DELEGATED POWERS AND LAW REFORM COMMITTEE

1st Meeting, 2022 (Session 6)
Tuesday, 11 January 2022

Inquiry into use of the made affirmative procedure during the coronavirus pandemic

Written evidence and correspondence

1. The purpose of this paper is to provide all written submissions received on the inquiry as well as correspondence following letters from the Committee.

Written evidence

- Bill Bowman
- Campbell Wilson
- Children and Young People's Commissioner Scotland
- Ian Davidson
- NASUWT
- The Law Society of Scotland
- University of Birmingham COVID-19 Review Observatory

2. The written evidence can be found in **Annex A**.

Correspondence

- COVID-19 Recovery Committee (Scottish Parliament)
- Legislation, Justice and Constitution Committee (Welsh Parliament)
- Joint Committee on Statutory Instruments (UK Parliament)

3. The correspondence can be found in **Annex B**.

Annex A - Written evidence

- Bill Bowman
- Campbell Wilson
- Children and Young People's Commissioner Scotland
- Ian Davidson
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- The Law Society of Scotland
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Bill Bowman

Has the made affirmative procedure generally been used appropriately for bringing forward urgent public health measures during the coronavirus pandemic? Please set out your reasons why.

Generally.

Are changes required to the use of the made affirmative procedure?

How is the 28 days calculated? Can it be more than 28 days as interpreted by a lay reader? If so, then should it not made to be 28 elapsed calendar days given it is likely to be used for legislation of an "emergency" nature?

Are changes required to how Parliament scrutinises the made affirmative procedure?

Should be a ministerial statement for all such instruments when put to a vote.

Campbell Wilson

Has the made affirmative procedure generally been used appropriately for bringing forward urgent public health measures during the coronavirus pandemic? Please set out your reasons why.

I had asked a question in the first year of Covid about mobile testing and yet to be told at that time due to cross contamination it wasn’t viable.

Garbage as there could have been cleaning done to stay within the hygiene zone as there was mobile breast screening and also blood donors yet even though open for any germs in those fields covid was different.

Covid is based on a common cold yet an made vaccines are not working mass immunity should be the norm from now on.

No laws as you will be putting shop workers on a front line if its about wearing masks and if so then you will need to start closing down clubs and hotels again!

Does this government really want to start going down that road again?

Shops being hit again with panic buyers??

Get a grip and start looking at what the general public do want and how much human rights you are taking away from people.

Are changes required to the use of the made affirmative procedure?

Yes but only to the standing government as this should be abolished immediately!

Are changes required to how Parliament scrutinises the made affirmative procedure?

Nobody in the current parliament listens to any single working class person.

All MSPs are liars and it clearly shows this when I have asked the FM many times How much did hosting CoP26 cost in full.

Never had one response or figure from that.

Children and Young People's Commissioner Scotland

The Covid-19 pandemic resulted in the use of emergency powers which represented some of the most serious interferences with the human rights of the general population since the Universal Declaration on Human Rights was adopted more than 70 years ago. These restrictions often had a disproportionate affect on children and young people.

Prior to the pandemic, the Scottish Parliament's 'made affirmative' procedure was seldom used. In a time of public health crisis it has been a valuable tool for passing urgent legislation quickly. Often this legislation has involved significant interferences with human rights. Even in response to a national crisis, such interference can only be justified if it is proportionate, necessary, lawful and time limited. We have three main concerns about the way in which the 'made affirmative' procedure operated in practice.

1. Short notice publication and lack of advance scrutiny

The made affirmative procedure has meant that a great deal of legislation has been put in place with parliamentary scrutiny only occurring retrospectively. While we appreciate the urgency of the situation and the pressures on Scottish Government, too often the text of regulations were published scant hours before they came into force. We highlighted concerns around this practice directly to Scottish Government officials, and they were also expressed by others including the Chair of the Independent Advisory Group on Police Use of Temporary Powers Relating to the Coronavirus Crisis. It was not always clear that such short notice publication was necessary, or that it was not possible for parliamentary scrutiny to take place in advance.

The Parliament should constructively challenge the Scottish Government on the use of the 'made affirmative' procedure and ensure that it is only used where absolutely

necessary and that the text of proposed regulations are available in good time before they come into force.

2. Absence of Children's Rights Impact Assessments

In the early stages of the pandemic, we commissioned the Observatory of Children's Human Rights Scotland to undertake an independent Children's Rights Impact Assessment (CRIA) on the impact of the pandemic and the state response on children and young people. We were concerned that the Scottish Government had not properly assessed the impact of emergency legislation on children, and that the parliament did not have before it the information necessary to conduct the level of scrutiny required to fulfil its role as a human rights guarantor. The findings of the Independent CRIA bore out these concerns.

When laying regulations under the 'made affirmative' procedure therefore, it is the Scottish Government's obligation to demonstrate to the parliament that it has considered the nature and level of impact on children and young people's human rights. Any regulations should always be accompanied by a CRIA, with the level of detail proportionate to the extent of impact. This is required to aid MSPs, in their role as human rights guarantors, to assess whether the restrictions are proportionate and necessary.

3. Children and Young People's participation

Throughout the pandemic we have expressed our concern about the limited extent to which children and young people have been able to participate in decision making – not only having their voices heard but taken into account. The Independent CRIA found that this was a major failing of the initial pandemic response from the Scottish Government.

Our young advisers addressed this at their meeting with the Covid-19 Committee in August. Although we accept that the emergency situation at the start of the pandemic limited the extent to which participation was possible, there is now a significant amount of material which captures children's views on the impact the pandemic and restrictions have had. This includes Lockdown Lowdown, A Place in Childhood's #ScotYouthandCovid, as well as a wide range of policy work by organisations such as LGBT Youth Scotland and Who Cares? Scotland. This information should be used to inform CRIAs, which in turn will support MSPs as they scrutinise emergency legislation.

