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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Review of the Presiding Officer's determination to identify a Scottish Law Commission Bill as defined in Rule 9.17A of Standing Orders



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Executive Summary

Proposed revised Presiding Officer's determination

The Committee recommends the Presiding Officer's determination is revised from the beginning of Session 6 to read:

"The Presiding Officer has determined under Rule 9.17A.1(b) that a Scottish Law Commission Bill is a Bill within the legislative competence of the Scottish Parliament the primary purpose of which is to—

(a) simplify, modernise or improve the law to—

(i) ensure it is fit for purpose,

(ii) respond to developments, or address deficiencies, in the common law, or

(iii) respond to other developments in the law

(b) make provision which is not likely to generate substantial controversy among stakeholders.

Consideration should also be given by the Parliamentary Bureau to whether there are any wider legislative proposals expected within two years beginning with the date of introduction of the Bill (or by the end of the same session if sooner), which relate closely to the same particular aspect of law as the Bill. Where further legislation is expected, regard should be had to whether scrutiny of the overall proposed law change would be aided by both pieces of legislation being referred to the committee that would be designated lead committee were Rule 6.11.1(g) not to apply."

It is recommended that the Session 6 DPLR Committee should review the operation of the revised determination at a suitable point during the session.

Wider work of the SLC Bills Working Group

Scottish Government's proposal to implement Scottish Law Commission reports over a full parliamentary session

The Committee welcomes the potential benefits contained within this proposal. It therefore recommends that the Scottish Law Commission and Scottish Government pursue potential synergies for future work programmes. It also suggests that any announcement of a programme of Bills stemming from Scottish Law Commission reports happens mid-way through a session, so that the programme spans parliamentary sessions.

How the Scottish Law Commission and Scottish Government might liaise more closely together in the future to prepare Bills stemming from Commission reports

The Committee sees real benefits in such an approach and welcomes the Scottish Law Commission and Scottish Government's thinking in this area. It therefore recommends that further discussions between the SLC and Scottish Government take place in the coming months to review the internal processes to remove unnecessary duplication of effort. The Committee would not however wish to see such joint working lead to any dilution of the Scottish Law Commission's independence.

Other areas of work

The Committee recommends that the Scottish Government write to the Committee within three months of receiving a report from the Scottish Law Commission. As well as highlighting the SLC's work, the update would include the Scottish Government's initial plans for how it might look to implement the report's findings including when it might bring forward any related legislation.

Introduction and background

1. The Scottish Law Commission (SLC) was established under the Law Commissions Act 1965 to make recommendations to Government to simplify, modernise and improve Scots law. Bills seeking to implement SLC reports are generally introduced by the Scottish Government. As such, it is for the Scottish Government to consider which SLC reports requiring legislative changes will be taken forward.
2. In the first three sessions of the Parliament there was, however, a difficulty in identifying sufficient parliamentary capacity to ensure that proposed law changes arising from SLC reports were progressed.

Law Reform Working Group (2011-2012)

3. Recognising this lack of parliamentary capacity, in November 2011 a Law Reform Working Group, consisting of officials from the Scottish Parliament, Scottish Government and Scottish Law Commission, was set up to consider the rate of implementation of reports of the SLC. Its remit was to "consider and recommend an approach to parliamentary scrutiny of certain Bills originating from Scottish Law Commission Reports." The Group [published a report of its conclusions in July 2012](#).ⁱ

Report by the Standards, Procedures and Public Appointments Committee (2013)

4. In April 2013, the Session 4 Standards, Procedures and Public Appointments (SPPA) Committee published its work on '[Implementing Scottish Law Commission reports](#)'ⁱⁱ. This drew heavily on the previous year's conclusions of the Law Reform Working Group.
5. The SPPA Committee noted in its report that the SLC carried out an invaluable role in recommending reforms to improve, simplify and update the law of Scotland. The SPPA Committee considered that both the Scottish Government and the Scottish Parliament were responsible for deciding when and how to translate the SLC's reports into law and that this could be challenging, given the many competing pressures on parliamentary time.
6. The purpose of the SPPA Committee's work was to consider whether:
 - ” Parliament's procedures can be amended to carve out a little more space for certain Scottish Law Commission bills. These would be bills where the need for reform and the approach suggested are widely agreed but which do not raise major or contentious political or financial issues.
7. The SPPA Committee felt that the majority of Bills arising from SLC reports raised issues of political or other significance which required scrutiny by the relevant subject committee. It nevertheless agreed with the earlier Working Group that there

ⁱ [Law Reform Working Group's Final Report](#), July 2012

ⁱⁱ Standards, Procedures and Public Appointment Committee (Session 4) report on [implementing Scottish Law Commission reports](#) , April 2013

were "a smaller number of proposals whose nature and scope" meant that they could instead be scrutinised effectively by the then Subordinate Legislation Committee.

