

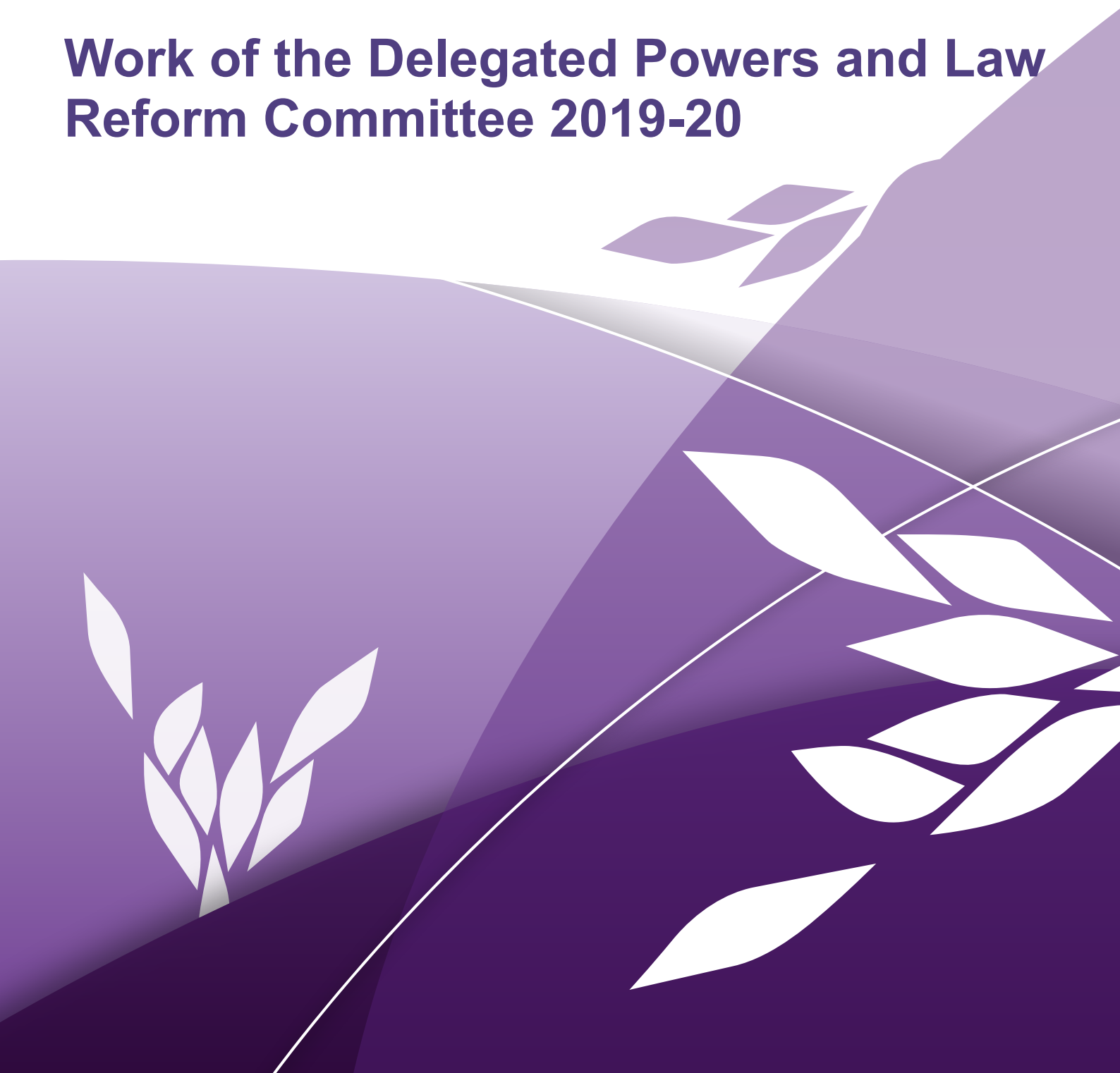


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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Work of the Delegated Powers and Law Reform Committee 2019-20



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Contents

Executive Summary	1
Introduction	2
What is an SSI?	3
Instruments considered in 2019-20	4
SSI Procedures	4
How does the Committee report instruments?	4
Process of the consideration of an SSI	5
How many instruments were considered this year?	7
Scottish Government Instruments	8
How many instruments were reported on this year?	8
Summary of use of reporting grounds	9
Which Committees received the most instruments?	12
Instruments from the Lord President's Private Office	15
Amending instruments	16
Withdrawal of instruments	17
Minor points raised	17
Consolidation	18
Instruments relating to the UK's withdrawal from the European Union	19
COVID Legislation	20
Primary legislation	22
Scottish Law Commission Bills	24
SLC Bills Working Group	24
Legislative Consent Memorandums	25
Interparliamentary Forum on Brexit	26
Annex A - Reporting Grounds: 12 May 2019 to 11 May 2020	27
Annex B - Commitments: 12 May 2019 to 11 May 2020	30

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>



dplr.committee@parliament.scot



0131 348 5212

Committee Membership



Convener
Bill Bowman
Scottish Conservative
and Unionist Party



Deputy Convener
Stuart McMillan
Scottish National Party



Mary Fee
Scottish Labour



Gordon Lindhurst
Scottish Conservative
and Unionist Party



Gil Paterson
Scottish National Party

Executive Summary

1. The Committee is heartened both by the reduction in the proportion of reported instruments (from 11.5% to 8%) and the improvement indicated by the continued reduction in the use of significant reporting grounds.
2. The Committee is also pleased with the continued reduction in the proportion of LPPO instruments being reported.
3. The Committee is pleased with the improvement to the number of commitments made this parliamentary year that remain outstanding. This suggests the Scottish Government is meeting newly made commitments at a quicker pace than it did last year and the Committee welcomes this. It also welcomes the reduction in the number of historical commitments that are outstanding.
4. The Committee notes the reduction in the volume of EU Exit legislation in this reporting year and is interested in exploring what the volume of legislation in this area might be going forward.
5. The Coronavirus pandemic has been a significant aspect of the Committee's work this year with it considering both primary and secondary legislation aimed at addressing the pandemic and its consequences. This is something the Committee will continue to monitor in the next parliamentary year.

Introduction

6. This report reflects upon the work of the Delegated Powers and Law Reform (DPLR) Committee in 2019-20, the fourth year of the fifth session of the Scottish Parliament. Reports of this nature have been produced by this Committee and its predecessor committee (the Subordinate Legislation Committee) since 2012.
7. The Delegated Powers and Law Reform Committee's remit encompasses a number of different roles which are considered in this report, but its primary focus is upon the scrutiny of delegated powers in bills and Scottish Statutory Instruments (SSIs).
8. In performing its roles the Committee has two specific objectives:
 - to ensure that Scots law is clear, accessible, and operable; and
 - to hold the responsible authority (primarily the Scottish Government) to account.
9. This report and the quarterly reports the Committee produces over the course of the reporting year are integral to meeting these objectives. Specifically, this report:
 - reviews the quality of the instruments laid by the Scottish Government and in doing so holds the Government to account while seeking to drive continuous improvement in the quality of SSIs laid; and
 - considers the Committee's scrutiny of delegated powers in primary legislation. The report reflects on issues that have arisen in relation to the scrutiny of delegated powers and the Committee's effectiveness in persuading the Scottish Government to bring forward amendments to the legislation to respond to issues identified by the Committee.
10. This report is therefore part of a broader process of holding the Scottish Government to account. The Committee will also take evidence from the Minister for Parliamentary Business and Veterans to respond to issues raised in the report.
11. It should be noted that the report also considers the quality of the instruments laid by the Lord President's Private Office (LPPO). More on the role of the LPPO can be found below.
12. The Committee met 30 times in the reporting period.