In addition, as the Independent CRIA recommended, the structures within which we make decisions need to be fundamentally rethought in order to enable children to take an active role in their own lives and communities. The right to respect for the views of children requires a shift in the perception and treatments of children from that of passive objects in need of adult protection to active participants in decision making processes affecting them at all levels of society. This includes the processes through which emergency legislation is developed, and parliamentary scrutiny mechanisms.

Conclusion

The Scottish Parliament's role in scrutinising 'made affirmative' regulations has developed over the last two years and we recognise that early in the pandemic, the parliament itself was grappling with the challenges of operating under Covid-19 restrictions.

In August 2021, the Commissioner, together with two of our Young Advisers, met with the Covid 19 Committee to discuss the ways in which the Committee could ensure that the human rights of children and young people were considered in their scrutiny of legislation. We welcome Parliament's proactive approach to its role as a human rights guarantor.

As recent developments have demonstrated, this pandemic is unpredictable and the situation can develop very quickly. It is therefore likely that the made affirmative procedure will require to be used again, however as with the restrictions it brings into force, it should only be used where it is proportionate and necessary. Adoption of the three recommendations we outline above would assist in ensuring this is so.

Ian Davidson

Has the made affirmative procedure generally been used appropriately for bringing forward urgent public health measures during the coronavirus pandemic? Please set out your reasons why.

No. It has been used to rush through legislation which has not been properly considered and consulted upon. The legal judgement on the "Churches" case gave an insight in to how shambolic the behind the scenes work in Scottish Government was and I would encourage the Committee to study this judgement in detail as part of its inquiry. There are numerous other examples. I am now very suspicious of Scottish Government and dismayed by the impotence of Parliament; not a healthy attitude but I think justified by the last 18 months of farce.

Are changes required to the use of the made affirmative procedure?

Obviously yes. I think the Parliament needs more independent assessors, suitably qualified and experienced, to advise before legislation is passed. The Committee should meet more often; if the Scottish Government is in "emergency mode" then so should the Parliament; if it really is "life and death" then meetings should be held (including virtually) as and when needed, including weekends and during the over-long "recess" periods.

Are changes required to how Parliament scrutinises the made affirmative procedure?

Obviously yes. I do not understand how a Chamber of 129 MSPs, half of whom are List members with little constituency work, has insufficient time to properly review draft legislation. It is very much a part time parliament with no second revising chamber. Passing legislation which affects individual liberties and public health without proper scrutiny is bad government. The urgency aspect has been over-egged and abused with Parliament "blackmailed" to "let it through" or else be held responsible for "dire consequences". This is just not good enough. I think all MSPs should have a 20%

salary deduction applied on the basis that they are not actually scrutinising legislation effectively nor effectively holding Ministers and Civil Servants to account. Compared with Westminster, the Holyrood Committee system is spineless.

NASUWT

The ‘made affirmative procedure’ confers on Scottish Ministers significant discretionary powers over which the Scottish Parliament has limited scope to exercise democratic oversight. The procedure was established to address discrete, urgent issues in exceptional circumstances. This intended characteristic of the procedure is evident, as the Committee notes, in the fact that prior to the COVID-19 pandemic, it was used extremely rarely.

Given that the procedure has been used more than 100 times since the start of the pandemic, it is right that the Committee investigates its use. In particular, the Committee’s work in this area will have taken note of the Scottish Government’s intention, as set out in its recent consultation, Coronavirus (COVID-19) recovery - justice system, health and public services reform, to make permanent many of the emergency powers it has taken on during the course of the pandemic. Many of these responses to the pandemic have been implemented through the use of the procedure.

The NASUWT did not oppose in principle giving Ministers across the UK temporary powers to deal with the consequences of the pandemic. However, it is important to distinguish those from the powers Scottish Ministers seek, which are significant and permanent.

As is to be expected, the NASUWT’s activities and focus during the course of the pandemic has centred on schools and the education system more broadly. 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.

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 [that are] framed by reference to whatever matters [Ministers consider] appropriate’; and ‘make such other provision as [Ministers consider] appropriate in connection with the giving of the direction’.

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.

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.”

Granting to Scottish Ministers the powers they seek, 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. The extended use of the procedure in future would be contrary to the principles on which parliamentary democracies, such as Scotland, are founded.

While in practice in Scotland it might be said that Ministers have not abused these powers to date, this provides no long-term certainty of system-wide confidence. In an emergency, such as the COVID pandemic, it is understandable that extraordinary powers need to be available and used to protect citizens and ensure that critical services can be sustained.

However, when the causes and consequences of any such emergency have receded, the use of such powers, such as those associated with the use of the procedure, should decline correspondingly, and safeguards must be in place to ensure that their extraordinary character is not abused.

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 are able to use them without seeking the permission of the Scottish Parliament.

The assessment of the use of the made affirmative procedure by the Committee must, therefore, give consideration to the future of existing emergency powers, challenge the Scottish Government’s intention to put more of these powers on a permanent footing, and establish a means by which democratic oversight and a genuine commitment to the rule of law will be protected and enhanced in future.

The Law Society of Scotland

Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors.

We are a regulator that sets and enforces standards for the solicitor profession which helps people in need and supports business in Scotland, the UK and overseas. We support solicitors and drive change to ensure Scotland has a strong, successful and diverse legal profession. We represent our members and wider society when speaking out on human rights and the rule of law. We also seek to influence changes to legislation and the operation of our justice system as part of our work towards a fairer and more just society.

Our Constitutional Law sub-committee welcomes the opportunity to consider and respond to the Delegated Powers and Law Reform Committee Inquiry into the Scottish Government's Use of Made Affirmative Procedure. The sub-committee has the following comments to put forward for consideration.

