

Scottish Government
**Coronavirus (COVID-19) recovery – justice system, health and
public services reform: consultation**
9 November 2021

Introduction

1. The NASUWT welcomes the opportunity to comment on the review of the legislative powers that have supported the Government's response to COVID-19 in Scotland.
2. The NASUWT is the Teachers' Union, representing teachers and school leaders in all sectors of education.

General

3. The effects on society of the COVID-19 pandemic have been deep and wide-reaching, causing long-lasting issues that will undoubtedly be felt for many years. The NASUWT agrees that there is a real opportunity to achieve a fairer and more equal post-COVID Scotland. Recovery should be understood as a long-term process, given the pandemic's far-reaching impacts. It should also be viewed as an opportunity to tackle deep-rooted structural issues affecting children and young people, in all aspects of their lives, which have been exposed and exacerbated by the pandemic.
4. The NASUWT recognises the profound impact the disruption from the pandemic has had on the educational progress and achievement of many children and young people, as well as their emotional wellbeing. This is notwithstanding the commitment, dedication and professionalism

demonstrated by teachers and school leaders in delivering high-quality learning during the lengthy crisis.

5. As part of a broader approach to deliver a continuous and sustainable recovery from the pandemic, the NASUWT stands firm in its view that substantially more investment is needed to provide increased capacity to meet the needs of children, young people and families. A long-term, sustainable and properly funded education recovery strategy which brings together the work of schools and other bodies is essential.
6. The Union is, however, concerned that the narrative of education recovery is used within the introduction to the consultation paper to misdirect the reader as to the purpose of the proposed legislative changes, which are to extend substantially the reach of the Scottish Government's emergency measures, as opposed to creating a suitable environment for recovery to take place.

Question 1: It is proposed that the provisions for Topic H1 (Education: powers to make directions to close educational establishments, and to ensure continuity of education) as described will be made permanent. Which of the following best describes what you think about this?

7. The NASUWT has serious concerns about the Scottish Government's proposals to extend its Coronavirus Emergency powers permanently and does not believe the provisions for Topic H1 should be extended or made permanent.
8. It is noted that the consultation paper justifies these proposals on the basis of future proofing for any further pandemics. It is disproportionate to make such substantial alterations to the status quo ante without a more robust justification or evidence base. The power for Scottish Ministers to give directions to the closure of educational establishments is profound and at risk of misuse without the appropriate checks and balances in place.
9. The NASUWT did not oppose, in principle, giving Ministers across the UK temporary powers to deal with the school-related consequences of the

pandemic. However, it is important to distinguish that from the powers Scottish Ministers seek which are significant and permanent. The Coronavirus Act 2020 gives Scottish Ministers the power to: require a setting to ‘open, to stay open, to re-open or to open at times when it would not usually be open’, including at weekends and over the holidays; provide childcare and ‘training’ and any ‘ancillary services and facilities’ in respect of childcare and training, such as residential accommodation, meals, laundry facilities, medical services, advice and pastoral support; admit persons they specify to enable such persons to access childcare, education, training and ancillary services; and alter term dates.

10. The Coronavirus Act also gives Ministers significant discretion over how these powers are implemented. Ministers can issue directions that: specify additional ‘reasonable steps in general terms’ that must be taken to comply with the direction; ‘make different provision for different purposes or [are] framed by reference to whatever matters [Ministers consider] appropriate’; ‘make such other provision as [Ministers consider] appropriate in connection with the giving of the direction’.

11. In short summary, these provisions appear to give Ministers the power to overrule provisions in teachers' contracts of employment, with very few constraints on that power. The rule of law, along with Parliamentary Sovereignty and court rulings, is fundamentally the defining principle of our ‘unwritten constitution’. There is significant concern that the fundamental principles and values underpinning the rule of law are undermined by the open-ended approach to legislative powers discussed herein.

12. Lord Neuberger, the President of the UK Supreme Court, said in 2013:

“At its most basic, [the rule of law] connotes a system under which the relationship between the government and citizens, and between citizen and citizen, is governed by laws which are followed and applied. That is rule by law, but the rule of law requires more than that. First, the laws must be freely accessible: that means as available and as understandable as

possible. Secondly, the laws must satisfy certain requirements; they must enforce law and order in an effective way while ensuring due process, they must accord citizens their fundamental rights against the state, and they must regulate relationships between citizens in a just way. Thirdly, the laws must be enforceable: unless a right to due process in criminal proceedings, a right to protection against abuses or excesses of the state, or a right against another citizen, is enforceable, it might as well not exist...