Membership Changes

13. Previous Members of the Committee during the reporting year:
 - Alison Harris (from 22 November 2016 to 17 September 2019)
 - Graham Simpson (from 29 June 2017 to 3 March 2020)
 - Tom Arthur (from 19 April 2018 to 3 March 2020)
 - Jeremy Balfour (from 17 September 2019 to 3 March 2020)

What is an SSI?

14. Before looking at the instruments which were laid in 2019-20, it is useful to explain what Scottish Statutory Instruments are.
15. SSIs are a form of law made by the Scottish Ministers (or other responsible authority such as the Lord President) exercising powers granted by the Scottish Parliament or the UK Parliament.
16. SSIs are usually in the form of regulations, orders, rules or schemes. They generally set out technical details or administrative matters necessary for primary legislation to operate, but can cover any subject matter ranging from criminal penalties, licensing schemes, implementing EU obligations, prescribing application forms, to providing procedural rules.
17. The content of SSIs is, however, limited by the terms of the primary legislation which authorises their use – referred to as the "enabling power" or "parent Act". The Delegated Powers and Law Reform Committee considers these enabling powers in Bills as they pass through the Parliament then also consider the SSIs that are later made under these powers.
18. The role of the Committee is to consider these instruments from a technical perspective. It:
 - scrutinises SSIs on behalf of the Parliament to ensure that proposed laws are within the powers the Parliament has delegated to Ministers in the parent Act – a law which is not within the enabling powers is invalid and has no legal effect;
 - checks the quality of each SSI to ensure that it is accurate, achieves the intended policy and the drafting is clear to the end user; and
 - through exchange of correspondence and its reports, encourages and monitors corrective action by the Scottish Government and other rule making authorities
19. The policy issues raised by SSIs are considered separately by the Scottish Parliament's various subject committees such as the Justice Committee, the Health and Sport Committee and the Environment, Climate Change and Land Reform Committee. These are known as the "lead committees".

Instruments considered in 2019-20

SSI Procedures

20. There are a number of different procedures that can be used when scrutinising an SSI. The procedure used in relation to each instrument is determined by what is said in the instrument's "Parent Act" - this is the legislation that authorises the use of subordinate legislation on a given matter.
21. The three most common procedures are:
 - **Affirmative** – this procedure is attached to instruments relating to significant matters and provides for a greater level of scrutiny than the other two main procedures. Before an instrument which is subject to the affirmative procedure can be made and brought into force, it must be approved by the Parliament.
 - **Negative** – this is the most common procedure attached to instruments laid before the Parliament. It is generally attached to instruments relating to matters of less significance than those subject to affirmative procedure. While the Parliament does not need to approve negative instruments before they can come into force, the Parliament can annul a negative instrument.
 - **Laid, no procedure** – these are instruments subject to the lowest level of scrutiny in the Parliament. They are laid before the Parliament for technical scrutiny and neither require approval nor can they be annulled.

How does the Committee report instruments?

22. Before examining the quality of the instruments laid by the Scottish Government this year, it is useful to reflect on how the Committee reports instruments. In considering each instrument the Committee is guided by a set of reporting grounds.
23. Rule 10.3 of Standing Orders outlines these reporting grounds. In order to make these more understandable and reflective of the extent of the Committee's concerns, the Committee has developed a hierarchy of reporting grounds.
24. "Significant grounds" represent those areas which would cause the Committee most concern; "other grounds" consist of areas where that concern would not be so significant, but nonetheless the matters can affect the understanding of an instrument if not its validity; and "advisory grounds" relate to matters which the Committee wishes to draw to the attention of the Parliament or lead committee but do not affect the understanding of an instrument.
25. Significant grounds:
 - ground (e) – (doubt as to whether it is intra vires);
 - ground (f) – (raises a devolution issue); and
 - ground (i) – (drafting appears to be defective).

26. Other grounds:

- ground (c) – (where the instrument has retrospective effect where the parent statute confers no express authority so to provide);
- ground (d) – (unjustifiable delay in publication or laying);
- ground (h) – (clarity of form or meaning); and
- the general reporting ground (which includes minor drafting errors and failures to follow proper drafting practice)

27. Advisory grounds:

- ground (a) – (charges on or payments to the Scottish Consolidated Fund);
- ground (b) – (made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts);
- ground (g) – (unusual or unexpected use of the powers conferred by the parent statute); and
- ground (j) – (non-compliance with laying requirements).

28. The intention of this approach is to enable the Scottish Government, lead committees, stakeholders and the public more generally to understand the extent of the Committee's concerns and respond accordingly.

Process of the consideration of an SSI

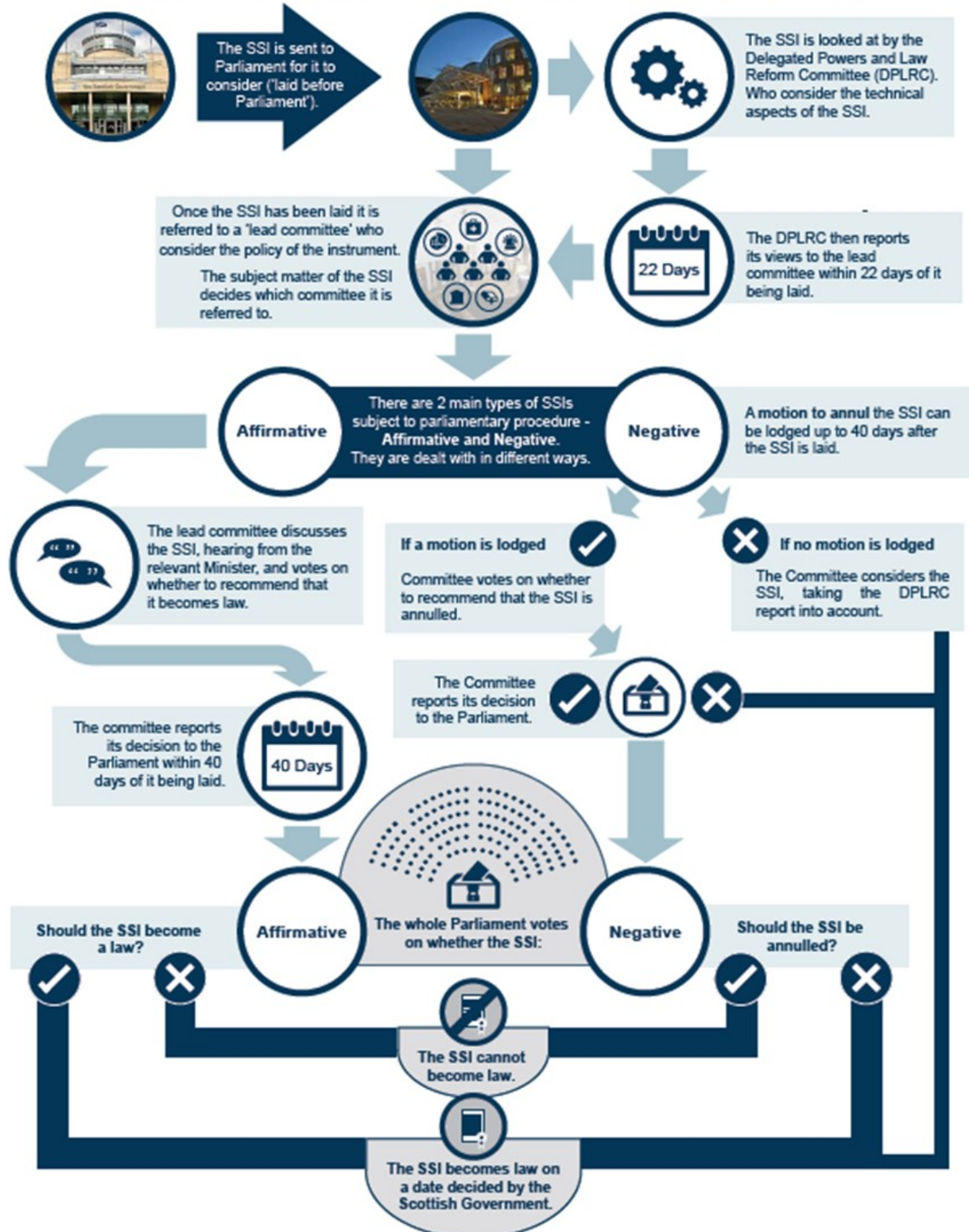
29. After the Delegated Powers and Law Reform Committee has considered an instrument from a technical perspective, the subject committee within whose remit the instrument falls then has an opportunity to consider the instrument from a policy perspective.
30. The following infographic explains the process by which an instrument is taken through the Parliament.