General Comments

There is a considerable amount of Coronavirus subordinate legislation across the UK.

This is evident from the number of regulations made in each jurisdiction in 2020:278 UK statutory instruments, 148 Scottish Statutory Instruments, 146 Northern Ireland Statutory Rules and 109 Wales Statutory Instruments; and in 2021: 422 UK statutory instruments, 222 Scottish Statutory Instruments, 267 Northern Ireland Statutory Rules and 194 Wales Statutory Instruments.

In a significant number of those statutory instruments made affirmative procedure was being used. Made affirmative procedure is a form of fast-track procedure for subordinate legislation, which needs to be carefully scrutinised. In Scotland such regulations are made on the basis that Scottish Ministers consider them to be needed urgently.

The Delegated Powers and Law Reform Committee (DPLRC) between 20 March 2020 and 2 December 2021 considered 132 made affirmative regulations.

The House of Lords Constitution Committee, in its "Fast-track Legislation: Constitutional Implications and Safeguards" report, said:

"The made affirmative procedure is often used in Acts where the intention is to allow significant powers to be exercised quickly. It is a kind of 'fast-track' secondary legislation. In most cases the parent Act specifies which form of procedure should be applied to instruments made under it. In some cases, however the Act may provide for either the draft affirmative or the made affirmative procedure to be used. If the made affirmative procedure is used, then the instrument is effective immediately."

The report went on to say:

"Instruments laid as made instruments almost inevitably place a serious time pressure on those drafting them. The JCSI's 8th report of this session drew the special attention of both Houses to three statutory instruments which had been laid as made affirmatives ... 'revisions were being made to the terms of the instruments down to the moment that they were made'", and there had been "serious time pressure" in the making of the instruments".

The parliamentary counsels' offices and the solicitors in the Governments' legal departments are clearly expert in drawing up instruments but the policies and the challenging conditions which prevail require speed of scrutiny so those carrying out that scrutiny need to be additionally careful about the legislation they are considering. Safeguards are built into the Coronavirus Acts applicable across the UK and in Scotland.

There is provision for a two-month review period in section 95 of the Coronavirus Act 2020. That is replicated in section 12 of the Coronavirus (Scotland) Act 2020 and sections 12 and 14 of the Coronavirus (Scotland) (No 2) Act 2020.

Automatic expiry is also a safeguard and is a significant factor in section 89 of the Coronavirus Act 2020, section 12 of the Coronavirus (Scotland) Act 2020 and section 9 of the Coronavirus (Scotland) (No 2) Act 2020.

Furthermore, made affirmative regulations are subject to specific expiry deadlines if the Scottish Parliament does not approve them within 28 days of being made (Coronavirus Act 2020 Schedule 19 paragraph 6(3)(b) and Public Health etc. (Scotland) Act 2008 section 122(7)(b)).

We echo concerns about the clarity and accessibility of subordinate legislation under made affirmative procedure which is subject to frequent and significant amendment for example The Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 13) Regulations 2021 or The Public Health (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 13) Regulations 2021. In 2020 some regulations were amended as many as 25 times The Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 25) Regulations 2020 (revoked). It is difficult to be certain of the state of the law when there are such frequent amendments, and the instrument is not presented as a consolidated version.

When amending an instrument, the Government should produce a consolidated version showing the whole instrument as amended. The drafter and policy team must be working with a marked up consolidated version, and it ought not to take extra time to produce a consolidation instrument.

Specific Questions

Has the made affirmative procedure generally been used appropriately for bringing forward urgent public health measures during the coronavirus pandemic? Please set out your reasons why.

When commenting on the enactment of coronavirus legislation in 2020 we stated that we would ordinarily "highlight the need to scrutinise the legislation carefully and not to sacrifice that scrutiny for speed. However, the nature of Covid-19 and the fast-evolving threat it poses to the community at large are potentially devastating, so the law's response must match that level of threat with alacrity. This does not mean that there should not be close scrutiny of how the legislation will work in practice and each legislature in the UK will need mechanisms to ensure that scrutiny will take place in a searching and comprehensive manner". Those comments apply equally today. As the DPLRC committee has already heard in evidence there is a potential danger of made affirmative procedure becoming a habit when there may not be any real urgency or emergency.

It is difficult to comment whether made affirmative procedure has been generally used appropriately without access to the information and data upon which the Government has made the decision to deploy made affirmative legislation.

Parent Acts

Made affirmative legislation is permitted under several Acts of both the UK and Scottish Parliaments including the Public Health etc. (Scotland) Act 2008, Corporate Insolvency and Governance Act 2020, Direct Payments to Farmers (Legislative Continuity) Act 2020

Other legislation under which made affirmative regulations have been made includes the Public Services Reform (Scotland) Act 2010, Land and Buildings Transaction Tax (Scotland) Act 2013 and Articles 69(1) and 75(3) of Regulation (EU) No. 1306/2013. We have carried out an analysis of the agendas of the DPLRC over 2020 and 2021 and have identified that made affirmative regulations under the Coronavirus Act 2020 were considered on 61 occasions and those under the Public Health etc (Scotland) Act 2008 on 67 occasions.

These acts provide the powers to Scottish Ministers to make the majority of made affirmative regulations. Specifically, they do not refer to "made affirmative" regulations but rather to powers deployed on the basis of "urgency" which is translated into "emergency" regulations.