8. The SPPA Committee recommended that the Parliament make changes to Standing Orders to create a category of Bills known as Scottish Law Commission Bills ("SLC Bills"). The rule changes, which were subsequently approved by the Parliament, meant that such Bills were now able to be considered by the Subordinate Legislation Committee as the lead committee. To reflect this change, the Committee also saw its name change to the Delegated Powers and Law Reform (DPLR) Committee. As the DPLR Committee would not otherwise normally be lead committee on a Bill, this would increase the Parliament's capacity for considering Bills and so in turn would hopefully improve the implementation rate of SLC reports.
9. To best capture the nature and scope of Bills which might be referred to the DPLR Committee, the SPPA Committee said that it gave careful thought to the criteria that should be used to define such Bills. It broadly agreed with the referral criteria suggested by the Working Group. To give some additional flexibility, it recommended that the criteria were specified in Standing Orders. Instead, the changes to Standing Orders required the Presiding Officer to issue a determination specifying what the criteria should be. The SPPA Committee believed that by not being set in Standing Orders, such a determination:

” ...can more easily be adjusted in the light of experience, if the initial criteria prove to be overly restrictive or too broad.

10. The SPPA Committee recognised that the new procedures would only be a partial answer to the problem of finding parliamentary time to implement Commission reports. It therefore agreed to review the changes later in Session 4 to consider whether the new procedures were working as intended and if any further steps were needed.

Review by the Standards, Procedures and Public Appointments Committee (2015)

11. The SPPA Committee subsequently [conducted a review of the new rules](#) ⁱⁱⁱ on how the Parliament considers SLC Bills in 2015. While satisfied that the changes agreed in 2013 appeared to have worked well, it noted that it had received some suggestions for changes which could be made to the referral criteria. One such suggestion was from the DPLR Committee, which said that it was "not averse to considering bills where there are more areas of contention", but only where "the divergence of views was of a legal rather than a political nature".
12. As only two Scottish Law Commission Bills had been introduced at the time of its review, the SPPA Committee decided not to take any further action. It nevertheless highlighted that it would be open to its successor committee to revisit the rules in Session 5 if it felt it was appropriate.

Review by the Delegated Powers and Law Reform Committee (2019 - 2020)

ⁱⁱⁱ Standards, Procedures and Public Appointment Committee (Session 4) note on the outcome of its [review of Scottish Law Commission bill procedures](#) , December 2015

Delegated Powers and Law Reform Committee

Review of the Presiding Officer's determination to identify a Scottish Law Commission Bill as defined in Rule 9.17A of Standing Orders, 67th Report (Session 5)

13. In the spring of 2019 the DPLR Committee ("the Committee") established a working group to review the Presiding Officer's determination for designating a Bill as an SLC Bill which may be referred to it for scrutiny. The working group was made up of Scottish Parliament, Scottish Government and Scottish Law Commission officials. After taking evidence from relevant stakeholders, the working group reported its findings to the Committee in February 2020.

14. This report is written in light of that review and is intended to provide the Parliament with a up to date assessment of the referral criteria in the Presiding Officer's determination for SLC Bills and whether the criteria needs to be refined in light of past experience.

