

USE OF THE MADE AFFIRMATIVE PROCEDURE IN SCOTLAND: REFLECTIONS FROM THE PANDEMIC

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A. INTRODUCTION

Concerns about delegated powers are not new. Their use in Westminster has been the focus of a dedicated stream of work by the Hansard Society for almost ten years,¹ the Lords' Constitution Committee has published two comprehensive reports raising significant constitutional concerns about the current state of affairs,² and numerous scholars have explored their effects and challenges.³ These interventions take place against the backdrop of five years in which the balance of law-making powers in the UK has shifted unprecedented ways due to both Brexit and COVID-19. The recent publication in November 2021 of two critical reports by the Delegated Powers and Regulatory Committee and the Secondary Legislation Scrutiny Committee highlights a sense of growing momentum for a 'reset' of the use of delegated legislation in Westminster.⁴

Less has been said about the situation of delegated powers at the devolved level, and the literature on the Scottish situation is dated.⁵ Intuition would suggest that differences in the electoral system (which make a strong majoritarian government gaining control of the unicameral parliaments in Cardiff, Edinburgh and Stormont difficult, if not unlikely) mean that

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The research for this paper was funded by the AHRC/UKRI through award AH/VO11561/1 (Pandemic Review: Rights and Accountability in COVID-19). For more see www.birmingham.ac.uk/CVRO. We are grateful to Caroline Lancaster of the Scottish Parliament's Public Information office for providing some of the data necessary to conduct this research.

¹ R Fox and J Blackwell, *The Devil is in the Detail: Parliament and Delegated Legislation* (2014); R Fox, J Blackwell and B Fowler, *Taking Back Control for Brexit and Beyond* (2017). See also the Hansard Society's recently-launched Delegated Legislation Review available at:

<https://www.hansardsociety.org.uk/projects/delegated-legislation-review>

² Select Committee on the Constitution, *The Legislative Process: The Delegation of Powers* (HL 2017-19, 225); Select Committee on the Constitution, *COVID-19 and the use and scrutiny of emergency powers*, HL 2021-22, 15).

³ J King, "The Province of Delegated Legislation" in E Fisher, J King and A Young (eds), *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (2020); A Tucker, "Parliamentary Scrutiny of Delegated Legislation" in A Horne and G Drewry (eds), *Parliament and the Law*, 2nd edn (2018); A Tucker, "Brexit and the Problem with Delegated Legislation" in O Doyle, A McHarg and J Murkens (eds), *The Brexit Challenge for Ireland and the United Kingdom* (2021)

⁴ Secondary Legislation Scrutiny Committee, *Government by Diktat: A call to return power to Parliament* (HL 2021-22, 105); Delegated Powers and Regulatory Reform, *Democracy Denied? The urgent need to rebalance power between Parliament and the Executive* (HL 2021-22, 106).

⁵ C Himsworth, "Subordinate Legislation in the Scottish Parliament" (2002) 6 ELR 356; C Reid, "Who Makes Scotland's Law? Delegated Legislation under the Devolution Arrangements" (2002) 6 ELR 380.

devolved executives cannot get away with broad delegations of powers. This certainly seemed to be the case in Scotland, as the SNP led a minority government for most part of the pandemic, until 31 August 2021, when the First Minister announced an agreement with the Scottish Green Party.⁶

However, a recent ‘inquiry into the use of the made affirmative procedure during the coronavirus pandemic’ by the Scottish Delegated Powers and Law Reform Committee (‘DPLRC’), which has just published its report, has drawn attention to the fact that concerning practices at Westminster level may also be present at the devolved level.⁷ Thus, in a recent oral evidence session, Graham Simpson MSP, a DPLRC committee member, claimed that while between 2011 and 2019, only nine Scottish Statutory Instruments (‘SSIs’) had been made under the made affirmative procedure (‘MAP’), between 20 March 2020 and 2 December 2021, 132 SSIs were subject to the MAP;⁸ a remarkable increase.