The powers under the Coronavirus Act 2020 derive from Schedule 19 Paragraphs 1(1) and 6 which provide:

(2) Sub-paragraph (1) does not apply if the Scottish Ministers consider that the regulations need to be made urgently.
(3) Where sub-paragraph (2) applies, the regulations (the "emergency regulations")—
(a) must be laid before the Scottish Parliament; and
(b) cease to have effect on the expiry of the period of 28 days beginning with the date on which the regulations were made unless, before the expiry of that period, the regulations have been approved by a resolution of the Parliament.
The powers under the Public Health etc. (Scotland) Act 2008 derive from sections 94 (International Travel) and section 122 (Regulations and Orders) which provides:
(6) Subsection (5) does not apply to regulations made under section 25(3) or 94(1) if the Scottish Ministers consider that the regulations need to be made urgently.

(7) Where subsection (6) applies, the regulations (the "emergency regulations")— (a) must be laid before the Scottish Parliament; and (b) cease to have effect at the expiry of the period of 28 days beginning with the date on which the regulations were made unless, before the expiry of that period, the regulations have been approved by a resolution of the Parliament.

Specific comments

There is no definition of "urgency" nor an explanation of the criteria which Scottish Ministers apply to arrive at a decision that a regulation should made on the basis of urgency. However, as the regulations under both acts are termed "emergency regulations" that suggests that Scottish Ministers must consider that an emergency exits and requires the Scottish Ministers to act with the minimum of delay to make regulations to meet the nature of the emergency.

It is noticeable that most introductory paragraphs in such regulations, after citation of the specific powers under the legislation, include a phrase such as "and all other powers enabling them to do so". It would be helpful were the Scottish Government to explain to what powers this refers.

Are changes required to the use of the made affirmative procedure?

As the DPLRC has already heard in evidence subordinate legislation is better drafted and accepted if more time is taken to consult and if the draft is able to be scrutinised by Parliament before being made.

Standing that made affirmative procedure will continue to be deployed consideration should be given to introducing some form of short consultation with relevant interests. This would be one way of increasing transparency and accountability for the actions of Scottish Ministers.

We also note that the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) bill provides that Scottish Ministers are required to lay before Parliament a statement of their reasons as to why the regulations should be made. This would be a useful addition to the made affirmative procedure which would enhance ministerial accountability to Parliament.

Are changes required to how Parliament scrutinises the made affirmative procedure?

We echo evidence the DPLRC has heard concerning the need for Parliament to limit the occasions on which Scottish Ministers are granted the power to make subordinate legislation subject to the made affirmative procedure, such as by defining what is an emergency or urgency, who is to determine it, the use of sunset clauses both in the Act and in the regulations and not enabling that procedure to be used twice in relation to the same instrument.

It is a feature of the treatment of made affirmative regulations that although they are approved by the Parliament they are not debated in the Chamber. There should be a regular scheduled Chamber debate where MSPs are able to discuss and comment

upon such regulations and question the Minister about the use of made affirmative procedure.

Ultimately, the alternative to made affirmative regulations is primary legislation perhaps made under emergency procedure. Scottish Ministers should include information in any supporting statement about occasions when primary legislation has been considered and why it has been decided to proceed with made affirmative regulations.

University of Birmingham COVID-19 Review Observatory

Professor Fiona de Londras, Dr Pablo Grez Hidalgo and
Daniella Lock

1. Has the made affirmative procedure generally been used appropriately for bringing forward urgent public health measures during the coronavirus pandemic? Please set out your reasons why.

Summary

- The Made Affirmative Procedure (MAP) is inherently problematic and should only be employed in exceptional circumstances.
- The figures indicate that the Scottish Government's response to the pandemic has relied heavily on the MAP, including in cases where the 'urgency' requirement has arguably not been met.
- While the *ex ante* scrutiny of policy announcements, strategic frameworks and the like can be a proxy for the scrutiny of Scottish Statutory Instruments (SSIs), it cannot replace the detailed scrutiny of the implementation of policy as contained in relevant SSIs.
- Parliamentary scrutiny procedures at the Scottish Parliament have improved over the course of the pandemic, however these improvements have not fully addressed the pressing issues raised by the MAP.

1. The Made Affirmative Procedure ('MAP') is inherently problematic

1.1. Primary legislation is subject to a superior degree of parliamentary scrutiny when compared to SSIs. Most SSIs are not debated at the Chamber, and Parliament cannot amend them. MSPs are presented with an 'all or nothing' choice: they either approve or reject the SSI. While this is common to all procedures used for making SSIs, challenges of parliamentary oversight of delegated legislation are exacerbated in respect of the MAP in at least in two ways.

1.2. First, SSIs can come into force even before they are laid before Parliament. This means that there is limited room for MSPs to engage in negotiations with the government. Similarly, there is often no realistic opportunity for the relevant Minister to withdraw a draft SSI and lay a new instrument addressing MSPs' concerns.

1.3. Second, in essence, by the time an SSI subject to MAP is considered by the Chamber, MSPs are presented with an instrument that already is in force,

sometimes for two or three weeks or even more. Thus, the SSI has already been in the public domain. If it contains lockdown restrictions, people are following guidance based on regulations contained in the SSIs, and where relevant the police may be enforcing them. Furthermore, public transport, workplaces, and business are abiding by these regulations. In such circumstances, confusion would likely result were the Scottish Parliament to reject the SSI, leaving it with few realistic options. In practice, a regulation made under the MAP comes before Parliament as a *fait accompli*.

1.4. Given these well-recognised shortcomings, the MAP should only be employed in the most exceptional circumstances.

II. The Scottish Government has relied heavily on the MAP to craft its emergency response to the Covid-19

2.1. In addition to primary legislation, the Scottish Government has used SSIs extensively during the pandemic. Indeed, they have been the mode of introducing lockdown regulations and international travel restrictions. These SSIs have been made under powers provided by s 49 and Schedule 19 of the Coronavirus Act 2020 ('CVA'), and section 94(1)(b)(i) of the Public Health etc. (Scotland) Act 2008 (PHA), respectively. In both cases, Scottish Ministers can make such regulations under the MAP if, in their view, there are reasons of urgency justifying use of the procedure (s 6(2) and (3) of Schedule 19 CVA and s 122(6) of the PHA).