The Presiding Officer's determination

15. An SLC Bills is defined in Rule 9.17A of Standing Orders as a Bill which:
 - (a) implements all or part of a report of the Scottish Law Commission (including a joint report with the Law Commission);
 - (b) complies with such criteria as shall be determined by the Presiding Officer; and
 - (c) is not a Consolidation Bill, Codification Bill, Statute Law Repeals Bill or Statute Law Revision Bill.
16. The criteria referred to in (b) were determined by the Presiding Officer in 2013 and have been used ever since. This criteria, which consist of five separate tests, say that an SLC Bill is a Bill:
 - i. where there is a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended;
 - ii. which does not relate directly to criminal law reform;
 - iii. which does not have significant financial implications;
 - iv. which does not have significant European Convention on Human Rights (ECHR) implications; and
 - v. where the Scottish Government is not planning wider work in that particular subject area.
17. As outlined earlier in the report, the purpose of the determination was to assist the Parliamentary Bureau in identifying Bills that might be broadly regarded as more 'technical' reforms to the law. These can properly be considered by the Committee as lead committee because it is regarded as better suited to dealing with technical legal matters, as opposed to another committee whose remit might otherwise be engaged by the subject matter of the Bill.
18. The determination also sought to set out factors that might indicate that a Bill is likely to have more significant policy implications or be more contentious. It might therefore be better suited to be considered by a committee whose remit covers that policy area.
19. Since the [Presiding Officer's determination was published in 2013](#), four Bills have been designated as SLC Bills and have been referred to the Committee. The resulting Acts of the Scottish Parliament are:
 - [Legal Writings \(Counterparts and Delivery\) \(Scotland\) Act 2015](#)
 - [Succession \(Scotland\) Act 2016](#)
 - [Contract \(Third Party Rights\) \(Scotland\) Act 2017](#)
 - [Prescription \(Scotland\) Act 2018](#)

Consideration of the SLC Bill working group

Consultation

20. At its first meeting in June 2019, the working group agreed to ask a number of internal and external stakeholders:
 - how effective the referral criteria and wider SLC Bill process have been in meeting the aim of improving the implementation rate of SLC reports;
 - whether there are any ways in which the process for the referral and consideration of SLC Bills could be improved; and
 - for any wider views on the implementation of SLC reports, beyond the parliamentary process, which the working group might take into account during its consideration.

21. Within the Parliament, the working group wrote to the:
 - Presiding Officer;
 - Parliamentary Bureau;
 - Economy, Energy and Fair Work Committee;
 - Justice Committee; and
 - Standards, Procedures and Public Appointments Committee.^{iv}

22. Externally, the working group issued a call for evidence to:
 - academics;
 - lawyers; and
 - legal bodies such as the Law Society of Scotland.

23. Responses were received from:
 - [Economy, Energy and Fair Work Committee](#);
 - [Justice Committee](#);
 - [Law Society of Scotland](#); and
 - [Lynda Ross, Director, Burness Paull](#).

^{iv} The Economy, Energy and Fair Work Committee and Justice Committee were written to their remits are often engaged by bills stemming from SLC reports.

Review of the effectiveness of the current Presiding Officer's determination

24. As outlined above, the purpose of the changes in 2013 was to improve the implementation rate of Scottish Law Commission reports. Examining the continued suitability of the Presiding Officer's criteria was central to the group's work. Both the [Scottish Law Commission](#) and the [Scottish Government](#) have previously highlighted the criteria as a potential barrier to the implementation of SLC reports. The working group spent some time discussing why this might be the case, particularly when there remain a number of unimplemented SLC reports, such as that on [Trust Law](#), which might appear at first glance to fit within the criteria. The Trust Law report suggests changes to an area of civil law based to a large extent on the Trusts (Scotland) Act 1921 and late 19th century cases and is considered long overdue for reform.
25. The Scottish Government has said that it has been reluctant to bring forward a Bill implementing a Scottish Law Commission report without a high degree of confidence that it would be classed as an SLC Bill in case the Parliamentary Bureau decides it should instead be allocated to another committee. For example, a Bill that includes a reform of criminal law might not fit the current criteria even if it does so only as a result of a provision that is a relatively minor part (e.g. certain enforcement powers) of a wider civil law reform.
26. Should the Bureau decide that a Bill does not meet the criteria it would then be referred to the committee whose remit includes the policy covered by the Bill. One of the Scottish Government's concerns is that another Bill, announced in the Programme for Government, may already be occupying that committee. As a result, the Bill might not be included in the Programme for Government as the committee would not have the capacity to consider the legislation. It is clear that this uncertainty can be a hindrance to the implementation of SLC reports.
27. Consultation responses on the criteria from other stakeholders were limited. This may in part be due to the fact that the effect of the Presiding Officer's determination is largely felt in the Parliament rather than having any direct effect on stakeholders.
28. The Justice Committee was content with the current determination as it believed that "more than technical SLC Bills should continue to be referred to subject committees". The Law Society of Scotland proposed that the determination should be widened to allow for Bills containing non-contentious criminal law reform which commanded broad agreement among stakeholders to be classed as SLC Bills. It also suggested that the nature of the term "significant financial implications" in the current criteria should be defined as this could "unduly restrict a bill from coming under the DPLR procedure." The Economy, Energy and Fair Work Committee outlined possible actions to highlight the work of the Scottish Law Commission within the Parliament while Lynda Ross, a Director at Burness Paull LLP, suggested changes to how the Committee might engage with the legal profession during its consideration of an SLC Bill.