13. 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.

14. 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.

15. Simply put, the Scottish Government has not made enough of a case for granting these powers – and significant discretion over the use of these powers – to Scottish Ministers permanently. In the case of a pandemic on the scale of COVID arising in future, emergency temporary legislation impacting on schools can be enacted quickly and extended where necessary, but in a way that is subject to parliamentary oversight and approval. It remains unclear why Scottish Ministers believe that they need to keep such powers in reserve and be able to use them without seeking the permission of the Scottish Parliament.

Question 2: It is proposed that the provisions for Topic H2 (Power to make public health protection regulations) as described will be made permanent. Which of the following best describes what you think about this?

16. The consultation outlines that a permanent change is required to enable Scotland to respond flexibly and proportionately to specific threats as they arise. The Union's original response to granting these powers was in the context of emergency legislation at the start of the pandemic. Indeed, Ministers across the UK sought to satisfy Parliaments and Assemblies that additional powers secured were temporary, with the purpose clearly identified as navigating the pandemic. It is unclear what has substantively changed. It is undoubtedly true that the pandemic has shone a light on system failures, but it is a weak consultation process, where the only option considered is the permanent annexing of emergency powers.

17. The Union considers that the provisions for Topic H2 may need to be extended beyond March 2022, but should not be made permanent without further detailed reflection and consideration.

Question 3: It is proposed that the provisions for Topic H3 (Vaccinations and immunisations) as described will be made permanent. Which of the following best describes what you think about this?

18. The consultation paper provides no risk-based analysis or evidence other than an inference of speed in order to justify the relaxation of the restriction within the National Health Service (Scotland) Act 1978 on vaccinations and immunisations being carried out by doctors or persons acting under their direction and control. A similar lack of evidence-based analysis is found in other sections of the consultation paper. The NASUWT considers that any proposal to make temporary changes permanent should follow a professional level of inquiry and risk analysis which is shared with all parties in an open and transparent manner. Without such an evidence base, proposals appear slapdash and ill-formed. Greater attention to detail and transparency are required before any proposals are considered.

Question 4: It is proposed that new permanent legislative provisions for Topic H4 (Virtual public meetings under the Schools (Consultation))

(Scotland) Act 2010) as described will be developed. Which of the following best describes what you think about this?

19. While there is significant merit in utilising online engagement events to reach more members of the community, the proposal makes no reference to the variability in access to electronic equipment or consistent broadband. Indeed, this proposal would need to be specifically covered in any equity and equality impact assessment. Additionally, it could not be considered good practice to move to close schools or make substantial changes under the 2010 Act during a national emergency. Therefore, while there is merit in exploring the means of engaging with communities, the NASUWT does not consider it necessary to amend legislation in order to do so.

Question 34: To support the key three themes for Covid recovery as described, do you have any proposals for legislation which goes beyond or is different to the consultation proposals in Chapters 2 to 4?

20. To be sustainable, recovery will also need to be manageable for those in the workforce with day-to-day responsibilities for children and young people. It will need to take into account the pressures they faced before the pandemic, the increased pressures they encountered during it, and the challenges they will need to take on as it recedes.

21. The NASUWT advocates a holistic view of recovery, based on supporting children in all aspects of their lives, including, but not limited to, those relating to formal schooling. Schools will have a critical role in securing recovery, but they cannot be expected to contribute in isolation or without working in effective partnerships with other services for children and young people that are adequately resourced and appropriately supported.

22. It is also clear that the impact of the pandemic has not been experienced uniformly. While it is likely to be the case that every child has been adversely affected by the crisis, some will have been affected more

profoundly than others, particularly those who were more vulnerable or more disadvantaged before the pandemic.

23. There are huge disparities in educational outcomes that young people from particular backgrounds face, and this is an increasing problem that has been exacerbated by the pandemic. Racism, racial injustice, economic disadvantage and other discriminatory factors affected the education outcomes and life chances of young people well before the pandemic as a result of systemic inequalities.

24. This situation has worsened for young black pupils, including those from Gypsy, Roma Traveller (GRT) communities, and from poorer backgrounds, further compounding the socioeconomic disadvantages they face.