2.2. According to figures provided by the Covid-19 Committee (Session 5 Scottish Parliament), Scottish Ministers have relied heavily on the MAP to make regulations during the pandemic (Covid-19 Committee, Annual Report 2020-21, SP 1022 at para 23). Between 21 April 2020 and 24 March 2021, the CVC considered a total of 56 Scottish Statutory Instruments, all containing Covid-19 related regulations. The vast majority of them (47) were made under the MAP.

2.3. Our own research and analysis of lockdown regulations made under s 49 and Schedule 19 of the CVA confirms this finding. We have identified a total of 64 SSIs made between the 26 of March 2020 and the 29 November 2021 (see Annex to this evidence). All but one of these SSIs (i.e. 63 SSIs) were made under the MAP.

2.4. The exception is The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 4) Regulations 2021. These regulations amend the Covid certification scheme by incorporating a recent negative test result as an alternative to proof of vaccination to access venues or events covered by the scheme. The Government made these regulations under the Affirmative Procedure, which meant that a draft was laid before the Scottish Parliament for approval. However, the Scottish Government asked Parliament to consider the instrument in four days, instead of the standard 40 days usually given to Parliament to approve affirmative instruments, as noted in the Delegated Powers and Legislative Reform Committee (DPLRC) letter to the convenor of the Covid-19 Recovery Committee (CVRC).

III. Arguably, the Scottish Government has employed the MAP in cases where the "urgency" requirement has arguably not been met

3.1. As mentioned above, the CVA and the PHA enable Scottish Ministers to employ the MAP, where there are reasons of urgency. However, whether the urgency threshold is met is a matter for the relevant Scottish Minister ("if the Scottish Ministers consider that the regulations need to be made urgently"). The frequent use of the MAP over the last 18 months noted in para. 2.3 above raises questions about whether and if so how that urgency threshold is operating as a constraint.

3.2 One interpretation is that Scottish Ministers have considered there to be a more or less constant condition of urgency over the last 18 months. This raises the concern that the urgency requirement is not an effective constraint on the MAP. Bearing this in mind, and cognisant of the scrutiny challenges that the MAP poses (outlined in Part I), claims of urgency should be justified and questions of how Ministers decide whether the urgency requirement is met, and whether all necessary and reasonable steps are taken to ensure that MAP is treated as *exceptional* arise.

3.3. The importance of this can be illustrated by reference to a recent example: the Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No 2) Regulations 2021. This set of regulations, which introduced a Covid vaccination certification scheme, was subject to the following procedure:

Made	**Laid**	**Came into Force**	**Scrutinised by Covid-19 Recovery Committee**	**Debated by the Chamber and approved by Parliament**
30.09.2021 11.39 am	30.09.2021 3.30 pm	01.10.2021 5 pm	04.11.2021 * Motion Ref. S6M-01529 to approve this instrument laid down on 5 October 2021	09.11. 2021 * Motion Ref. S6M-02048 Approved on a division 60 for, 49 against (Conservatives, Labour and LibDems)

3.4. While the Scottish Government made the SSI on 30 September it was not debated until the 9th of November. However, the 'certification scheme' policy was announced before Parliament by the First Minister of Scotland (FMS) on 3 August 2021 (Scottish Parliament Official Record 3 August 2021 col 4); almost two months before the Regulations were made. MSP questioned the FMS on the details of the policy on 3 August, and on 9 September 2021 the Chamber debated for 2 hour and 16 minutes a motion on a 'COVID Vaccine Certification Scheme' (S6M-01123), introduced by the Cabinet Secretary for Covid-19 Recovery (Scottish Parliament Official Record, 9 September 2021 cols 77-127). The motion provided very broad guidelines on how it was proposed that the policy would work. In addition, the Government published on that very same day a 'Strategy/Plan' with proposals. The debate was a clear indication that the proposal was fraught with political controversy. The Conservatives, Labour and Liberal Democrats all voted against

the motion, which was eventually passed, 68 for, 55 against. The CVRC subsequently undertook three evidence sessions (16, 23 and 30 September) to gather the views of stakeholders on the vaccine certification scheme.

3.5. Hence, despite the policy being announced on 3 August 2021, the Government's publication of a policy document outlining the policy, and opposition from the three major opposition parties, the Government used the MAP to make regulations implementing the policy on the 30 September 2021. The Government only shared a draft of the regulations for MSPs to scrutinise one day in advance of the regulations being made (29 September 2021). This also meant that the CVRC got a copy of the regulations only *after* two evidence sessions had taken place. In other words, only in the last session, did the CVRC have a chance to look at the details of the scheme, as developed in the regulations.

3.6. We respectfully submit that passage of time between the policy announcement and making of the regulations calls into question the urgency-basis for the use of the MAP in this case. Eventually, the CVRO undertook proper scrutiny of the SSI implementing the scheme on 4 November 2021, one month and four days after they had come into force, and the Chamber debated and approved the regulations on 9 November 2021, one month and nine days after they had come into force. It is also worth noting that the Chamber only debated the instrument for ten minutes, despite all the major opposition parties being opposed to this policy. Notably, these debates and approval took place after the 28 days period indicated in the Coronavirus Act 2020 ('CVA').[1]

IV. *Ex ante* policy scrutiny cannot replace detailed scrutiny of the text of proposed SSIs.

4.1. As indicated by the Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No 2) Regulations 2021, it can be possible for a policy decision and associated strategy, framework or similar to be scrutinised in advance of the text of an SSI being published. It might be claimed that this mitigates the scrutiny concerns raised by the MAP. However, such scrutiny can only be of the broad policy decision. In the absence of the text of an SSI the exact mode of its implementation and likely impacts of a policy cannot be subjected to proper scrutiny. Thus, such *ex ante* policy scrutiny cannot replace parliamentary scrutiny of the SSI itself.

