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Dear Convener

## **Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill**

Thank you for your letter of 2 December detailing the Delegated Powers and Law Reform Committee's consideration of the Criminal Justice Modernisation and Abusive Domestic Behaviour Reviews (Scotland) Bill.

The Committee has requested further justification as to why the Scottish Government considers the negative procedure provides an appropriate degree of scrutiny in relation to sections 11(5) and 20(6) of the Bill or whether, on reflection, it considers that the affirmative procedure might be more appropriate.

Section 11(5) (power to modify list of nominating bodies) and section 20(6) (power to modify list of public authorities required to co-operate) both enable and ensure cooperation with the review process. They address gaps in schemes operating elsewhere and evidence a collective endeavour from all those involved.

In both instances it is quite probable that those bodies and public authorities may well change over time, and it is imperative that we are able to respond that scenario quickly and effectively to enable the review process to continue.

The Committee's potential concerns regarding the use of negative procedure seem to stem from the fact that the powers allow amendment of primary legislation, rather than necessarily the nature of the powers themselves. I fully appreciate that, as the committee notes, where a power permits modification of primary legislation then the starting point is usually that the affirmative procedure is appropriate. However, I believe there is justification in these cases for ending up in a different place from that starting point. The powers themselves are, in my view, fairly administrative in nature and I believe that this is what is of most relevance.

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The specification of nominating bodies in section 11 could have been left entirely to regulations rather than them being named on the face of the Act. Had that been the case, I would have expected the negative procedure to be accepted as being appropriate given that, for example, the right of nomination is a right rather than a duty (and indeed does not even guarantee acceptance of any nominations which are voluntarily made). There is of course also a guarantee of prior consultation with the body being named.

Examples of cases where the negative procedure has been accepted for the naming of persons who fall within a particular category include [paragraph 17 of schedule 1 of the Defamation and Malicious Publication \(Scotland\) Act 2021](#) and [section 27 of the Age of Criminal Responsibility \(Scotland\) Act 2019](#) (see inserted section 179A(4)(d) which, as noted in footnote 42 in paragraph 79 of the [explanatory notes](#), is subject to the negative procedure). Both of these are more substantive conferrals of rights on persons than is the case with section 11 of this Bill, but it has been accepted that the negative procedure is nevertheless appropriate.

In relation to section 20, I would note that a duty of cooperation of this nature and in this context might fairly uncontroversially be imposed on public bodies without limitation. As such, the application of it only to named bodies, and the possibility of adjusting the public bodies to which it applies, is not something that I would consider requires the use of the affirmative procedure. This is particularly so when there is a requirement incorporated for prior consultation with the public bodies in question.

By way of comparison, [section 1 of the Coronavirus \(Recovery and Reform\) \(Scotland\) Act 2022](#) also deals with the imposition of obligations on public bodies. In new section 86J, it grants the power to confer functions on local authorities or health boards. As noted in paragraph 27 of the [explanatory notes](#), regulations under that section will be subject to the negative procedure by virtue of [section 122\(4\)](#) of the Public Health etc. (Scotland) Act 2008.

In the case of both section 11 and section 20, I would therefore submit that the nature of the powers is such that the negative procedure is appropriate, as it is the breadth of what can be done under the powers that is vital rather than the means by which the powers are exercised. It would, for example, have been possible to specify further bodies in secondary legislation rather than adding them to the list in the Act. However, that route was not pursued because it would be unhelpful from an accessibility perspective for the list on the face of the Act to become out of date. Nevertheless, I believe that it remains the case that the same level of procedure which would have been selected had that route been pursued is appropriate for the Bill, as that ensures the appropriate balance between scrutiny and use of the Parliament's valuable time.

The Parliament has previously accepted that there are instances where it is appropriate to allow modification of primary legislation by negative procedure where the nature of the change merits it and where the textual amendment itself would be a fairly mechanical swapping of one thing for another. Examples include [section 41 of the Redress for Survivors \(Historical Child Abuse in Care\) \(Scotland\) Act 2021](#) (see section 107 for the level of procedure) or [paragraph 1 of the schedule of the Child Poverty \(Scotland\) Act 2017](#) among many other similar examples. While the present cases under consideration would result in a change of a name rather than a number, I would submit that this continues to be a change of a very mechanical nature, and given that the body in question will have been consulted in

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advance, there is no need for concern about the regulations identifying the body by the correct name.

For the reasons set out above, I continue to believe that the negative procedure provides the Parliament, the DPLR Committee and the lead Committee sufficient scope to challenge any proposed changes. I am not convinced that the additionality of the affirmative procedure is required in these instances and I hope that the further justification given demonstrates the reasons for moving away from the usual starting point here.

Yours sincerely,

**ANGELA CONSTANCE**

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