section, could also involve Ministers in imposing functions that are contrary to the powers of the governing bodies of institutions concerned as defined in the legal instruments that define each institution’s power and responsibilities, e.g. in Orders in Council or articles of association. What would happen in that instance?
 - We understand that this power may be used to set up vaccination or testing centres in universities. While being entirely supportive of that intention, we do not see the need for such a wide power to enable it – and during the Covid-19 pandemic no emergency statutory powers were needed to achieve this.
- 8(5)(b) enables Ministers to “require an educational establishment to open, to stay open, to reopen, or to open at times when it would not usually be open”. This is inoperable for universities, which must always ‘open’ for a range of purposes. There are a range of functions which need to be carried out around the clock every day of the year e.g. concerning continuing operation of facilities, availability of student support services, statutory obligations for animal welfare, and research experiments that cannot be stopped. Even in the narrower instance of deciding when students can learn in person during a pandemic, the needs of those students who should continue to be prioritised for in-person learning do not fit within specific hours of the day: for instance some students who are balancing study with care responsibilities will be reliant on access to learning in the evening. These judgements need to be made on a course-by-course and student-by-student basis within an overall framework of management of a pandemic, and that can only happen at institutional level in close collaboration between managers, staff and students.
- 8(5)(c) enables Ministers to require a university to “allow specified people or people of a specified description to attend an educational establishment”. Again, this is something that can only be competently defined at institutional level.
 - For instance, if during a period of intense public health concern government wished to restrict in-person provision to certain categories of students such as those for whom it was essential to achieve their qualifications, and/or students in the health

disciplines, government should set that expectation out at a high level and let institutions implement it in detail. Any government attempt to prescribe in detail who should or should not be studying in-person would inevitably not be able to prescribe the exact range of circumstances for every course in which a student might be prioritised for in-person learning. It would generate unforeseen effects where students on particular courses may be unfairly excluded from the categories defined by Ministers.

- On one reading, 8(5)(c) would also give Ministers the power to direct whom universities should admit to courses, which would be completely inappropriate since this has to be a matter of institutions' own academic judgement about whether a student is likely to succeed in a particular course of study.
- 8(5)(d) enables Ministers to “require specified people” to attend a “a specified educational establishment”. This is clearly inoperable: participation in a university course is an essentially voluntary action and it would be a bizarre infringement on freedom to actually require someone by law to attend a specific university or a specific course. We understand that one intention behind the provision may be to transfer between institutions in the event of local restriction of provision: while this may be well-intentioned it is not a suitable use of regulatory power since Ministers will not know whether a course at the receiving institution has capacity, or meets the diverse needs of the students concerned.
- 8(5)e enables Ministers to “restrict or prohibit access in respect of the whole or a specified part of an educational establishment”. This power cannot be exercised competently by government. Only the managers of an institution (in consultation with staff and students) know their own estates well enough to know what facilities should have access restricted or prohibited in an emergency and how to manage the impact of that on the rest of the estate. And, as set out above, the closure of the whole of university is simply not possible. There are essential teaching and research support functions which must be maintained, whether the majority of students and staff are working from home or not. Again, allowing or requiring institutions to take local action within a national framework would be much more effective, and is in line with how universities, the public health authorities and government have acted successfully during the most intense phases of the pandemic.
- 8(5)(f) enables Ministers to “restrict or prohibit access in respect of the carrying on of all/specified activities”. Again, this judgement is impossible for government to make without detailed knowledge of activities undertaken by an institution in a specific place: restriction or provision of activity in particular places needs to be done by people with knowledge of the places concerned, within an overall framework set by government.
- 8(5)(g) enables Ministers to “require measures to ensure safe standards of hygiene, and other measures to protect public health, to be put in place”. While this is an entirely reasonable thing to do manage a public health emergency, it should be done by local application of national guidance.

- 8(5)(h) enables Ministers to “require the alteration of term dates, holiday dates or examination dates”. It is for each university to decide its own term dates: each university will have multiple entry, assessment and exit points within each academic year and no two annual cycles will be identical. If there is a public health emergency that requires a restriction of in-person provision that should be done directly through national guidance with local implementation, and potentially by travel restrictions, rather than by Ministers telling universities what their term dates are. Altering term dates risks the perverse effect that even digital provision could be postponed, to the detriment of students’ learning. Neither can government competently tell universities what their examination dates should be: universities operate a wide range of assessment at different times of the year, much of which is related to the external requirements of professional regulatory bodies. Universities have also made arrangements during the pandemic for assessments to be conducted digitally when that is necessary for public health reasons. If a public health emergency means that in-person examinations cannot take place, it must be for institutions to decide on a course-by-course basis what assessment arrangements to put in place, and when.
- 8(5)(i) enables Ministers to require universities to take “actions in general terms, or particular actions” that ministers consider appropriate. This power is so widely conceived that it is impossible to offer a meaningful response, but potentially it opens up the possibility for Ministers to require universities to do something that is not within their capacity, which they believe to be inappropriate or damaging, or which is outside the powers defined in their founding documents.

More generally, the powers in this section of the Bill are also inconsistent with universities’ status as autonomous charitable bodies. While we recognise the need for emergency powers to address public health emergencies, these should be framed in a way that enables autonomous institutions to decide how to implement them.

Section 10: regulations on student accommodation

Again, universities understand the need for effective public health measures during the pandemic. Effective measures are already in place involving universities, health boards, Public Health Scotland and the Scottish Government in the management of outbreaks in student accommodation, and statutory powers appear unnecessary.

Section 10, similarly to section 8, puts Ministers in the position of making decisions which should be made locally as part of incident management. It is for the university and the public health authorities to take urgent and specific action if that is needed to contain or manage an outbreak, rather than for Ministers to make specific regulations about specific accommodation.

Ministers should also be aware that:

- a) most students do not live in purpose-built student accommodation so would not be within the scope of the proposed power; and



b) many of the students who do live in purpose-built student accommodation have nowhere else to go for instance because they are international students who cannot return home during pandemic restrictions, or are estranged from their families and student accommodation is their only home. So, there is a risk of a perverse effect of centralised Ministerial action making students homeless.

Section 12: procedure for regulations

As we have highlighted throughout this evidence, national government is not able to make regulations competently about every circumstance of local management of a pandemic by universities. Government simply does not have the granular level of knowledge to do so.

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' own views on how best to achieve the intended objectives of the regulations.

ENDS