4.2. This is not to suggest that such *ex ante* policy scrutiny is not of value. It clearly is, as indicated by, for example, pre-legislative scrutiny of regulations extending the expiry date of the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No. 2) Act 2020 ('the Scottish Acts') and bringing some of its provisions to an early expiry, which included two inquiries by the session 5 Covid-19 Committee (CVC) resulting in the elicitation of a wealth of evidence, including an oral evidence session with the First Minister of Scotland. Similarly, the CVC's inquiries "Options for easing lockdown restrictions" (April-July 2020) and "COVID-19 Framework for Decision Making and Scotland's Route Map" including scrutiny of the Scottish Government's plans for transitioning out of the first lockdown, entitled "Coronavirus (COVID-19): framework for decision making", the "COVID-19: Framework for Decision Making – Scotland's Route Map Through and Out of The Crisis", and the

"Coronavirus (COVID-19): Scotland's Strategic Framework". These plans outlined policies which would later be reflected in SSIs. For instance, the "Coronavirus (COVID-19): Scotland's Strategic Framework, was given effect by means of The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020 and The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment Regulations 2020. Again, the inquiries gathered valuable evidence and reflected formidable work by the Committee.

4.3. Notwithstanding this, however, inquiries and other forms of *ex ante* policy scrutiny cannot be said to be equivalent to scrutiny of the relevant SSIs themselves. As noted by Fox and Blackwell, 'The devil is in the detail' (Fox, Ruth & Blackwell, Joe, The Devil is in the Detail: Parliament and Delegated Legislation, Hansard Society, 2014). SSIs contain the detailed development of broad policy objectives and should be subject to proper scrutiny by Parliament.

[1] According to s 6(1)(3)(b) Schedule 19 CVA, regulations made under the MAP "cease to have effect on the expiry of the period of 28 days on which the regulations were made unless" approved by Parliament.

V. Improvements in Parliamentary Oversight over the course of the Pandemic do not resolve the challenges posed by SSIs made under the MAP

5.1. We acknowledge that there have been considerable improvements in parliamentary oversight over the course of the pandemic. However, these improvements do not resolve the challenges posed by SSIs made under the MAP.

5.2. The Chamber very rarely considers SSIs made under the MAP. Our analysis of the 64 SSIs introducing lockdown regulations and made under the powers provided by s 49 and Schedule 19 of the CVA indicates that the Chamber very rarely debates SSIs. According to our data, out of 64 SSIs introducing lockdown regulations, 63 of which were made under the MAP, the Chamber has only debated six of them (including two debated on the same day). In practice, the Chamber only debates regulations when an individual MSP makes a point or expresses dissatisfaction with an SSI's content or its broader policy. Furthermore, debates on regulations are quite short; the longest of those debates considered for this submission lasted for 10 minutes. In total, in one year and eight months of pandemic, the Chamber has spent a total of 35 minutes debating lockdown regulations made under the MAP.

5.3. In terms of the voting arrangements, the default position is that Covid-related SSIs are put to a vote at "decision time". Until the end of November 2020, SSIs were put to a vote without even providing a brief introduction about their content and significance. This meant that in practice MSPs might be unaware of what they were voting on. Now most SSIs are introduced by a brief statement by the relevant Scottish Minister before being moved to a vote. However, despite this improvement in practice, which we welcome, SSIs are only put to a vote if they have been previously debated, and, as indicated above, they are rarely debated at the

Chamber. Thus, only six of the 64 SSIs we have analysed have been approved on a division. None of them has been voted down.

5.4. Thus, the burden of scrutinising SSIs in the pandemic falls on committees. Hence, when committees are not in operation, the quality of parliamentary scrutiny diminishes dramatically. This is relevant because due to the 2021 general election committees at the Scottish Parliament were not established from the end of March 2021 to the end of June 2021, although the CVC was permitted to meet during the recess, it chose not to do so (Scottish Parliament, Official Report 26 May 2021 col 38). Committees were arranged in mid-June 2021 (see Scottish Parliament, Official Report 15 June 2021 cols 82-86 and Scottish Parliament, Official Report 17 June 2021 col 104-105 and 118-119) but only started operating normally after the summer recess in September 2021, resulting in a significant parliamentary scrutiny gap.

5.5. As regards committees, scrutiny of relevant SSIs is primarily undertaken by the CVRC (and previously, during Session 5, in its predecessor, the CVC) and the Delegated Powers and Legislative Reform Committee ('DPLRC'). Most Covid-related SSIs are subject to scrutiny by the CVRC (in session 5, by the CVC), which acts as the lead committee, and by the DPLRC. Consideration by the CVRC usually takes place after the instrument has been scrutinised by the DPLRC. If Covid-related SSIs are made under pre-pandemic powers, the SSI is subject to scrutiny by the committee to which it best corresponds according to their respective remits. However, regulations containing international travel restrictions, which are made under the PHA, are scrutinised by the CVRC. Both the CVRC (the CVC in session 5)and the DPLRC issue a report on each SSIs that they scrutinise. With respect to the 64 SSIs we looked at, none of these reports were referenced in a debate at the Chamber.

