

## SCOTTISH GOVERNMENT RESPONSE TO DPLR COMMITTEE INQUIRY REPORT – MADE-AFFIRMATIVE PROCEDURE

THEME	RECOMMENDATION <i>(Report calls on the Government to:)</i>	SCOTTISH GOVERNMENT RESPONSE
Clarity and accessibility of law	<ul style="list-style-type: none"> <li>outline its internal checks and balances for ensuring that secondary legislation, even when drafted at speed, meets the high standard of drafting required for making changes to the law. <b>(para.56)</b></li> </ul>	<p>The Scottish Government is committed to high standards of drafting in all of the legislation it brings forward, including legislation brought forward under the made-affirmative procedure.</p> <p>The Scottish Government's starting point is to take the same approach to drafting standards and internal quality assurance checks for made-affirmative instruments as for instruments brought forward under other procedures. The development of SSIs is supported by comprehensive drafting guidance for lawyers which sets out clear stylistic and drafting conventions. Draft SSIs are checked by other lawyers to provide a fresh pair of eyes and consistency against the drafting guidance. Contingency drafts will be developed where appropriate to enable time for drafting, policy consideration and legal checking. There are also agreed version control arrangements in accordance with the Scottish Government's document management system.</p> <p>My view is that the legislation brought forward under the made-affirmative procedure has generally been of a very high standard. I would wish to take the opportunity to recognise the lengths which those involved in the SSIs have gone to, over the course of the pandemic, to make that possible, including the Scottish Parliament's advisers involved in scrutiny of the SSIs. Where errors have arisen, the Scottish Government has recognised that to be the case and has sought to address them at the earliest appropriate opportunity.</p>
	<ul style="list-style-type: none"> <li>ensure that the policy note and explanatory note accompanying each SSI is written in plain English and is sufficiently detailed so those affected can clearly understand the law and how it impacts them. <b>(para 59, 3<sup>rd</sup> bullet)</b></li> </ul>	<p>The Scottish Government is committed to ensuring that policy notes and explanatory notes for all SSIs it brings forward are clear and accessible for those affected by them. The Scottish Government recognises this has been especially important in the context of the pandemic. My view is that the Scottish Government already delivers on the Committee's recommendation, but I should be grateful if the Committee would identify any instruments they have particular concerns about and I will ensure the Government consider what lessons can be learned.</p>
	<ul style="list-style-type: none"> <li>ensure that regulations relating to the pandemic, and particularly those subject to the made affirmative procedure, that have been frequently amended are regularly consolidated. <b>(para.58)</b></li> </ul>	<p>The Scottish Government agrees that it is important that regulations which are frequently amended are clear and accessible, and that consolidation exercises should be carried out where appropriate. In the context of the pandemic the legislation.gov.uk website has been a particularly important resource which ensures that Covid-related regulations are updated as soon as possible after they are amended so that an accessible consolidated version can be</p>

	<ul style="list-style-type: none"> <li>publish as soon as possible, and prior to them coming into force, any relevant consolidated regulations; <b>(para.59, 1<sup>st</sup> bullet)</b></li> <li>clearly signpost to the public where the most up-to-date and consolidated regulations dealing with the pandemic might be read (suggests via the SG's main coronavirus website to the relevant consolidated regulations on <a href="http://www.legislation.gov.uk">www.legislation.gov.uk</a>). <b>(para.59, 2<sup>nd</sup> bullet)</b></li> </ul>	<p>accessed. I agree that it is helpful to link to that version from the Scottish Government website. The Scottish Government also progressed a specific consolidation of international travel regulations last year to take account of amendments which had been made to those regulations over time. The Government does need to consider the resource implications of conducting formal consolidation exercises, and in the context of the urgent work which has required to be undertaken in the context of the pandemic, it is not always proportionate to routinely conduct these consolidation exercises. However, if the Committee has any specific consolidations in mind I would be happy to consider those cases further.</p>
<p><b>Changes to how made affirmative instruments are brought forward</b></p>	<p><i>Report calls on the Government to:</i></p> <ul style="list-style-type: none"> <li>publish its criteria for determining whether a situation is suitably urgent in responding to the Coronavirus pandemic to require the use of the made affirmative procedure; <b>(para 75, 1<sup>st</sup> bullet)</b></li> </ul>	<p>The Scottish Government's starting point is to use the normal affirmative procedure where that is possible, but that is set against the timing constraints of that procedure under Standing Orders - which is 40 days of committee scrutiny followed by a further period to schedule a plenary vote. The principal reason for the Scottish Government's use of the made-affirmative procedure is that action in each case has required to be taken more urgently than is provided for under the affirmative procedure. Although the reason for urgency will of course be case-specific, and the Government recognises the importance of providing that case-specific justification, it is that general requirement to move at pace to safeguard public health or to lower restrictions when appropriate which is the determining factor in deciding to make use of the made-affirmative procedure.</p>
	<p>provide a written statement prior to the instrument coming into force (which in any event should accompany the laid instrument) for any future made affirmative instrument that provides a consistent level of detailed justification and evidence as to why the Scottish Ministers consider the regulations need to be made urgently; <b>(para 75, 2<sup>nd</sup> bullet)</b></p>	<p>The Scottish Government agrees that it is appropriate and desirable that an explanation is provided as to why urgent action, in the form of the made-affirmative procedure, has been considered necessary. My view is that the Scottish Government already provides a clear explanation of its rationale for urgency but I am happy to work with the Committee to consider how that could be better codified in practice for current and future made-affirmative powers. The Committee will of course be aware that this matter arose during consideration of the Coronavirus (Discretionary Compensation for Self-isolation) Bill, and the Government brought forward an amendment to ensure that where regulations under that Bill needed to be made urgently that Ministers would have to set out in the relevant Statement of Reasons the reason(s) why the regulations were needed urgently.</p>
	<p>ensure that any such regulations are published as quickly as possible following any Scottish Government announcement so that all those impacted might fully understand the detailed changes being made to the law. <b>(para 75, 3<sup>rd</sup> bullet)</b></p>	<p>The Scottish Government is committed to ensuring that regulations are published as soon as possible following any Scottish Government announcement so that all those impacted might fully understand the detailed changes being made to the law. However, it is important to recognise in the context of the pandemic that the Scottish Government has endeavoured to set out at the earliest possible opportunity what policy changes it is considering so that</p>