What are Scottish Statutory Instruments?

A Scottish Statutory Instrument (SSI) is a type of legislation which can be used to make changes to the law without a new Act of Scottish Parliament having to be passed.

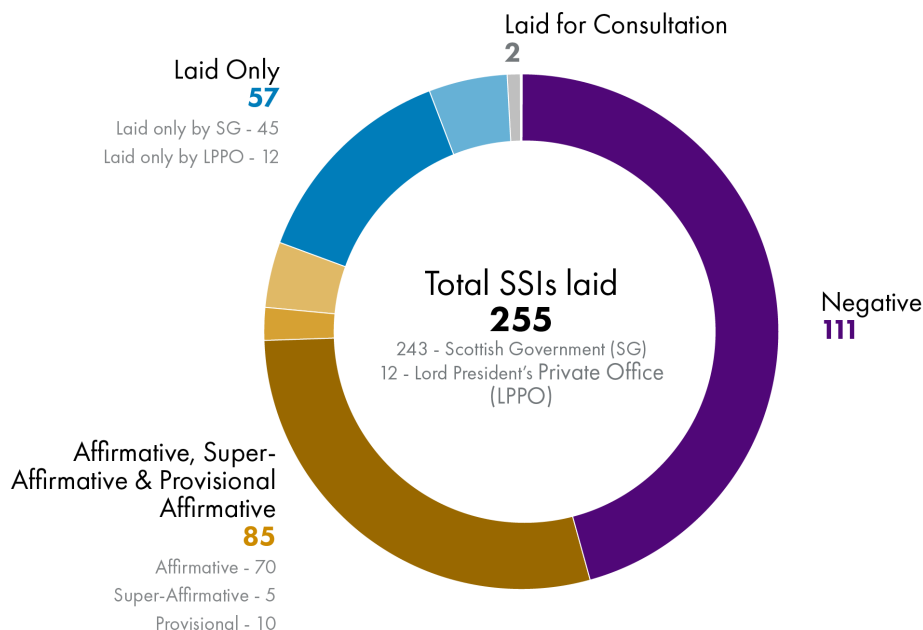
When the Parliament passes a bill it gives the Scottish Ministers the power to make SSIs which relate to that bill.



How many instruments were considered this year?

31. The Committee considered 255 instruments during this reporting period. This compares with 243 considered in 2018-19.
32. Of the 255 instruments, 243 were laid by the Scottish Government and 12 by the Lord President's Private Office ("LPPO"). This is slightly more Scottish Government instruments than the last reporting year (223 in 2018-19) but fewer LPPO instruments (20 in 2018-19).
33. The number of instruments laid by the Scottish Government this year is closer to the figure in previous reporting years (279 in 2017-18 and 281 in 2016-17). The 223 instruments considered last year was lower than average and, as last year's report discussed, may have been related to the volume of EU Exit instruments that year and extra requirements for instruments under the European Union (Withdrawal) Act 2018. EU Exit legislation is considered later in this report.
34. The 243 SSIs laid by the Scottish Government can be broken down by procedure as follows:
 - 111 negative
 - 70 affirmative
 - 45 laid, no procedure
 - 10 provisional affirmative
 - 5 super-affirmative
 - 2 documents laid for consultation
35. The 12 SSIs laid by the LPPO were all laid, no procedure.
36. This is a high number of provisional affirmative (or "made affirmative") instruments which are generally rare (there were no made affirmative instruments in the two previous reporting years). This procedure means that an instrument may come into force as soon as it is made but it will lapse after 28 days unless the Parliament approves it. It is generally used for matters that are considered to require a high degree of Parliamentary scrutiny (thus requiring Parliament to approve the instrument) but where the circumstances are too urgent to allow the 40 day period of Parliamentary scrutiny before making the instrument that would apply to an instrument subject to the affirmative procedure.
37. Of the 10 provisional affirmative instruments laid, 5 of these were related to the Coronavirus pandemic. The primary legislation made in response to this pandemic grants authority for subordinate legislation that is subject to the provisional affirmative procedure, so a high number of these might continue to be seen in the next parliamentary year.

Figure 1: Number of SSIs laid under each procedure



Scottish Government Instruments

How many instruments were reported on this year?

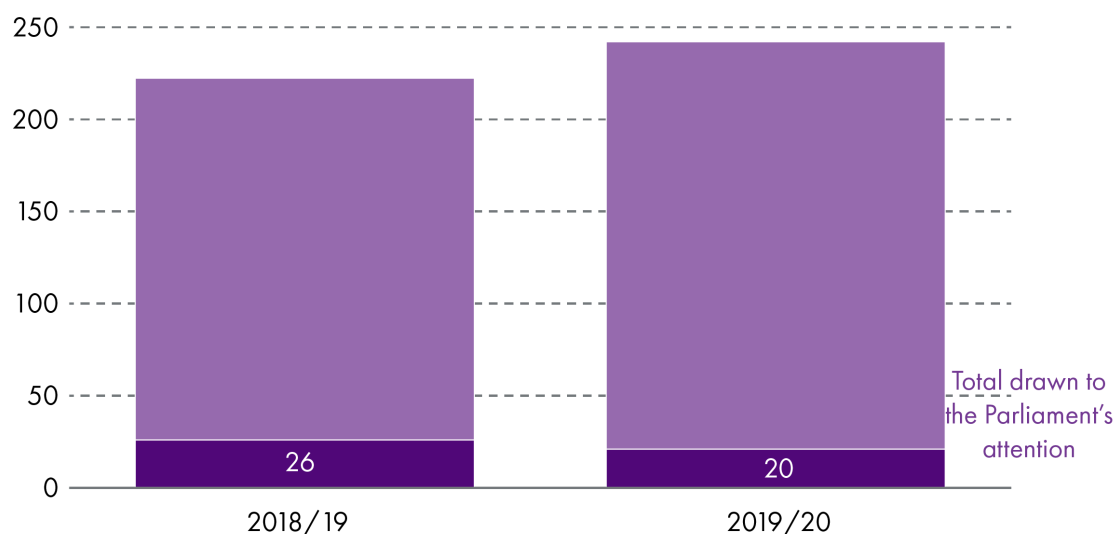
38. As can be seen in the table below, the proportion of instruments reported this year is 8% compared to 11.5% in the 2018-19 reporting period, demonstrating an improvement in the drafting quality of instruments.