This growth is partly explicable by the legislative framework through which the Scottish Government’s pandemic response is shaped. Both the Coronavirus Act 2020 – a UK-wide piece of law – and the Public Health etc. (Scotland) Act 2008 allow for regulations to be made by the MAP where a Scottish Minister considers there to be a reason of urgency for so doing.⁹ The regulations are made by laying a draft before the Scottish Parliament, and they cease to have effect after twenty eight days unless they are approved by Parliament.¹⁰ Given the quickly changing epidemiological situation, one might argue that there is *in principle* little objectionable about the use of the MAP to make such regulations *if* the statutory condition of urgency is met and potential negative effects on the principles of accountability and shared power between the Scottish Government and the Scottish Parliament are appropriately mitigated through restrained use of the MAP. However, our analysis of a sample of SSIs made during the pandemic suggests that these conditions may not have always been met.

B. OUR SAMPLE

⁶ Scottish Parliament Official Report cols 10-15 (31 August 2021)

⁷ Delegated Powers and Law Reform Committee, Inquiry into the use of the made affirmative procedure during the coronavirus pandemic (SP Paper 110, 12th Report 2022, Session 6). The Chamber debated the findings of this report on the 22 February 2022, in which the Cabinet Secretary for Covid Recovery responded to some of the Committee’s recommendations. See Scottish Parliament Official Record cols 38-63 (22 February 2022)

⁸ Scottish Parliament Official Report, Delegated Powers and Law Reform Committee col 10 (14 December 2021).

⁹ Coronavirus Act 2020, s 49 and Sch 19 ss 1 and 6(3); Public Health etc. (Scotland) Act 2008 ss 94(1)(b)(i), 122(2), (6), (7).

¹⁰ Coronavirus Act 2020, Sch 19(6)(3); Public Health etc. (Scotland) Act 2008 s 122(2), (6), (7).

The sample we consider in this short analysis comprises of sixty-four SSIs made between 26 March 2020 and 29 November 2021. A full list of these regulations is available as supplementary data online.¹¹ These SSIs are those drafted under powers provided by Schedule 19 section 1(1) of the Coronavirus Act 2020, i.e. SSIs made “for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination in Scotland”.¹² Although this is only a fraction of the overall corpus of SSIs made during the pandemic, it allows for a representative analysis of how the MAP is being used in Scotland.

This is because the SSIs in our sample were made during a time period that included the initial period of the public health emergency, early in spring 2020, and subsequent ‘waves’. Among our sample SSIs, there are ‘parent SSIs’ containing sets of regulations introducing lockdown restrictions,¹³ replacing those schemes by new tier-systems of restrictions,¹⁴ and amending those parent SSIs.¹⁵ Our sample SSIs regulate matters as varied as mask wearing, social distancing, closures of business and places of worship, stay at home rules,¹⁶ and vaccination certification schemes.¹⁷

Of the sixty-four SSIs made under Schedule 19 section 1(1) of the Coronavirus Act 2020 between late March 2020 and late November 2021, sixty-three (or 98.5%) were made under the MAP.¹⁸ This raises an initial question of whether the urgency threshold for using the MAP operates as a constraint in practice. Ultimately the notion of urgency is a matter of judgment for the relevant Scottish Minister. The frequent use of the MAP over the last eighteen months suggests that Scottish Ministers have taken the view that there is a more or less constant

¹¹ To access the table containing the raw data, please visit XXX

¹² Consequently, we don’t look at regulations made under powers conferred by the Public Health etc. (Scotland) Act 2008. It is worth noting that international travel regulations have been made under this Act, and that there has also been heavy reliance on the MAP as far as these regulations are concerned.

¹³ For instance, The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, SSI 2020/103; The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020, SSI 2020/279; The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020, SSI 2020/318.

¹⁴ The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Regulations 2020, SSI 2020/344.

¹⁵ The parent act introducing a tier system of restriction (SSI 2020/344) was subject to 32 amendments before being replaced by The Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021, SSI 2021/277, which is currently in force.

¹⁶ For instance, see The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, SSI 2020/103 ss 3, 4, 5, 6.

