

**Inquiry into use of the 'made affirmative procedure' during the coronavirus pandemic : Consultation**

**Monday 20 December 2021**

1. 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 pandemic, it was used extremely rarely.
2. 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 use of the procedure.
3. 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 that from the powers Scottish Ministers seek which are significant and permanent.

4. 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; to require settings to admit persons they specify to enable such persons to access childcare, education, training and ancillary services; and alter term dates.
5. 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 or [are] framed by reference to whatever matters [Ministers consider] appropriate'; 'make such other provision as [Ministers consider] appropriate in connection with the giving of the direction'.
6. In short summary, these provisions appear to give Ministers the power to overrule provisions in teachers' contracts of employment if they think fit 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.
7. Lord Neuberger, the President of the UK Supreme Court, said in 2013: *"At its most basic, the expression [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 ...”*

8. Granting to them the powers that Scottish Ministers seek to use 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 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.
9. 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.
10. However, when the causes and consequences of any such an 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.
11. 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 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 be able to use them without seeking the permission of the Scottish Parliament.

12. 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.

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