Table 1: Scottish Government instruments laid and drawn to the Parliament's attention over the last two reporting years

	2018-19	2019-20
Total SSIs	223	243
Total Reported ⁱ	26 (34)	20 (34)
% Reported	11.5%	8%

ⁱ The instruments reported to the Parliament under reporting ground (j) (failure to comply with laying requirements) have been removed from the numbers shown in this table in cases where the Committee was content with the Government's reasons for the breach (all cases in this year). Removing these from the overall figures provides a more accurate picture of matters of concern to the Committee. The overall number drawn to the attention of Parliament when ground (j) is included is shown in brackets.

Figure 2: Scottish Government instruments laid and drawn to the Parliament's attention over the last two reporting years



39. The Committee welcomes this reduction in the proportion of instruments laid by the Scottish Government that engage a reporting ground.

Summary of use of reporting grounds

40. As discussed earlier in the report, instruments are reported by the Committee under one of eleven grounds as set out in rule 10.3 of Standing Orders.
41. The table below shows a breakdown of reported instruments by reporting ground.ⁱⁱ A list of the instruments reported under each ground can be found in Annex A.

ⁱⁱ The numbers in this table represent the number of times each reporting ground was engaged. Therefore, if more than one ground was engaged in the same instrument, that instrument is represented in the table more than once.

Table 2: Scottish Government instruments reported on broken down by reporting ground over the last two reporting years

Reporting Grounds	2018-19 (223 SSIs)	2019-20 (243 SSIs)
Significant Grounds		
(e) doubt as to whether the instrument is intra vires	1	0
(f) raises a devolution issue	1	0
(i) drafting appears to be defective	3	2
Other Grounds		
(c) retrospective effect where the parent statute confers no express authority so to provide	0	0
(h) form or meaning could be clearer	8	7
General ground (e.g. failures to follow proper drafting practice or legislative process)	17	11
Advisory Grounds		
(a) charge on the Scottish Consolidated Fund	0	0
(b) made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts	0	0
(g) unusual or unexpected use of the powers conferred by the parent statute	0	0
Procedural Grounds		
(d) unjustifiable delay in the publication or the laying of it before the Parliament	0	0
(j) failure to comply with laying requirements ⁱⁱⁱ	0(8)	0(16)

ⁱⁱⁱ The numbers shown in brackets here are instruments reported under this ground in relation to which the Committee was content with the reasons for the breach.

Figure 3: Scottish Government instruments drawn to the attention of the Parliament by reporting ground

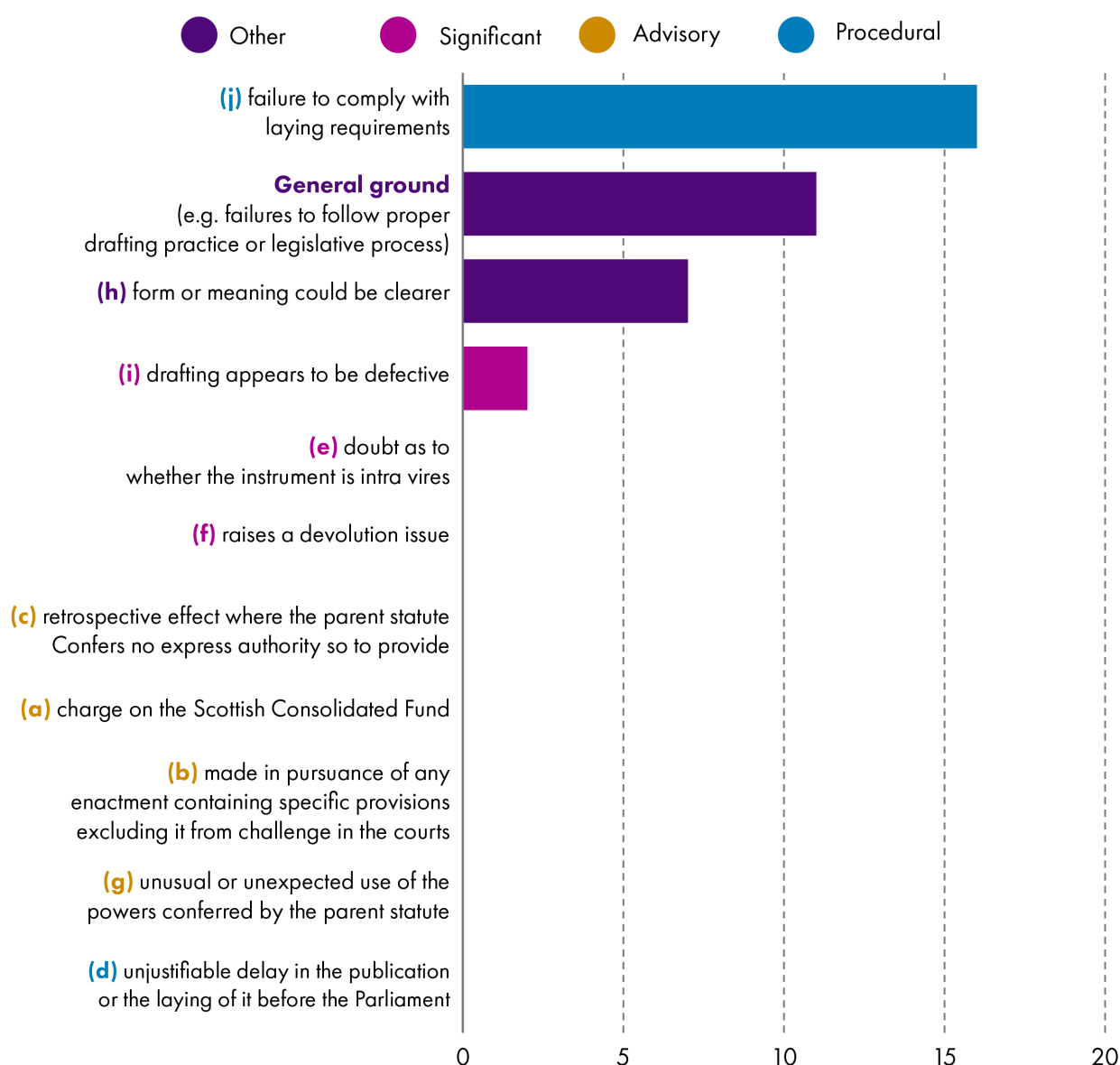
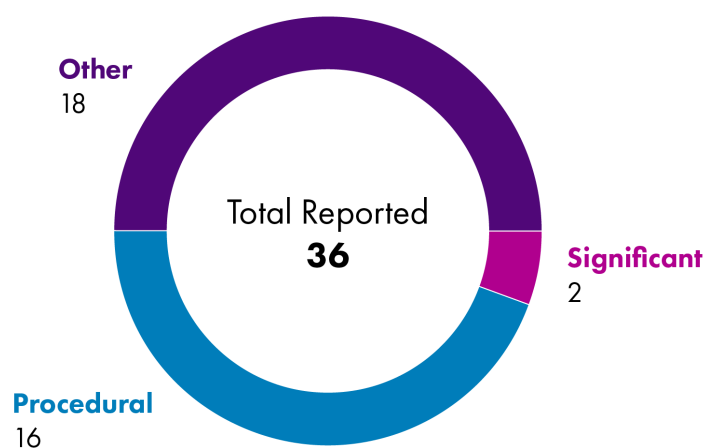


Figure 4: Scottish Government instruments drawn to the attention of the Parliament by category of reporting ground



42. The most common reporting ground this year was reporting ground (j) - failure to comply with laying requirements. The number of instruments reported under this ground has doubled from last year (from 8 to 16). In all cases the instrument was reported for failing to respect the "28-day rule". This rule provides that 28 days should elapse between the laying of a negative instrument before the Parliament and the coming into force of that instrument. The principle behind this rule is that the law should not apply to citizens until the Parliament has had a chance to scrutinize this. This rule is broken when the Scottish Government considers that a matter is of such urgency that an instrument must come into force before the 28 days have elapsed. The Scottish Government must write to the Presiding Officer explaining the reasons for the breach. In this reporting year, 9 of the 16 instruments reported under reporting ground (j) were made in response to the Coronavirus pandemic.
43. The number of instruments being reported under the most serious reporting grounds has decreased from 5 to 2 this reporting year. This is a continued decrease from 2017-18 when there were 11 instruments reported under the most serious grounds.
44. The Committee welcomes the continued reduction in the number of instruments reported on serious grounds.