¹⁷ The Health Protection (Coronavirus) (Requirements)(Scotland) Amendment (No. 2) Regulations 2021, SSI 2021/349

¹⁸ The only exception is The Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 4) Regulations 2021, SSI 2021/453, which was subject to the affirmative procedure. These regulations contain an amendment to the COVID-19 vaccine certification scheme. It was laid on draft on 29 November 2021, and approved four days later on 2 December 2021.

condition of urgency justifying its use. Given that, it is instructive to consider how the MAP has operated in practice over the course of the pandemic. To do this, we break our analysis down to consider the key stages of an SSI: when the instrument is made, laid before Parliament, comes into force, is approved, and expires.

C. SSIs MADE AND IN *FORCE* vs SSIs LAID

The vast majority of our sample, forty-four SSIs, came into force after being laid before the Scottish Parliament. This is, of course, welcome. However, it is important also to note how long before coming into force they were laid. MSPs were given very little notice in advance about the creation of these regulations, in the vast majority of cases, having between one and four days notice of their coming into force. Twenty-eight SSIs were laid one day in advance of coming into force; four SSIs, two days in advance; seven SSIs, three days in advance; five SSIs, four days in advance; and two SSIs, seven days in advance. This suggests that MSPs had a very small window of opportunity to react to these SSIs. Twelve SSIs were laid before Parliament on the same day as they came into force.¹⁹

Importantly, six of the sixty-four SSIs in our sample (or 9%) came into force before being laid in Parliament. This means that MSPs had no chance to read the regulations before they entered into force. Temporality played a part in this. One of these SSIs, the very first lockdown regulations introduced in response to the pandemic in late March,²⁰ was introduced when there was a situation of great urgency and systems to respond to the pandemic were just being put in place. In those circumstances one might argue that bringing an SSI immediately into force was appropriate. Five other SSIs were made while Parliament was in recess, particularly the pre-general election recess. Within this second group, we found cases of SSIs that were laid before Parliament more than a month after they were made and came into force.²¹

¹⁹ For instance, The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 23) Regulations 2021, SSI 2021/209 entered into force on 17 May 2021 (having been made on 14 May 2021), and it was laid before the Scottish Parliament at 11.30 on 17 May 2021.

²⁰ The Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020, SSI 2020/103.

²¹ The Scottish Parliament entered recess for 2021 General Elections. This caused that the following SSIs were laid after a month of being made: The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 19) Regulations 2021, SSI 2021/180 (made on 1 April 2021, laid on 13 May 2021); The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 20) Regulations 2021, SSI 2021/186 (made on 15 April 2021, laid on 13 May 2021); The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 21) Regulations 2021, SSI 2021/193 (made on 22 of April 2021, laid on 13 May 2021)

D. SSIs *MADE* vs SSIs *APPROVED*

We already know that SSIs are made and come into force around the same time that they are laid before the Scottish Parliament. In what follows, we explore what happens once an SSI has been laid before the Scottish Parliament. As noted above, the Coronavirus Act 2020 provides that SSIs made under the MAP must be approved within twenty-eight sitting days of being made. However, our analysis shows that because the time limit is expressed in *sitting days* this does not preclude a very long period—far more than twenty-eight days *per se*—passing before an SSI is approved.²²

Twenty-two of the SSIs we analysed (or 34%) were approved more than twenty-eight *calendar* days after being made. In each of these cases, the approval periods coincided with a period of recess. Thus, while they were approved within twenty-eight sitting days (hence complying with the rule), they were in force for a considerably longer period of time before they were approved. While this might, perhaps, be considered unavoidable, it is apposite to consider how quickly after recess the SSI was approved; in other words, were efforts made to ensure that the recess did not *unduly* extend the twenty-eight days? Within our sample there is a mixture of practice in this respect. While the 2020 Summer recess ended on 9 August, SSIs made before or during that recess were approved only on 26 August.²³ Likewise, SSIs whose periods were extended due to the recess for the 2021 General Elections were approved on 9 June although Session Six had started on 13 May.²⁴ After the 2021 two week October recess, two pending SSIs were approved on 4 and 9 November, two weeks and 19 days after the end of recess, respectively.²⁵ Importantly, when Parliament reconvened on 4 September 2001 after the summer recess, Government sought approval of pending SSIs on 8 September.²⁶ This indicates that it was open to Government to seek to enact greater respect for the spirit of the

²² CVA Sch 19 s 6(6) CVA provides that in calculating the twenty-eight day period, the period lapsed during a recess lasting for more than four days is not counted.

