



Law Society  
of Scotland

# Law Society of Scotland Response

Delegated Powers & Law Reform Committee Inquiry  
into the Scottish Government's Use of Made  
Affirmative Procedure

December 2021



## 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](#) and the [Coronavirus 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 be 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 exists 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.



Law Society  
of Scotland

**For further information, please contact:**

Michael Clancy  
External Relations  
Law Society of Scotland  
DD: 07785578333  
[MichaelClancy@lawscot.org.uk](mailto:MichaelClancy@lawscot.org.uk)