Analysis of each of the criteria within the current determination

29. Given the current Presiding Officer's determination has five distinct criteria, the working group looked at each in turn. Each of these criteria were originally suggested by the Law Reform Working Group when it considered the rate of implementation of reports of the Scottish Law Commission in 2012. It's [Final Report](#) from July 2012, provides the background to each criterion. The new working group was able to consider whether, in light of experience, each was still applicable today.

i. where there is a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended

30. For this first condition, the 2012 Law Reform Working Group was of the view that "rather than try to determine how contentious the subject matter of the Bill was, the degree of consensus amongst stakeholders would be an indicator of how welcome generally the Bill would be amongst those individuals or groups on whom it would have the greatest impact." Its added that "Where there was significant disagreement, the Group considered that the Bill would not be suitable for scrutiny by the [then] Subordinate Legislation Committee."
31. Each of the original criterion has some degree of interpretation. In the case of this condition, 'wide degree of consensus amongst key stakeholders' raises questions as to how wide is wide; who are the 'key' stakeholders and is it consensus about the general direction of travel or about each distinct element of the Bill? In addition, 'wide degree of consensus' does not necessarily correlate with the 2012 Working Group's suggestion of 'where there was significant disagreement'.
32. The working group believed that it might be more effective to turn the criteria around to instead 'make provision which is not likely to generate substantial controversy among stakeholders'. This more general descriptor might be more readily understood. The Committee agrees with this view as it gives the Bureau a degree of flexibility when reaching its decision on the suitability of a Bill to be referred to the Committee as it can be easier to gauge controversy rather than consensus.

ii. which does not relate directly to criminal law reform

33. The 2012 Working Group said that condition (ii) was to recognize that any extensive revision to criminal law, such as a Bill which made changes to substantive criminal law or criminal procedures, could itself be considered controversial.
34. The Committee fully accepts that the vast majority of Bills which focus on criminal law reform will likely generate substantial controversy among stakeholders and therefore would be referred to the Justice Committee. Nevertheless, the Committee considers that it is also used to considering criminal law as part of its wider delegated powers remit. Where a Bill is therefore to simplify or modernise the law with largely technical and uncontentious reforms, the fact that it touches on criminal law should not necessarily preclude it from being designated as an SLC Bill.

35. Condition (ii) has therefore not been directly referred to in the proposed revised determination set out in the next section of the report and will be considered in light of the new general purpose statement recommended. Nevertheless, a Bill that deals with significant or substantive criminal law reform should always be considered by the subject committee responsible for justice matters. This approach will allow for a technical Bill that addresses criminal law in a minor or consequential way to be referred to the DPLR Committee.

iii. which does not have significant financial implications

36. In terms of condition (iii) in the current Presiding Officer's determination, the 2012 Working Group accepted that any Bill, where it was anticipated that the Presiding Officer would be likely to determine that it would require a financial resolution, would not be suitable for scrutiny by the then Subordinate Legislation Committee. The Group anticipated that any cost to the public purse could potentially create a degree of controversy. It also recognised that the financial impact the Bill had on external bodies was a factor that would have to be borne in mind in considering whether this condition was met. That may contribute to the Bill generating more controversy among stakeholders.
37. In its submission to the 2019 - 2020 working group, the Law Society of Scotland suggested that 'significant financial implications' should be redefined. It gave the SLC's Report on Trust Law as an example, which if implemented could encourage the use of Scottish Trusts in "innovative ways, especially in commercial and financial matters such as pensions." However, the Scottish Law Commission asked whether a Bill stemming from that report might fail the test in condition (iii).
38. The Committee agrees that any cost to the public purse or businesses could potentially mean that a Bill would be more controversial. However, such costs should be considered in the context of the nature of the Bill as a whole rather than potentially limiting its classification as an SLC Bill when all other considerations were met. The Committee therefore considers that this condition be removed and instead financial considerations be taken into account more broadly as part of the recommended general purpose statement set out in the next section of the report.