²³ Scottish Parliament Official Report col 141 (26 August 2020). For instance, The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendment (No 5) Regulations 2020, SSI 2020/190 was made and laid on 26 June 2020, came into force on 29 June, yet it was only approved on 26 August.

²⁴ Scottish Parliament Official Record 9 June 2021 col 100. For instance, The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 19) Regulations 2021, SSI 2021/180 were made on 1 April 2021, laid before Parliament on 13 May, but only approved on 9 June.

²⁵ These were the Health Protection (Coronavirus, Restrictions) (Directions by Local Authorities) (Scotland) Amendment Regulations 2021, SSI 2021/329 (approved on 4 November 2021, see Scottish Parliament Official Report col 108 (4 November 2021)) and the Health Protection (Coronavirus) (Requirements) (Scotland) Amendment (No. 2) Regulations 2021, SSI 2021/349 (approved on 9 November 2021, see Scottish Parliament Official Report cols 72-74 (9 November 2021)).

²⁶ Scottish Parliament Official Report cols 86-89 (8 September 2021).

twenty-eight-day approval period than seemed to be in evidence after other recesses even if, in those circumstances, the rule *per se* was complied with.

In other, rare cases (four in our sample) SSIs were never approved at all because they expired before a vote could be held. While these cases are, clearly, exceptional, the very fact that the MAP enables Scottish Ministers to make regulations that can be repealed before Parliament has a chance even to express their assent raises serious questions as to the appropriateness of the current parliamentary oversight procedures. Take for instance the case of The Health Protection (Coronavirus) (Restrictions) (Scotland) Amendments (No.13) Regulations 2020 (SSI 2020/261). This SSI, which introduced a series of amendments to the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 (SSI 2020/103), came into force on 28 August 2020 and was revoked just over two weeks later, on 14 September, before being approved by the Chamber.²⁷

Importantly, it is possible for a ‘chain’ of SSIs all made under MAP and then extended by a subsequent SSI made using MAP, which is in turn revoked by an SSI made using MAP, etc. without approval ever being given for any of them and without the twenty-eight-day rule being troubled because each of them individually expires before the approval period is up. Precisely this did take place within our sample. The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) (Scotland) Regulations 2020 (SSI 2020/318) contained a series of measures regarding, for example, closure of premises, restrictions on public gatherings and mask wearing, and was made on 9 October 2020. However, no motion of approval was moved because on 22 October the Scottish Government extended their expiry date from 26 October to 2 November 2020 by means of The Health Protection (Coronavirus) (Restrictions and Requirements) (Additional Temporary Measures) Amendment (No.2) (Scotland) Regulations 2020 (SSI 2020/329). However, since the only purpose of SSI 2020/329 was to extend SSI 2020/318 until 2 November, these regulations expired on that very day, and were never taken to a vote before the Chamber. This second situation, although exceptional, raises significant concerns that in practice a set of regulations could remain in force through various extensions without being subject to parliamentary approval.

E. THE APPROVAL STAGE: AN ABSENT CHAMBER

²⁷ It was revoked by The Health Protection (Coronavirus) (Restrictions and Requirements) (Scotland) Regulations 2020, SSI 2020/279, made on 1 September 2020, came into force on 14 September.

As already noted, most SSIs made using the MAP were indeed approved by the Chamber. However, within our sample most motions to approve SSIs were approved at decision time with no previous debate and no vote on a division. Indeed, only six of the SSIs (9%) within our sample were debated by the Chamber at all, and two of those were debated on the same day,²⁸ while only seven SSIs of our sample (11%) were subject to a vote on a division. These were the same six SSIs that were debated (as indicated above), plus one exceptional SSI, which was not previously debated and in respect of which there is no record as to why it triggered a division.²⁹ Until the end of November 2020, motions of approval were put to a vote without even a statement by a Scottish Minister introducing the content and significance of the SSI in question.³⁰ Now most, but not all, SSIs are introduced by a brief statement by a Scottish Minister before the motion of approval is put to a vote. Since in an overwhelming majority of cases, no MSP speaks against the motion, most SSIs are approved without a division.