5.6. In October 2020, the Parliamentary Bureau launched a consultation on improving scrutiny and future business planning in relation to Covid-19-related regulations and policy changes. Eventually, the Government and Parliament agreed a package of measures to improve the scrutiny of Covid-19 regulations at Parliament. This included regulations made under the MAP. Among the measures introduced was the commitment that Ministers shall make statements to Parliament on each Tuesday setting out any changes to lockdown policies. In addition, the Government agreed to provide a draft copy of proposed regulations (including those to be made by MAP) on Wednesday afternoons, and to make a Scottish Minister available to give evidence to the CVC (and currently, to the CVRC), on a weekly basis, on Thursdays afternoons (see Covid-19 Committee, SP Paper 1010 Session 5, at paras 17-21). With these arrangements in place, a sort of routine of 'pre-legislative' scrutiny of policies and draft SSIs was instantiated. This had a more or less fixed weekly routine as follows:

Policy change announcement	**Draft copy of SSI laid at Parliament**	**Minister appears before the CVC/CVRC**	**Regulations are made**	**Regulations enter into force**

Tuesday afternoon morning before the Chamber, Opportunity for MSPs to question the Minister	Wednesday (potentially the DPLRC or another committee may look at the draft SSI)	Thursday morning The CVC/CVRC conducts 'pre-legislative' scrutiny of the draft SSI	Thursday afternoon Ministers make the SSI following the MAP	Friday

5.6. Thanks to these arrangements, during session 5, the Cabinet Secretary for the Constitution, the National Clinical Director, and other high-level civil servants have appeared before the CVC on a weekly basis. The Cabinet Secretary attended some 25 committee sessions between November 2020 and March 2021. This practice has continued during session 6, although rather than one Minister, various Ministers have attended these meetings (the Minister for Transport, the Cabinet Secretary for Covid Recovery, the Cabinet Secretary for Health and Social Care and the Cabinet Secretary for Net Zero, Energy and Transport).

5.7. While these arrangements represent a significant improvement from the previous situation and are very much welcomed, they still fall short of addressing the various shortcomings of the MAP. Although they provide an opportunity to perform 'pre-legislative' scrutiny of draft SSIs, this is done under a very constrained timetable as these regulations continue to be made using MAP and, thus, on an urgency basis. As a consequence, if a Committee member suggests improvements or changes, there is no subsequent opportunity to scrutinise how the Government addresses their concerns in the final SSI text. In reality, this pre-legislative routine has not resolved the challenges posed by SSIs made under the MAP.

2. **Are changes required to:**
   - **the use of the made affirmative procedure**
   - **how Parliament scrutinises the made affirmative procedure.**

   Please set out what those changes should be.

Summary:

- The MAP should only be employed when there are objective reasons of urgency, supported by a statement of reasons in an SSI's explanatory memorandum.
- Serious consideration should be given to incorporating core elements of the pandemic response (e.g. modes of regulating lockdowns (e.g. tier systems), vaccine certification schemes, international travel restrictions, requirements to wear face coverings etc) into primary legislation, and empowering the Scottish Government to use secondary legislation to select, trigger, expire, and determine appropriate combinations of these measures as appropriate to the prevailing circumstances.
- The Parliamentary Bureau may want to consider replicating the measures to strengthen parliamentary scrutiny of SSIs agreed in November 2020.

2.1. In its consultation paper on 'public health, public services and justice system reform', published on 17 August 2021, the Scottish Government made clear its intention to retain powers granted by the Coronavirus Act 2020, including the powers contained in Schedule 19 to make Public Health Regulations (Scottish Government, Covid Recovery, August 2021, at paras 25-30). However, nothing is said in the consultation document about retaining the ability to make such regulations used the MAP. We respectfully submit that, should the Scottish Government wish to retain the ability to make such regulations using the MAP significant changes would be required.

2.2. First, the MAP should only be employed when there are objective reasons of urgency, supported by a statement of reasons in an SSI's explanatory memorandum. In other words, the Minister should have the burden of justifying the claim of urgency whenever it is proposed to use the MAP. This would allow, for example, for MSPs to test claims of urgency where a public health crisis has persisted for such time and Government continues to rely on the MAP rather than shifting into a more scrutinised mode of law making suited to crisis management situations.

2.3. Second, we propose that any new primary legislation pertaining to public health emergencies might be designed so that different available 'levels' of foreseeable elements of a public heath response (like lockdowns, restrictions on international travel, closure of schools, requirements for vaccine status certification etc) are outlined within primary legislation, with powers to trigger these powers and tailor them according to level, extent, duration etc being exercisable through secondary legislation. Such a legislative design would strike an appropriate balance between flexibility and urgency in response to an evolving situation, and democratic legitimacy for and parliamentary oversight of government powers. Furthermore, this would allow bodies involved in delivering and enforcing public heath responses, like police forces, local authorities and NHS services, to have delivery plans in place and be prepared according to a known general framework of response. This of course would not preclude new, perhaps even emergency, law-making in the event that such frameworks are not sufficient to address a new or evolving public health emergency in the future, but would place the burden of justifying a move away from these agreed and known approaches on the part of the Scottish Government. The legislative framework should also outline clear parliamentary oversight processes to be implemented in case of a public health emergency, learning from the experience of this pandemic. These might include a bespoke committee dedicated to the crisis in question, requirements for regular appearance by relevant ministers before this committee, and requirements for regular reporting on the use, status, impacts and effects of powers in force as part of the public health response.

2.4. Third, we respectfully submit that the Parliamentary Bureau may want to consider replicating the measures to strengthen parliamentary scrutiny of SSIs to which we referred in our response to question 1 (see para 5.6 above). Given that a significant proportion of SSIs are made under the MAP, these measures have, in practice, enabled a sort of 'pre-legislative' stage of SSIs subject to the MAP. If such measures are combined with our second proposal above, this would put the

Scottish Parliament at the centre of the emergency response, and would address many of the issues raised by the MAP.