		<p>there is transparency around our intentions and so that consultation can be carried out with relevant stakeholders. That means it will not always be the case that when the Government sets out a proposed or potential policy direction that detailed regulations will have been drafted or will be available to publish. In those situations, the Scottish Government will endeavour to explain as clearly as possible the basis on which it is setting out its policy intentions or potential policy direction, and when detailed regulations will be available for scrutiny.</p>
	<p>If the Committee considers that the Government has not sufficiently justified its choice of the made affirmative procedure for reasons of urgency, it reserves the right to seek to raise this matter in the Chamber and to do so quickly.          Contends that there is no obvious current parliamentary process by which Members could debate the issue with sufficient speed (flagging a committee announcement which does not require a Minister to respond; an urgent or supplementary Q during a question time, all such options serving to highlight the Committee's concerns).<b>(para.76)</b></p>	<p>The Scottish Government considers that this recommendation is a matter for the Scottish Parliament to progress.</p>
	<p>The Government, in discussion with the Parliamentary Bureau, should provide a note containing a summary of all statutory instruments to be considered in the Chamber, which should be sent to Members sufficiently far enough in advance of the motion being taken. <b>(para.78)</b></p>	<p>The Scottish Government is content in principle to accept this recommendation and to explore with the Parliamentary Bureau how it can best be given effect to.</p>

<p><b>Future made affirmative powers</b></p>	<p>Committee has developed four principles for its scrutiny of the SG's approach to inclusion of made affirmative procedure in future legislation:</p> <ol style="list-style-type: none"> <li>1. <u>Use of the affirmative procedure should be the default position in all but exceptional and urgent circumstances.</u> Legislation making provision for the made affirmative procedure must be very closely framed and its exercise tightly limited.</li> <li>2. Provision in primary legislation will need to encompass a requirement to provide an explanation and evidence for the reasons for urgency in each case where the procedure is being used. There should be an opportunity for debate in a timely fashion and open to Members to seek to contribute.</li> <li>3. Any explanation provided by Scottish Ministers should also include an assessment of the impact of the instrument on those affected by it and Ministers' plans to publicise its contents and implications.</li> <li>4. A general expectation that legislation containing provision for the made affirmative procedure will include provision for sunset clauses to the effect that (a) Ministers' ability to use the power will expire at a specified date and that (b) any instrument made under the power will be time-limited. <b>(para 87)</b></li> </ol>	<p>The Scottish Government notes the four principles which the Committee intends to apply to scrutiny of the Scottish Government's approach to inclusion of made-affirmative procedure in future legislation. I would wish to stress that the Scottish Government does not intend that the made-affirmative procedure should become a routine feature of its future legislation and accepts that it will require to fully justify any proposals for its inclusion.</p>
<p><b>An expedited affirmative procedure</b></p>	<p>Whilst supportive of the principle of negotiation on a case-by-case basis for when the use of an expedited affirmative procedure as an alternative to the use of the made affirmative procedure might be appropriate the Committee considers that it may be helpful for the Parliament and Scottish Government to agree the process (perhaps in the form of a protocol) that should be followed to aid the decision making in such cases. <b>(para 96/97)</b></p>	<p>The Scottish Government acknowledges that a potential alternative to use of the made-affirmative procedure is to agree an expedited timetable for instruments progressed under the affirmative procedure. The Scottish Government would be happy to explore how this might be codified in the form of a protocol. The Scottish Government would also be happy to consider how Paul Sweeney MSP's suggestion of a pilot approach to expedited scrutiny of affirmative instruments might be progressed. I would, however, emphasise the need for any approach to remain flexible and proportionate to ensure it remains a practicable alternative to the made-affirmative procedure designed for urgent SSIs.</p>