In practice the Chamber only debated these regulations when an individual MSP made a point or expressed dissatisfaction with an SSI's content or the broader policy it pursued, or made a procedural point about the lack of meaningful scrutiny. In the few instances in which the Chamber debated the SSIs in our sample, debates were short, lasting for between five and ten minutes, and were limited to two or three interventions, including one by the Scottish Government. In total, over the twenty months that our sample covered the Chamber spent a mere thirty-five minutes debating the sixty-four SSIs made by MAP that we consider; SSIs that introduced substantive limitations on everyday life including lockdowns, calling into question the extent to which the Chamber is actively engaged in scrutinising this substantial body of legislative activity.

F. CONCLUSIONS

The purpose of this analysis is not to uncover 'new' problems with the use of MAP or delegated legislation. The shortcomings of parliamentary scrutiny procedures over secondary legislation

²⁸ Scottish Parliament Official Report cols 97-100 (20 January 2021).

²⁹ The Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) (Amendment No 28) Regulations 2021, SSI 2021/242. These regulations restricted travel to and from the areas of Manchester City Council and Salford City Council. These regulations were approved on the 8 September 2021, two months and three weeks after being made, on a division (for 67, against 25, abstentions 24) on 8 September 2021 (Scottish Parliament Official Report cols 86-89 (8 September 2021)).

³⁰ This measure is part of a package of measures agreed between the Scottish Government and the Parliamentary Bureau to strengthen parliamentary scrutiny in the coronavirus context. See Parliamentary Bureau, *Minutes of Meeting 10 November 2020*, PB/S5/20/168 available at https://archive2021.parliament.scot/S5_BusinessTeam/Bureau_PDF_-_17_November_2020.pdf

are well known: diminished scrutiny, an ‘all or nothing’ choice about accepting or rejecting the SSI, a lack of time etc. It is also well known that these issues are amplified in the case of the MAP as, by the time an SSI reaches the Chamber, MSPs must decide on an instrument that has already been in force for weeks, if not (albeit in rare cases) months. The SSIs we analysed contain regulations on stay-at-home rules, limitations of indoor and outdoor social gatherings, restrictions on workplaces and the operation of businesses, and other restrictions whose content has already been disseminated in the public domain through publication, guidance and press conferences. This means that the police were already enforcing them, and people, public transport, workplaces, and business were already abiding by them. Against this background, SSIs made under the MAP came before Parliament as a *fait accompli*. However, what the sample analysis we present here suggests is that both Scottish Ministers and the Scottish Parliament could do more to mitigate the difficulties posed by the MAP. The urgency requirement could be applied by Ministers with more fidelity to its character as a *restriction* on the use of MAP, pending SSIs could be brought forward for approval as soon as practicable after a recess, and (critically) the Chamber could engage more rigorously with the SSIs it is asked to approve.

Our analysis reaffirms that in practice SSIs made by MAP receive the thinnest form of parliamentary scrutiny, notwithstanding the reach, import, and implications of their substantive content. As Parliament scrutinises the Coronavirus (Recovery and Reform) (Scotland) Bill, which seeks to put critical parts of the ‘temporary’ Coronavirus statutory framework (including the power to make SSIs using MAP) on a permanent footing,³¹ MSPs should ask themselves how to ensure that MAP enables urgent law making *where it is necessary* without surrendering Parliament’s law-making role.

³¹ Coronavirus (Recovery and Reform) (Scotland) Bill, available at <https://www.parliament.scot/bills-and-laws/bills/coronavirus-recovery-and-reform-scotland-bill>. See also Scottish Government, Covid Recovery, *A consultation on public services, justice system and other reforms*, August 2021, available at <https://www.gov.scot/binaries/content/documents/govscot/publications/consultation-paper/2021/08/covid-recovery-consultation-public-services-justice-system-reforms/documents/covid-recovery-consultation-public-health-public-services-justice-system-reforms/covid-recovery-consultation-public-health-public-services-justice-system-reforms/govscot%3Adocument/covid-recovery-consultation-public-health-public-services-justice-system-reforms.pdf>