25. Any education recovery plan for 'building back better' and fairer must address these existing disparities and ensure that new policies and practices focus on demonstrable positive outcomes for all pupils and communities. All aspects of recovery must recognise and address the demonstrable disparities in experience and outcomes that particular groups of pupils have faced during the pandemic, including those that relate to race, socioeconomic status and geographical location. They must give practical effect to provisions set out in equalities legislation, particularly the Public Sector Equality Duty and the specific duties and responsibilities this establishes in respect of those with protected characteristics.

26. Recovery will also need to reflect the aims and objectives of the United Nations Convention on the Rights of the Child (UNCRC), including those set out in Article 12 of the Convention on ensuring that appropriate weight is given to their views in matters that affect them.

27. Given the significant scale of the recovery challenge and the need for it to be impactful, it will be essential that it is subjected to ongoing system-level evaluation of the extent to which it is making a difference for children and

supporting the workforce. Schools will also require support in developing manageable and meaningful approaches to evaluating the impact of their strategies.

28. Schools and the staff who work in them will be at the heart of any effective recovery strategy. This strategy will require a focus on the workforce to ensure that it is as well placed as possible to support children's learning and development. Such a strategy will need to encompass the following elements:

- a. action to tackle excessive and unnecessary workload;
- b. allowing for teachers and school leaders to concentrate on teaching and learning;
- c. maintaining of adequate teacher supply and employment;
- d. securing the right of every child to be taught by a qualified, professionally developed teacher;
- e. supporting leaders to support the workforce;
- f. deployment of supply teachers;
- g. innovation and research;
- h. assessment, qualifications and accountability.

29. More detailed information on the NASUWT policy position on recovery can be accessed here: <https://www.nasuwt.org.uk/advice/health-safety/coronavirus-guidance/full-reopening-of-schools/full-reopening-of-schools-england/education-recovery-package/education-recovery-position-statement.html>.

30. Two examples of potential legislation which would support recovery are set out below, looking specifically at action to address class sizes and poverty.

Class Sizes

31. Studies indicate that limiting class size can have a powerful impact on pupils' educational experiences. The Student/Teacher Achievement Ratio (STAR) project in Tennessee and the Class Size and Pupil-Adult Ratio

(CSPAR) study in the UK supported the view that class size has positive implications for pupils' learning. This impact was particularly evident for younger pupils, those from disadvantaged backgrounds and those with relatively lower levels of prior attainment. Other studies have pointed to the benefits for the development of pupils' non-cognitive skills (such as persistence and engagement) of smaller class sizes.

32. Evidence suggests that smaller class sizes not only have positive benefits for all pupils, but are also associated with particularly positive outcomes for black pupils and those for whom English is an additional language.

33. Literature reviews of teachers' reported experience confirm that reductions in class size can positively impact on teacher workload and stress levels. Evidence from other jurisdictions further suggests that reductions in class size can help address concerns relating to teacher recruitment and retention.

Poverty

34. Before the pandemic, levels of child poverty in the UK had reached entirely unacceptable levels. Evidence confirms that in 2019/20 a total of 4.3 million children were living in poverty in the UK, with children of lone-parent or large families and black children among those most at risk of living in the most economically disadvantaged households. Across this period, three quarters of children in poverty lived in homes where at least one adult was in employment.

35. Given that economic disadvantage is the characteristic that has the most significant impact on pupils' learning, development, wellbeing and life chances, it is profoundly concerning that the pandemic has compounded the financial pressures on many households.

36. A study of families on low incomes undertaken by the Child Poverty Action Group in November 2020 found that nearly nine in ten families had experienced a significant deterioration in their living standards since before

the pandemic. The same study found that almost six in ten families were experiencing difficulties covering the cost of three or more essentials, including food, utilities, rent, travel or child-related costs. These concerns are compounded by evidence that the economic prospects for many economically disadvantaged households are likely to deteriorate further in the absence of meaningful action to address these risks.

37. An approach based on the continuation of previous policy in this area will serve only to hinder rather than support the development of a recovery programme that addresses the needs of the most vulnerable children in society. In the short term, the Government must reverse its decision to reverse the £20 per week uplift to Universal Credit and tax credits, enhance other child-related benefits, and remove current arbitrary benefits caps. The ability of all children to access universal free school meals would also have a positive impact on addressing the food insecurity that many households with children continue to face. The Government should work with schools to implement these strategies to support pupils from the most disadvantaged families.
38. The NASUWT would be delighted to meet with the Scottish Government to discuss education recovery further.

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