Which Committees received the most instruments?

45. The table below shows the instruments laid by the Scottish Government (and those reported) over the last two reporting years, broken down by lead committee.

Table 3: Scottish Government instruments laid and drawn to the attention of the Parliament over the last two reporting years broken down by lead committee

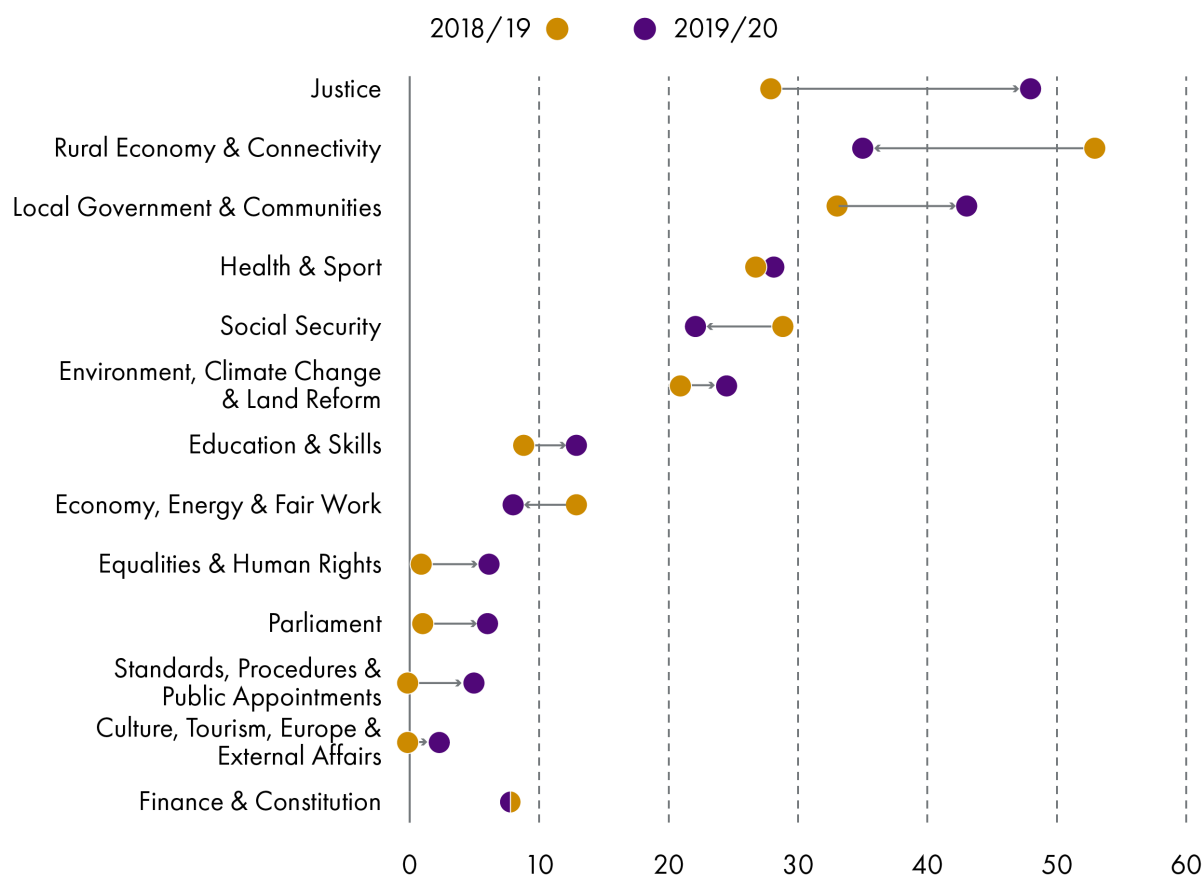
Lead Committee	Total SSIs		Reported SSIs ^{iv}		% Reported	
	2018-19	2019-20	2018-19	2019-20	2018-19	2019-20
Environment, Climate Change and Land Reform	21	24	4	1	19%	4%
Health and Sport	27	28	3	4	11%	14%
Justice	28	48	0	3	0%	6%
Local Government and Communities	33	43	4	6	12%	14%
Educations and Skills	9	13	1	0	11%	0%
Rural Economy and Connectivity	53	35	8	3	15%	8.5%
Economy, Energy and Fair Work	13	8	1	0	7%	0%
Finance and Constitution	8	8	0	0	0%	0%
Equalities and Human Rights	1	6	0	0	0%	0%
Social Security	29	22	5	2	17%	9%
Standards, Procedures and Public Appointments	0	5	0	0	0%	0%
Culture, Tourism, Europe and External Affairs	0	2	0	0	0%	0%
COVID-19	N/A	2	N/A	0	N/A	0%
Parliament	1	6	0	0	0%	0%

Figure 5: Scottish Government instruments laid broken down by lead committee

46. There was a significant decrease in the number of instruments considered by the Rural Economy and Connectivity Committee this year, from 53 instruments in 2018-19 to 35 this year. In 2018-19 a large proportion of the instruments considered by this Committee were related to the UK's withdrawal from the European Union. There has been a decrease in the number of EU Exit instruments this year (see more on this below) which explains the reduction in the number of instruments considered by the Rural Economy and Connectivity Committee.
47. Conversely, there has been a significant increase in the number considered by the Justice Committee, from 28 in 2018-19 to 48. There has also been an increase in the number considered by the Local Government and Communities Committee from 33 to 43.
48. The number considered by the Standards, Procedures and Public Appointments Committee increased this year from 0 to 5. For the Equalities and Human Rights Committee the number increased from 1 to 6. Numbers for other committees remain similar this year.
49. There has also been a higher number considered by the Parliament this year (from 1 in 2018-18 to 6 this year). This can be explained by urgent Coronavirus-related

instruments early in the pandemic that went straight to consideration by the whole Parliament rather than being considered by a lead committee. The COVID-19 Committee was later established to consider Coronavirus-related primary legislation and any subordinate legislation made under this.

Figure 6: Change in number of Scottish Government instruments going to each committee



50. There was an increase in the proportion of instruments being reported to the Health and Sport Committee (from 11% to 14%), the Justice Committee (from 0% to 6%) and the Local Government and Communities Committee (from 12% to 14%).
51. Conversely, decreases in the proportion being reported were seen by the Environment, Climate Change and Land Reform Committee (from 19% to 4%) and the Education and Skills Committee (from 13% to 0%), Rural Economy and Connectivity Committee (from 15% to 8.5%), Economy, Energy and Fair Work Committee (from 7% to 0%) and the Social Security Committee (from 17% to 9%).
52. The numbers for other committees remain consistent with no reported instruments being considered.