iv. which does not have significant European Convention on Human Rights (ECHR) implications

39. The intention of condition (iv) was to ensure that consideration was given as to whether any particularly complex ECHR issues could potentially arise during the passage of the Bill.
40. In reviewing this condition, it was noted that the SLC includes an assessment of human rights issues in its reports. The Parliament's Standing Orders also require a Government Bill to be accompanied by a Policy Memorandum which must set out an assessment of the effects, if any, on human rights.
41. As with the previous two conditions, the Committee feels that any ECHR issues are intrinsically linked to the underlying policy of the Bill, rather than something that in

themselves indicates whether a Bill is suitable to be considered by the DPLR Committee as lead committee. The Bureau is therefore able to consider such issues as a further aspect of whether the Bill is likely to generate substantial controversy among stakeholders. This specific condition would be removed as it is anticipated that any significant ECHR implications will be caught by the recommended general purpose statement in the proposed revised Presiding Officer's determination.

v. where the Scottish Government is not planning wider work in that particular subject area

42. The 2012 Working Group considered that condition (v) was necessary in order to ensure that the Scottish Government was not intending to bring forward wider legislative proposals which could be used as a vehicle to make the changes that the Commission recommended in its report. This condition was also included in recognition of the fact that the Scottish Government could also bring forward legislation arising from Commission reports as part of its own legislative programme.
43. The Committee accepts that SLC Bills do not exist separately from the Scottish Government's wider legislative programme. However, the Committee is keen to ensure that legislation is brought forward as efficiently as possible and parliamentary committees are engaged effectively. The Committee has therefore suggested replacing condition (v) with a modified direction for the Parliamentary Bureau which is set out in the proposed revised Presiding Officer's determination.

Proposed revised Presiding Officer's determination

44. The working group accepted that it was possible that some Bills which might otherwise appear to be largely technical and uncontentious reforms to the law may not meet one or other of the current criteria. This uncertainty could lead to delays in the introduction of Bills stemming from SLC reports, so impacting the implementation rate of such reports and the important reform of areas of Scots law. The working group agreed that there was a need to find an approach that properly reflected the distinction between Bills that may be suitable for the Committee, with its technical and legal perspective, to scrutinise and those that are of a character that would be more properly scrutinised by the committee whose remit would otherwise be engaged.
45. The working group considered a number of possible options for that purpose, including an option to allow the Parliamentary Bureau complete flexibility in deciding whether to refer a Bill to the DPLR Committee. However, complete flexibility was felt unhelpful as it would give no predictability in helping to manage legislative demands.
46. Reflecting on the use of the criteria over the past 8 years and what might now better suit the circumstances in light of that experience, the approach that attracted consensus amongst the group was to **replace the current determination with a broad general purpose statement of what an SLC Bill is for the purposes of this process**. Such an approach would remove those aspects of the current

determination which might place an unnecessary obstacle in the way of referral. Nonetheless, this would also retain the previous protections that only bills that suit its legal and technical expertise will be referred to the DPLR Committee.

47. As with the recommendation of the original review in 2012, it was also considered that the criteria should remain in the form of a Presiding Officer's determination rather than on the face of Standing Orders. This allows any changes to be reviewed and updated more easily in future in light of any further reviews.
48. The working group believed that such an approach would give the Bureau more latitude when deciding on whether a Bill is an SLC Bill (and, therefore, whether to propose that the Committee be designated as lead committee). Scottish Parliament officials would also continue to work closely with the Scottish Government in advance of a Bill's introduction to identify whether there was anything in the Bill which might cause concern as to whether it would be likely to fall within the definition. The Scottish Government might therefore be more reassured that the Bureau will have the ability to consider the Bill's character appropriately when considering a recommendation to the Parliament on which committee should be designated lead committee.
49. The working group believed that this approach strikes an appropriate balance between the interests of the Government and the SLC in managing the programme of legislation that may arise from the work of the Commission and of the Parliament in ensuring effective and appropriate scrutiny of such legislation. The revised approach seeks to ensure flexibility to consider the nature of a Bill in the round, while also providing sufficient guidance to identify those Bills arising from the Commission's work which should be referred to the appropriate subject committee rather than to the DPLR Committee.
50. **The Committee agrees that this proposal will help enable an increase in the implementation rate of Scottish Law Commission reports yet still ensure that only Bills that suit the legal and technical expertise of the Committee are designated as SLC Bills.**
51. Standing Orders would remain unchanged. The DPLR Committee would still be able to refer the Bill back to the Bureau if it felt at any point during its Stage 1 scrutiny that it would be more appropriate for another committee to consider the legislation. It would also continue to be the responsibility of whichever committee is designated as lead committee - whether the DPLR Committee or another committee - to agree the appropriate level of scrutiny for any Bill. Whichever committee considers the legislation, the proposed approach does not change in any way the ability of the Parliament's committees to scrutinise each Bill effectively.
52. The Committee therefore recommends the Presiding Officer's determination is revised from the beginning of Session 6 to read:

