

Inquiry into the use of the made affirmative procedure during the coronavirus pandemic
Evidence to the Delegated Powers and Legislative Reform Committee

Professor Fiona de Londras, Dr Pablo Grez Hidalgo and Daniella Lock
COVID-19 Review Observatory, Birmingham Law School, University of Birmingham

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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 and uncertainty 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.

2.4. 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 health 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 health 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.