Instruments from the Lord President's Private Office

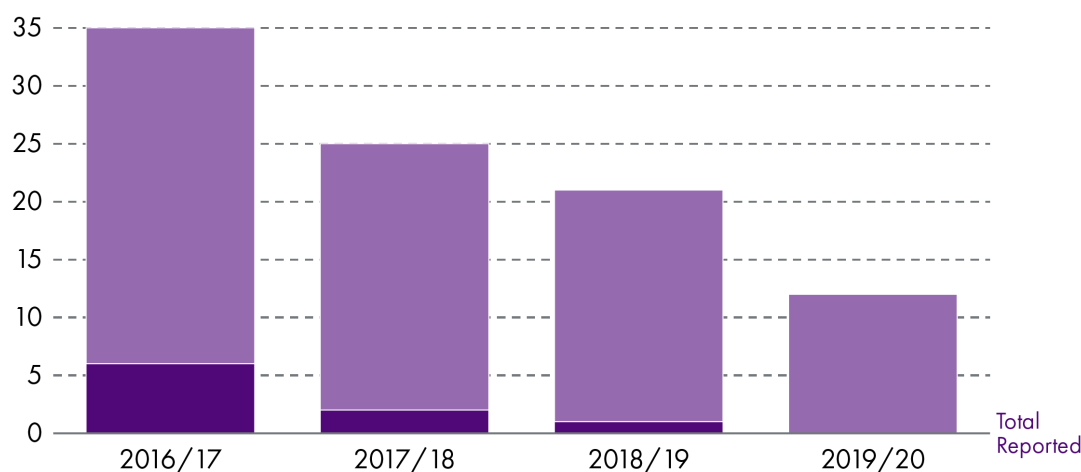
53. Instruments can be laid by the Lord President's Private Office (LPPO) on behalf of the Court of Session and High Court of Justiciary. These instruments are used to update court rules in Scotland and can be split into two distinct types:
- Acts of sederunt are used primarily to regulate civil procedure in the Court of Session and Sheriff Courts
 - Acts of adjournal are concerned with regulating criminal procedure in the High Court of Justiciary and Sheriff Courts
54. Both acts of sederunt and acts of adjournal are subject to the same level of scrutiny by the Committee as any other SSI. They are laid by the LPPO as the Lord President is the head of the judiciary in Scotland.
55. These instruments are laid separately from those laid by the Scottish Government so a separate analysis of the quality of these instruments is provided below.

Table 4: LPPO instruments laid and drawn to the Parliament's attention over the last two reporting years

	2018-19	2019-20
Total SSIs	20	12
Total Reported	1	0
% Reported	5%	0%

56. This table shows a reduction in the number of instruments laid by the LPPO.
57. There has also been a further decrease in the proportion of instruments reported. No instruments have been reported during this period (down from 5% of instruments considered in 2018-19, 8.5% in 2017-18 and 20.5% in 2016-17).

Figure 7: LPPO instruments laid and drawn to the Parliament's attention over the last four reporting years



58. The Committee welcomes the low number of instruments laid by LPPO in recent years that have engaged reporting grounds, and the further reduction that can be seen in this reporting period.

Amending instruments

Scottish Government Instruments

59. Over the course of the reporting year, the Scottish Government laid 8 amending instruments which corrected errors in instruments that were drawn to the attention of the Parliament by the Committee.
60. There are also errors in instruments that remain outstanding but which the Scottish Government has given a commitment to correct. A list of all outstanding commitments can be found at Annex B.
61. The number of outstanding commitments has previously been pursued by this Committee and its predecessor committee in Session 4.
62. The Minister for Parliamentary Business and Veterans, Graeme Dey, MSP stated in his evidence to the Committee on 11 December 2018 and in a follow-up letter to the Committee that it was the Scottish Government's intention to fulfil the current commitments by the end of this session, and as many new commitments as possible, as quickly as possible. This was reiterated in his evidence to the Committee on 19 December 2019.
63. At the end of parliamentary year 2018-19, 7 commitments were outstanding. At the end of this parliamentary year, 3 of these commitments are outstanding.
64. Additionally, 4 of the commitments from parliamentary year 2018-19 remain outstanding, bringing the total number of outstanding commitments from previous years to 7. This is a reduction on the number from last year (12).
65. Turning to commitments made this year, 4 of these remain outstanding. At the time of the 2018-19 report, 11 of the commitments given that year were outstanding. This would suggest that the Government has been faster in addressing new commitments this year than in 2018-19.
66. The new commitments combined with the commitments from previous years brings the total number of outstanding Scottish Government commitments to 11. This is a reduction from the 18 commitments that were outstanding at the end of parliamentary year 2018-19, and compares favourably against figures from the two previous years (16 outstanding at the end of parliamentary year 2017-18 and 20 at the end of 2016-17).
67. The Committee welcomes the reduction in the number of outstanding commitments and continues to encourage the Scottish Government to endeavour to meet commitments made to the Committee as soon as possible.

LPPO Instruments

68. The LPPO laid no amending instruments during this reporting period and has no outstanding commitments.

Withdrawal of instruments

69. If concerns are raised by the Committee in relation to affirmative SSIs, the Scottish Government can withdraw the instruments during their passage through the Parliament. This is one indication of the quality of instruments laid before the Parliament.
70. During this reporting year the following 8 instruments were withdrawn:
- Presumption Against Short Periods of Imprisonment (Scotland) Order 2019 (2019/draft)
 - Conservation (Natural Habitats, &c.) (Miscellaneous Amendments) (Scotland) Regulations 2019 (2019/draft)
 - Additional Powers Request (Scotland) Regulations 2019 (2019/draft)
 - Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2020 (2019/draft)
 - Representation of the People (Annual Canvass) Amendment (Scotland) Order 2020 (2020/draft)
 - Local Government Finance (Scotland) Order 2020 (2020/draft)
 - Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2020 (2020/65)
 - UEFA European Championship (Scotland) Act 2020 (Ticket Touting Offence) (Exceptions for Use of Internet etc.) (Scotland) Regulations 2020 (2020/draft)
71. This is a reduction from 11 withdrawn instruments in 2018-19 and a return to similar numbers in the previous two reporting years (7 in 2017-18 and 8 in 2016-17).
72. The Committee welcomes the reduction in the number of instruments requiring to be withdrawn but continues to encourage the Scottish Government to endeavour to lay instruments of such a standard that they do not require to be withdrawn.

Minor points raised

73. Minor points are generally typographical or referencing errors in instruments. These are separate to, and less significant than, points that lead to an instrument being reported. While they do not affect the validity of the instrument, they are

nevertheless drafting errors which can point to wider concerns with the quality of instruments.

74. During its scrutiny of instruments in 2019-20, the Committee identified a total of 53 instruments on which minor points were raised (20% of instruments laid). This can be broken down into 51 instruments laid by the Scottish Government and 2 instruments laid by the LPPO.
75. This is a reduction on last year in which there were 68 instruments with minor points (28% of instruments laid). In 2017-18 there were 93 instruments on which minor points were raised (33% of instruments laid). This year therefore continues the reduction in minor points that has been seen in recent reporting years.
76. The Committee welcomes the improvements that have been made over the last year to reduce the number of minor points arising and encourages continuation of efforts to reduce this further.

Consolidation

77. As noted at the beginning of this report one of the Committee's objectives, and one which it repeatedly restates, is to ensure that law is clear and accessible to those who use the legislation. An obstacle to that objective is where instruments are amended on a considerable number of occasions meaning that the user of the legislation has to refer to multiple instruments to understand what the principal instrument is now doing.
78. One example of this, which was also highlighted in last year's report, is the Council Tax Reduction (Scotland) Regulations 2012.
79. The Committee has had ongoing correspondence with the Scottish Government in relation to these regulations and in 2017 then Cabinet Secretary for Finance and the Constitution wrote to the Committee setting out fully the Scottish Government's position.^v The Cabinet Secretary acknowledged the desirability of consolidation but did not view this as essential.
80. The Committee has had further correspondence on this matter this year with Graeme Dey MSP, the Minister for Parliamentary Business and Veterans and the Scottish Government's position remains unchanged.^{vi}
81. The Committee, as stated in its [49th report of 2018](#), continues to encourage the Scottish Government to undertake a consolidation of the Council Tax Reduction

^v [Letter from the Cabinet Secretary for Finance and the Constitution dated 18 December 2017.](#)

^{vi} [See letter from the Minister for Parliamentary Business and Veterans dated 26 March 2020.](#)

(Scotland) Regulations 2012, within a reasonable timescale, in the interests of clarity and accessibility.