"The Presiding Officer has determined under Rule 9.17A.1(b) that a Scottish Law Commission Bill is a Bill within the legislative competence of the Scottish Parliament the primary purpose of which is to—

(a) simplify, modernise or improve the law to—

- (i) ensure it is fit for purpose,
- (ii) respond to developments, or address deficiencies, in the common law, or
- (iii) respond to other developments in the law,

(b) make provision which is not likely to generate substantial controversy among stakeholders.

Consideration should also be given by the Parliamentary Bureau to whether there are any wider legislative proposals expected within two years beginning with the date of introduction of the Bill (or by the end of the same session if sooner), which relate closely to the same particular aspect of law as the Bill. Where further legislation is expected, regard should be had to whether scrutiny of the overall proposed law change would be aided by both pieces of legislation being referred to the committee that would be designated lead committee were Rule 6.11.1(g) not to apply."

53. It is recommended that the Session 6 DPLR Committee should review the operation of the revised determination at a suitable point during the session.

Wider work of the SLC Bills Working Group

54. While the working group's remit was primarily focused on considering how the Presiding Officer's determination currently operates, it is recognised that improving the implementation rate of SLC reports is also a matter for the Scottish Government, given that the SLC reports to Ministers rather than the Scottish Parliament. The working group therefore discussed broader themes that may contribute to the Scottish Government bringing forward Bills arising from Scottish Law Commission reports more quickly. This has included:
- a longer-term statement of the Government's plans for implementing SLC reports, separate from announcement of the main legislative programme in the annual Programme for Government; and
 - how the Scottish Law Commission and Scottish Government, while independent of each other, might liaise more closely in the future to prepare Commission Bills for implementation.
55. As with the suggested changes to the Presiding Officer's criteria, the aim of each is to improve the implementation rate of SLC reports. This report covers each in turn.

Scottish Government's proposal to implement Scottish Law Commission reports over a full parliamentary session

56. The Scottish Government develops an annual legislative programme which is announced in the September Programme for Government. This legislative programme is developed on a cross-government basis, reflects the Government's

policy priorities, takes into account current events and is limited by the resources required to develop Bills and the parliamentary time required for their scrutiny. While the working group recognises that Bills arising from Scottish Law Commission reports form an important part of the Government's considerations when legislative programmes are developed, these Bills must compete for resource and parliamentary time in the same way as all other prospective Bills.

57. The Government typically has more prospective legislation under consideration than can be resourced through to the development of a draft Bill or which can be accommodated within parliamentary norms for how many Bills a committee can scrutinise and how long that scrutiny will take. In that context an annual process of prioritisation is inevitable and this has a significant bearing on whether or not a Bill which arises from an SLC report is ultimately brought forward.
58. Although the Scottish Government does plan internally for what legislation might be required over the course of a parliamentary session, it is acknowledged that the convention of announcing an annual legislative programme is unlikely to change in the near future. This is due to the need for flexibility in responding to current events, progress in developing prospective legislation and progress with existing Bills.
59. The working group considered the merits of the Scottish Government considering, in its planning of future legislative priorities, whether Bills arising from SLC reports might be decoupled from the annual legislative programme. This was on the basis that the genesis and development of these Bills was sufficiently different from normal policy Bills that a case could be made for taking a different approach to their legislative planning and scheduling.
60. The Scottish Law Commission has a duty to prepare and submit to Scottish Ministers programmes for the examination of different branches of the law with a view to reform. The programmes are usually rolling programmes in so far as they include ongoing work from the previous programme as well as new projects. They generally cover a period of five years and have a mix of short, medium and long term projects in terms of scale and timing in order to achieve a balance of workload.
61. For the purpose of selecting new projects for the current (10th) programme they adopted the criteria of:
 - the extent to which the law is unsatisfactory and the potential benefits likely to accrue from undertaking reform of the law;
 - whether the issues concerned are predominantly legal rather than political; and
 - the expertise and experience of Commissioners and legal staff.
62. The Scottish Law Commission consults widely through a variety of media ahead of forming its programme. The Scottish Law Commission also takes into account whether a Bill on the topic may be suitable as a SLC Bill for the DPLR Committee to be designated lead committee. The programme, comprising a number of specific projects, is then submitted to the Scottish Ministers for their approval and then laid before the Scottish Parliament.
63. The Scottish Law Commission has a record of published reports on its website and reports on any implementation in its Annual Report and on its website. The Scottish