2.4. Third, we respectfully submit that the Parliamentary Bureau may want to consider replicating the measures to strengthen parliamentary scrutiny of SSIs to which we referred in our response to question 1 (see para 5.6 above). Given that a significant proportion of SSIs are made under the MAP, these measures have, in practice, enabled a sort of 'pre-legislative' stage of SSIs subject to the MAP. If such measures are combined with our second proposal above, this would put the Scottish Parliament at the centre of the emergency response, and would address many of the issues raised by the MAP.

Annex B - Correspondence

- COVID-19 Recovery Committee (Scottish Parliament)
- Legislation, Justice and Constitution Committee (Welsh Parliament)
- Joint Committee on Statutory Instruments (UK Parliament)

COVID-19 Recovery Committee (Scottish Parliament)

The Covid-19 Recovery Committee ('the Committee') welcomes the opportunity to contribute to the Delegated Powers and Law Reform Committee's inquiry.

The Committee recognises that the Covid-19 pandemic has given rise to exceptionally challenging circumstances in which to govern. At times, the government has needed to act urgently and the made affirmative procedure enabled it to do so. This was most apparent at the start of the pandemic when little was known about the disease and vaccines had not yet been developed to mitigate its impacts.

Nearly two years on from the first confirmed case of Covid-19 in Scotland, more is now understood about the disease and the tools we have developed to combat it are more refined. This period of learning has enabled the government to draw on past experiences and to anticipate certain challenges, such as heightened pressures on the NHS in winter, before an urgent need to act arises.

Scottish Ministers are given the power to determine whether they require to use the made affirmative procedure under the Coronavirus Act.[1] The Committee considers that there must be checks and balances on the use of this power and it should not be used as a mechanism to maximise the period for policy development at the expense of the normal timescales for parliamentary scrutiny. This is best illustrated by the vaccination certification scheme. There was a significant delay between the Scottish Government first highlighting its policy intent and the regulations being laid and subsequently enforced.[2] The Committee considers that the use of the made affirmative procedure was not appropriate in these circumstances. The Committee welcomed the Scottish Government's consideration of this issue when it sought to extend the vaccination certification scheme to include proof of a negative test using the affirmative procedure in an expediated timescale.[3]

The Committee considers that the Scottish Government's default position should be to use the affirmative procedure to introduce new health protection regulations under Schedule 19 of the Coronavirus Act 2020.[4] The affirmative procedure enables the Committee to gather views from affected stakeholders before proposed policy changes are made into the law. This process is an essential part of the Committee's role in delivering the Scottish Parliament's mission statement to create good quality, effective and accessible legislation. In circumstances where it is not possible to allow the full 40 days for parliamentary scrutiny, the Committee would be content to consider proposals for a compressed period of scrutiny on a case-by-case basis.

1 Coronavirus Act 2020, 2020 (c. 7), schedule 19, paragraph 6(2).
2 The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 2) Regulations 2021 (SSI 2021/349).
3 The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 4) Regulations 2021 (SSI 2021/453).
4 Coronavirus Act 2020, 2020 (c. 7), schedule 19.

The Committee wrote to the Scottish Government on 30 September 2021, expressing its concern that the pace of health protection regulations to date had made it difficult for businesses to plan ahead.[5] This is why the Committee called upon the Scottish Government to explain how it would respond to a worsening situation in the pandemic should that arise. As lead policy committee, we consider that greater clarity on the overall Covid policy framework would maintain public confidence in Scotland's response to the pandemic and alleviate pressure on businesses caused by any rapid changes to health protection regulations going forward.

The Committee is concerned by the recent mutation of the disease that has manifested in the Omicron variant. The Committee recognises that this latest development may require the Scottish Government to act urgently once more and we will continue to monitor developments closely.

I hope this response has been helpful to your inquiry. The Committee will follow your evidence sessions with interest and we would be grateful to receive a copy of your report when it is published.

Siobhian Brown MSP
Convener
COVID-19 Recovery Committee
15 December 2021

Legislation, Justice and Constitution Committee (Welsh Parliament)

Thank you for your letter of 25 November about your Committee's inquiry on the use of the made affirmative procedure during the coronavirus pandemic when making statutory instruments.

This is an issue which is also on our radar but because of other pressures, particularly around our scrutiny of statutory instruments and legislative consent memoranda, we have not yet been able to take stock of the impact of the Welsh Government using this procedure when bringing forward legislation about Covid-19. It is however an area of work that we identified in September as part of our early strategic planning which we will hopefully pursue next year. We do not therefore feel we could offer comments at this stage without being seen to prejudice our own findings in any future inquiry.

However, you may wish to be aware that all our reports on made affirmative instruments are located on our website and they may prove a source of useful information about our approach. The reports of our predecessor committee in the Fifth Senedd on such instruments are also available in a single location.

I would like to thank you for seeking our views on what is a particularly important matter for parliamentary scrutiny and ultimately the rule of law. It may well be that we will be a position to share each other's findings at some point in the near future which may also provide an opportunity for us to engage more widely on all matters relating to the scrutiny of subordinate legislation.

[5] Convener of the COVID-19 Recovery Committee to the Deputy First Minister and Cabinet Secretary for COVID Recovery, 30 September 2021.

Huw Irranca-Davies MS
Chair
17 December 2021

Joint Committee on Statutory Instruments (UK Parliament)

Thank you for your letter of 2 December, inviting the Committee to contribute to your Committee's inquiry into the use of the made affirmative procedure during the coronavirus pandemic.

As you noted, we have recently published a Special Report on Rule of Law Themes from COVID-19 Regulations, which set out a number of recurring themes that arose in our consideration of statutory instruments addressing the COVID-19 pandemic. At this time, we do not have anything to add to our comments in the Report, which sets out our views in detail.

We have noted your inquiry with interest and look forward to seeing your Committee's Report in the new year.

Jessica Morden MP
Chair, Joint Committee on Statutory Instruments
16 December 2021