82. More generally, the Committee would encourage the Scottish Government to give consideration to whether a consolidation exercise could be undertaken where a principal Order or Regulations have been amended multiple times.

Instruments relating to the UK's withdrawal from the European Union

83. In this reporting year there has been a number of instruments that have passed through the Parliament to address deficiencies in legislation that would arise on the UK's exit from the European Union, though the volume has significantly reduced compared with the last reporting period.
84. The delegated powers to make these instruments are found in the European Union (Withdrawal) Act 2018 ("the 2018 Act"). The instruments under this Act that are of relevance to the Scottish Parliament fall into two categories:
- Scottish statutory instruments laid by the Scottish Government
 - Statutory instruments laid by the UK Government which relate to devolved matters
85. Two protocols have been agreed between the Scottish Parliament and the Scottish Government to establish how these are scrutinised by the Scottish Parliament. These are each considered below.

SSI Protocol

86. The [SSI protocol](#) was agreed in relation to the instruments laid by the Scottish Government to correct deficiencies. This adds an extra element to the normal SSI scrutiny procedure by allowing committees to express a view on the categorisation of instruments as high or low significance and whether they should be subject to either the negative or the affirmative procedure.
87. This protocol was created in order to assist committees in prioritising their scrutiny of these instruments in anticipation of high volumes of SSIs under the 2018 Act.
88. During this reporting period, 15 SSIs were considered under this protocol (6% of instruments received from the Scottish Government). This is less than half the number considered under the protocol in the last reporting period (31 instruments - 14% of instruments received from the Scottish Government). This reduction is to be expected as most of the work that was required to correct deficiencies in preparation for EU exit was done in the period leading up to the withdrawal agreement when there was a risk of a "no deal" exit on 31 March 2019 with no transition period.

SI Protocol

89. The [SI protocol](#) applies in relation to UK statutory instruments stemming from the 2018 Act. Certain powers in this Act can only be exercised in devolved areas with the consent of the Scottish Ministers. The Scottish Parliament does not play a direct role in approving or disapproving these instruments.
90. However, the SI protocol creates a way for the Scottish Parliament to scrutinise the proposal of the Scottish Ministers to consent to this legislation. This allows the Parliament to voice any concerns about the proposed SIs to the Scottish Ministers who can take account of this in their decision to consent or to withhold consent to the UK Government exercising its power in a devolved area.
91. During this reporting period, the Scottish Parliament considered 34 consent notifications.^{vii} In all cases, the Scottish Parliament agreed with the Scottish Ministers' intention to consent to the proposed SI.
92. In the 2018-19 reporting year, 93 consent notifications were considered so this is a significant reduction. For the reasons set out above in relation to the SSI protocol, this is not unexpected.

COVID Legislation

93. In the reporting period the Committee considered 23 instruments relating to the Coronavirus pandemic (9.5% of instruments laid by the Scottish Government).
94. Some of these instruments were made under powers in the Coronavirus Act 2020 and the Coronavirus (Scotland) Act 2020 ("the Coronavirus legislation") but others were made under pre-existing delegated powers. Initially, the Scottish Government was subject to reporting requirements in respect of Coronavirus SSIs under the Coronavirus (Scotland) Act 2020, but only those made under the Coronavirus legislation. The Committee reported to the COVID-19 Committee when the Coronavirus (No.2) (Scotland) Bill was being scrutinised that this meant that many of the SSIs being made would not feature in the reports. An amendment to the Bill was agreed extending the Scottish Government's requirement to report to all Scottish Government instruments where their main purpose is to make provision for a reason relating to Coronavirus.
95. Only one Scottish Government report has been published and considered by the Committee at the time of writing (and this fell outwith the reporting period, into the 2020-21 parliamentary year). The Committee will continue to consider these reports in the next parliamentary year and highlight any issues it considers significant to the Parliament.
96. The expiry date of provisions relating to Coronavirus has also varied between instruments with some being in force for the period of the Coronavirus Act that they are made under, others setting their own expiry date, and others setting no expiry date at all. This is a matter that the Committee will give further consideration to in the next parliamentary year as it considers the reports from the Scottish Government.

^{vii} A complete list of consent notifications considered by Parliament can be found [here](#).

97. As discussed above, the urgency required in addressing the Coronavirus pandemic was the reason given for many of breaches of the 28 day rule (reported by the Committee under reporting round (j)) and for the substantially increased use of made affirmative procedure. It has been a significant aspect of the Committee's work in the last 2 months of the 2019-20 parliamentary year and it is expected that this will continue into the next parliamentary year.

Primary legislation

98. A primary function of the Committee is to consider the delegated powers provisions in bills introduced in the Scottish Parliament. Over the reporting period, the Committee has considered and reported on the following 16 bills at Stage 1:

- Non-Domestic Rates (Scotland) Bill
- Referendums (Scotland) Bill
- Female Genital Mutilation (Protection and Guidance) (Scotland) Bill
- Consumer Scotland Bill
- Period Products (Free Provision) (Scotland) Bill
- Scottish Elections (Franchise and Representation) Bill
- Disclosure (Scotland) Bill
- Scottish Biometrics Commissioner Bill
- UEFA European Championship (Scotland) Bill
- Scottish Elections (Reform) Bill
- Children (Scotland) Bill
- Animal and Wildlife (Penalties, Protection and Powers) (Scotland) Bill
- Agriculture (Retained EU Law and Data) (Scotland) Bill
- Civil Partnership (Scotland) Bill
- Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill
- Defamation and Malicious Publication (Scotland) Bill

99. The Committee also considered and reported on the following 14 bills after Stage 2:

- Fuel Poverty (Targets, Definition and Strategy) (Scotland) Bill
- South of Scotland Enterprise Bill
- Census (Amendment) (Scotland) Bill
- Human Tissue (Authorisation) (Scotland) Bill
- Management of Offenders (Scotland) Bill
- Climate Change (Emissions Reduction Targets) (Scotland) Bill
- Transport (Scotland) Bill
- Scottish National Investment Bank Bill

- Non-Domestic Rates (Scotland) Bill
- Referendums (Scotland) Bill
- Consumer Scotland Bill
- Disclosure (Scotland) Bill
- Scottish Biometrics Commissioner Bill
- UEFA European Championship (Scotland) Bill

100. This is an important part of the Committee's work and can shape the legislation that is passed by the Parliament. For example, the recommendations of the Committee featured significantly in the lead committee's report, and the Stage 1 debate, on the Referendums (Scotland) Bill. Substantial changes to the delegated powers in this Bill, in line with the Committee's recommendations, were then made by amendment at Stage 2.

Scottish Law Commission Bills

101. The Delegated Powers and Law Reform Committee can be designated the lead committee in relation to Scottish Law Commission ("SLC") Bills. SLC Bills are bills that originate from SLC reports and meet the criteria determined by the Presiding Officer. The criteria for an SLC bill are that it is a bill within the legislative competence of the Scottish Parliament:
- where there is a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended;
 - which does not relate directly to criminal law reform;
 - which does not have significant financial implications;
 - which does not have significant European Convention on Human Rights (ECHR) implications; and
 - where the Scottish Government is not planning wider work in that particular subject area.
102. During 2019-20 the Committee did not consider any SLC Bills.