Ministers usually provide an initial response to published Reports with an indication of whether and when it is anticipated that the report will be implemented, but this needs to be qualified by the requirement to secure collective approval for including a Bill within the relevant future legislative programme. When the Scottish Government formally responds to the publication of a SLC report there is therefore limited clarity or certainty about when or if a report might be implemented.

64. The working group recognised that this was a source of frustration to all parties with an interest in Scottish Law Commission reports, and risked losing the goodwill of stakeholders upon which the preparation of Commission reports depend. It appears that the current approach can act to inhibit effective and transparent forward planning across all three organisations involved in the development and implementation of SLC Bills.
65. The working group recognised that the development, announcement and implementation of legislative programmes is ultimately a matter for the Government of the day. However, the working group recommended to the Committee that the current Scottish Government as well as future administrations consider announcing at the start of each parliamentary session what programme of Bills stemming from Scottish Law Commission reports it is minded to progress over the course of that session.
66. The Committee recognised that this could:
- provide certainty, clarity and a more considered and strategic approach to law reform;
 - help to address any residual backlog of potential SLC Bills and reduce delays in delivering law reform going forward;
 - assist it in its forward work planning as well as allow subject committees to highlight at an early stage any interest they might have in the legislation; and
 - enable the Government to plan more strategically for allocating the resource and parliamentary time required to support that programme of Bills arising from Commission reports.
67. As highlighted by the working group, the Committee accepted that the Government may need to revisit its planning assumptions for SLC Bills as the session unfolds. Indeed, the Committee considered that announcing the programme of Bills mid-way through the session would be preferable as it would help to further distinguish the work of the Commission from the political programme of the Government of the day.
68. The Committee welcomes the potential benefits contained within this proposal. It therefore recommends that the Scottish Law Commission and Scottish Government pursue potential synergies for future work programmes. It also suggests that any announcement of a programme of Bills stemming from Scottish Law Commission reports happens mid-way through a session, so that the programme spans parliamentary sessions.

How the Scottish Law Commission and Scottish Government might liaise more closely together in the future to prepare Bills stemming from Commission reports

69. The current process for considering and taking forward Scottish Law Commission Bills is a linear one. Responsibility for policy development, consultation, legal analysis, drafting of a report and the preparation of a Bill rests with the Scottish Law Commission. The Scottish Government has no formal role in these activities beyond regular engagement with the Scottish Law Commission to monitor and discuss how projects are progressing. As regards Bills however, the Commission works with Parliamentary Counsel Office (PCO) to produce Commission Bills.
70. It is only once the Scottish Law Commission has published its Report that the Scottish Government begins its detailed consideration of the recommendations and the draft legislation. That analysis may be deferred if the Scottish Government's expectation is that there is not likely to be a slot available in the legislative programme in the near future to progress the Bill. If there is a significant lapse of time between publication and the Scottish Government taking forward the legislation then further consultation by the Government on the proposals is likely to take place and this adds to the delay and duplication of effort.
71. When the Scottish Government analyses a Scottish Law Commission report it considers policy issues, what consultation has been undertaken, the views of stakeholders, legislative competence including ECHR issues and the technical drafting of the Bill. The Scottish Government has a rigorous internal assurance process which all Bills, including those derived from Scottish Law Commission reports, must go through. To prepare a Scottish Law Commission Bill for introduction to the Scottish Parliament the Scottish Government must also produce a suite of accompanying documents and impact assessments. Some, but not all, of these are currently produced by the Scottish Law Commission in conjunction with its reports: the Commission produce a Bill, Explanatory Notes, a Business and Regulatory Impact Assessment (BRIA), and the policy is set out in a Report.
72. Accompanying documents for a bill are covered in Rule 9.3 of Standing Orders and must include a:
- Financial Memorandum;
 - Policy Memorandum; and
 - Explanatory Notes.
73. A Delegated Powers Memorandum is also required if the Bill contains relevant provisions.
74. Standing Orders sets out matters that must be covered for each of these documents but do not prescribe the exact content and level of detail. There is therefore some flexibility in what is presented to the Scottish Parliament, particularly if a different format contributes to a reduction in duplication of effort.
75. The working group considered that there appeared to be unnecessary duplication of effort in some of the tasks carried out by Scottish Government officials when taking forward Scottish Law Commission Bills and that this can be perceived to prolong

