

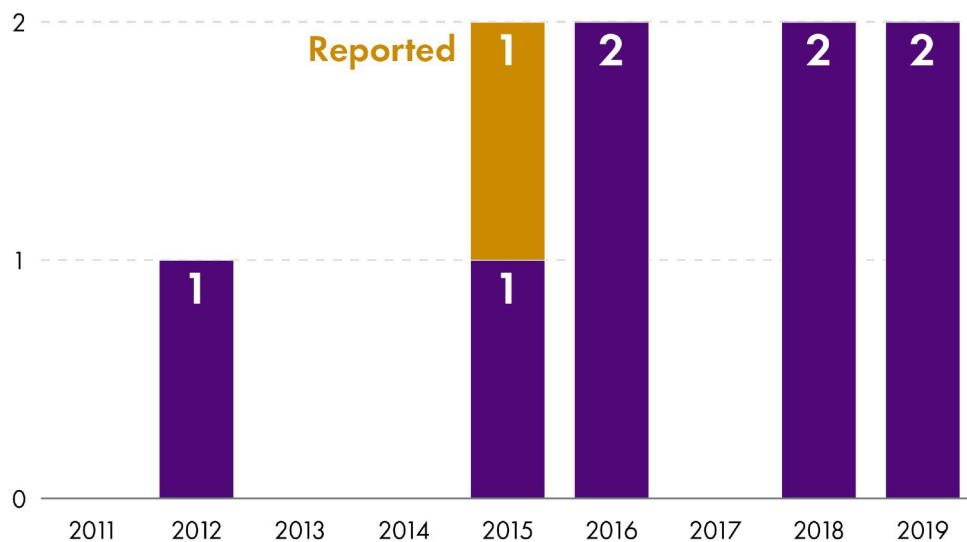
# Introduction

15. Up until the start of the pandemic, the made affirmative procedure was a rarely used and little known parliamentary mechanism for the laying of SSIs (Scottish Statutory Instruments). The Scottish Parliament considered roughly one or two a year. This was primarily due to rarity of provisions to allow the use of the made affirmative procedure in primary legislation.
16. Since the start of the coronavirus pandemic, over 120 made affirmatives have been laid by the Scottish Government. The vast majority of these have been made using the provisions in schedule 19 of the UK Coronavirus Act 2020 Act (restrictions, local levels and current requirements) and sections 94(1) and 122 of the Public Health etc. (Scotland) Act 2008 (International Travel Regulations).
17. The Delegated Powers and Law Reform Committee ("the Committee"), has **regularly acknowledged the requirement for made affirmative instruments during the pandemic so as to allow the Scottish Government to respond quickly to the many challenges presented by coronavirus**. Nevertheless, the Committee has also said that **bringing such substantial changes into force immediately, before any parliamentary scrutiny, should only be used when essential and should not become standard practice when time would allow the affirmative procedure to be used**.
18. Given the rapid increase in the use of the made affirmative procedure since March 2020, the Committee agreed at its meeting on 9 November 2021 to hold a **short and focused inquiry to consider how the made affirmative procedure has been used by the Scottish Government during the coronavirus pandemic**. The Committee's objective for this work was to:
  - help inform the Parliament's consideration of the made affirmative procedure in future legislation; and
  - help ensure there is an appropriate balance between flexibility for the Government in responding to an emergency situation while still ensuring appropriate parliamentary scrutiny and oversight.
19. The Committee heard from witnesses across three evidence sessions and received a number of written submissions and correspondence on its inquiry. A full list of witnesses and those who contributed written submissions is available in **Annex A**. The Committee is grateful for all those who took time to contribute to the Committee's work.
20. The Committee has also used its experience of considering made affirmative instruments and its scrutiny of proposed delegated powers in Bills to inform this report.

# What is the made affirmative procedure?

21. The made affirmative procedure allows an SSI to be made and come into force even though it has not yet been approved by the Parliament. However, it cannot remain in force beyond a specified period of time (often 28 days in the case of coronavirus instruments) unless it is subsequently approved by the Parliament.
22. The primary difference between the made affirmative and affirmative procedures is that an SSI laid under the affirmative procedure cannot be made and come into force unless and until the Parliament has voted to approve it. The lead committee has up to 40 days from when an affirmative instrument is laid to publish its report.
23. Made affirmative SSIs were not, until 2020, very common. These are only used for time-limited situations because they can make changes to the law immediately before the Parliament has looked at an SSI that would otherwise be subject to the affirmative procedure.

## Made affirmative instruments considered since the start of Session 4 (2011) to the end of 2019



24. Both a made affirmative and affirmative instrument will firstly be considered by the Delegated Powers and Law Reform Committee as a matter of law. It will then be considered by the relevant subject committee (known as the lead committee) as a matter of policy before being voted on in the Chamber.