the development process without necessarily adding significant value. Although some overlap is unavoidable, given the need for the Scottish Government to familiarise itself and ensure that Ministers are content with all aspects of a Scottish Law Commission report before introducing a Bill to the Parliament, the working group considered that there may be scope to reduce this overlap by reviewing the point at which the Government conducts its own analysis and due diligence on a Commission Report.

76. The working group also observed that the greater the time lapse between publication and introduction, the less likely it is that the project team who worked on the Report at the Scottish Law Commission will still be in situ. Valuable insight and knowledge could therefore be dispersed and potentially lost to the Scottish Government but particularly the Scottish Parliament when it is taking evidence and considering the Bill. The goodwill generated amongst stakeholders could also be lost.
77. The working group believed that there would be significant benefit in taking steps to review the process of developing Scottish Law Commission Bills for introduction as a Government Bill so that it reduces the chances of duplication of effort. The most obvious way to achieve this would be to bring forward the point at which the Scottish Government engages with the development of the Bill. Doing so would enable the Scottish Government to put its resources, expertise and support behind preparation of a Bill and accompanying documents. The working group recommended that the Scottish Government and Scottish Law Commission should take forward discussions with a view to developing an appropriate methodology for engagement between the Government and the Commission in the production of Scottish Law Commission Bills and accompanying documents which would parallel track as many of the Government and the Commission's activities and assurance processes as possible.
78. The working group nevertheless recognised that such a process would need to be done in such a way that it did not in any way influence or affect the recommendations contained in the Report or provisions reflecting these recommendations made in the Bill. The working group especially noted the importance of ensuring that the independent status of the Scottish Law Commission is maintained. The SLC is valuable to the Government and the Parliament because it is an independent body.
79. The working group noted that one of the products of the change in approach outlined above could be that Scottish Law Commission reports are accompanied by as many of the impact assessments and accompanying documents which are required for Bills being introduced to the Parliament as possible. Such a move would help reduce the volume of work which is required between the production of a Scottish Law Commission report and a Bill's introduction.
80. The Committee sees real benefits in such an approach and welcomes the Scottish Law Commission and Scottish Government's thinking in this area. It therefore recommends that further discussions between the SLC and Scottish Government take place in the coming months to review the internal processes to remove unnecessary duplication of effort. The Committee would not however

wish to see such joint working lead to any dilution of the Scottish Law Commission's independence.

Other areas of work

81. In the evidence received by the working group on the review, the Committee was particularly interested in the evidence from the Economy, Energy and Fair Work (EEFW) Committee.
82. Firstly, the EEFW Committee suggested that the role and work of the SLC is highlighted to all MSPs in the Parliament at the beginning of each session. The Committee agrees that the SLC should have an opportunity to fully brief MSPs of its role and future plans.
83. Another EEFW Committee suggestion was that committees should be notified of any completed consultations and Bill proposals from the SLC which fall within their remits. This closely mirrors a recommendation by the [Commission on Parliamentary Reform](#) in 2017 which called on a mechanism for the Scottish Ministers to announce to the Parliament (either in committee or in chamber) when they receive Scottish Law Commission reports proposing law reform. This reflected concerns from external organisations that the Parliament does not give sufficient regard to some of the external levers which may give rise to future legislation, such as SLC reports.
84. The Committee recommends that the Scottish Government write to the Committee within three months of receiving a report from the Scottish Law Commission. As well as highlighting the SLC's work, the update would include the Scottish Government's initial plans for how it might look to implement the report's findings including when it might bring forward any related legislation.