SLC Bills Working Group

103. The time taken to bring forward SLC Bills is something that was raised by the Committee in previous reports and the Committee has continued to be interested in the implementation rate of SLC reports.
104. In the 2018-19 reporting year the Committee established a working group to explore whether the Presiding Officer's criteria (set out above) may need to be reviewed.
105. This year the working group, comprising officials from the Scottish Parliament, Scottish Government and Scottish Law Commission, issued a call for evidence and considered possible options before drawing up its recommendations to the Committee. The Committee considered these recommendations in February and will publish a report on the findings of the working group in the 2020-21 parliamentary year.

Legislative Consent Memorandums

106. The Committee considered and reported on Legislative Consent Memorandums (LCMs) in relation to the following 5 UK Parliament Bills:
- Domestic Abuse Bill
 - European Union (Withdrawal Agreement) Bill
 - Direct Payment to Farmers (Legislative Continuity) Bill
 - Coronavirus Bill
 - Agriculture Bill
107. LCMs are lodged by the Scottish Government in relation to UK Parliament bills which seek to change the law in relation to devolved matters.^{viii}
108. As with Bills before the Scottish Parliament, the Committee considers any powers to make subordinate legislation that are being delegated to Scottish Ministers.
109. The Coronavirus Bill was the first piece of primary legislation to address the COVID-19 pandemic in the UK. While the Committee did not publish a report on the LCM due to an expedited timetable at the UK Parliament, the Convener spoke during the Chamber debate to contribute the Committee's views.^{ix}

^{viii} LCMs can also be lodged by Members but this has only happened once to date (Iain Gray MSP lodged an LCM in relation to the [Scotland Bill 2010-12](#)). If a Member wished to lodge a legislative consent motion (because the Government has refused to do so), an LCM should also be lodged by that Member.

^{ix} See [Official Report, 24 March 2020](#).

Interparliamentary Forum on Brexit

110. The Interparliamentary Forum on Brexit was established following the recommendation of the House of Lords European Union Committee's report "Brexit: devolution" that the structures of interparliamentary dialogue within the UK should be strengthened.
 111. The Forum brings together chairs and conveners of the committees scrutinising Brexit-related issues in the Scottish Parliament, National Assembly for Wales, House of Commons and House of Lords. It is intended to provide a forum to discuss the scrutiny of the legislative consequences of the UK's withdrawal from the European Union, and collective scrutiny of that process in legislatures across the UK.
 112. The Forum has met once in this reporting period:
 - 5 September 2019 at the House of Commons
 113. A further meeting was scheduled for 19 March 2020 but was cancelled due to concerns around the Coronavirus pandemic.
114. The Committee continues to welcome the opportunity the Forum provides for interparliamentary relations in the context of Brexit.

Annex A - Reporting Grounds: 12 May 2019 to 11 May 2020

Scottish Government instruments engaging each reporting ground

(a) charge on the Scottish Consolidated Fund

- None

(b) made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts

- None

(c) retrospective effect where the parent statute confers no express authority so to provide

- None

(d) unjustifiable delay in the publication or the laying of it before the Parliament

- None

(e) doubt as to whether it is intra vires

- None

(f) raises a devolution issue

- None

(g) unusual or unexpected use of the powers conferred by the parent statute

- None

(h) meaning could be clearer

- Food Information, Labelling and Standards (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/285)
- Police Pensions Amendment (Increased Pension Entitlement) (Scotland) Regulations 2019 (SSI 2019/380)
- Firefighters' Pension Scheme Amendment (Increased Pension Entitlement) (Scotland) Order 2019 (SSI 2019/381)
- Local Government Pension Scheme (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/31)
- Environmental Impact Assessment (Transport) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/415)
- Welfare Foods (Best Start Foods) (Scotland) Regulations 2019 (SSI 2019/193)

(i) drafting appears to be defective

- Planning (Scotland) Act 2019 (Commencement No. 2, Saving and Transitional Provisions) Regulations 2019 (SSI 2019/377 (C.19))

(j) failure to comply with laying requirements

- Electricity Works (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/123)
- Education (Miscellaneous Amendments) (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/128)
- National Health Service (Charges to Overseas Visitors) (Scotland) Amendment Regulations 2020 (SSI 2020/17)
- Public Health etc. (Scotland) Act 2008 (Notifiable Diseases and Notifiable Organisms) Amendment Regulations 2020 (SSI 2020/51)
- Restriction of Liberty Order etc. (Scotland) Amendment Regulations 2019 (SSI 2019/423)
- Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2020 (SSI 2020/122)
- Non-Domestic Rates (Coronavirus Reliefs) (Scotland) Regulations 2020 (SSI 2020/101)
- Town and Country Planning (Miscellaneous Temporary Modifications) (Coronavirus) (Scotland) Regulations 2020 (SSI 2020/124)
- Local Government Pension Scheme (Miscellaneous Amendments) (Scotland) Amendment Regulations 2019 (SSI 2019/204)
- Welfare Foods (Best Start Foods) (Scotland) Amendment Regulations 2019 (SSI 2019/232)
- Plant Health (Miscellaneous Amendments) (Scotland) Order 2019 (SSI 2019/242)
- Official Controls (Agriculture etc.) (Scotland) Regulations 2019 (SSI 2019/412)
- Plant Health (Official Controls and Miscellaneous Provisions) (Scotland) Regulations 2019 (SSI 2019/421)
- Council Tax Reduction (Scotland) Amendment (No. 3) (Coronavirus) Regulations 2020 (SSI 2020/108)
- Carer's Allowance (Coronavirus) (Breaks in Care) (Scotland) Regulations 2020 (SSI 2020/117)

General

- Proposed Draft Regulations – The Deposit and Return Scheme for Scotland Regulations 2020 (SG/2019/164)

- Public Health Scotland Order 2019 (SSI 2019/336)
- Scottish Public Services Ombudsman (Healthcare Whistleblowing) Order 2019 (SG/2019/66)
- Firefighters' Pension and Compensation Schemes (Amendment) (Scotland) Order 2019 (SSI 2019/382)
- Fuel Poverty (Targets, Definition and Strategy) (Scotland) Act 2019 (Commencement No. 1) Regulations 2019 (SSI 2019/277 (C.9))
- Local Government Pension Scheme (Increased Pension Entitlement) (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/438)
- Fuel Poverty (Enhanced Heating) (Scotland) Regulations 2020 (SSI 2020/draft)
- Local Government Pension Scheme (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/161)
- Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2019 (SSI 2019/419)
- Council Tax Reduction (Scotland) Amendment Regulations 2020 (SSI 2020/25)

(h) and (i)

- Fishing Boats Designation (EU Exit) (Scotland) Order 2019 (SSI 2019/345)

(j) and General

- Official Feed and Food Controls (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/407)

LPPO instruments

No LPPO instruments were drawn to the attention of the Parliament during this reporting period.

Annex B - Commitments: 12 May 2019 to 11 May 2020

Commitments met during this reporting period

The following instruments correct errors identified by the Committee in line with commitments made by the Scottish Government:

- Public Procurement etc. (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/173) *corrected errors identified in the Public Procurement etc. (Scotland) (amendment) (EU Exit) Amendment Regulations 2019 (SSI 2019/112)*
- Local Government Pension Scheme (Miscellaneous Amendments) (Scotland) Amendment Regulations 2019 (SSI 2019/204) *corrected issued identified by Legal in the Local Government Pension Scheme (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/161)*
- Welfare Foods (Best Start Foods) (Scotland) Amendment Regulations 2019 (SSI 2019/232) *corrected errors identified by committee in the Welfare Foods (Best Start Foods) (Scotland) Regulations 2019 (SSI 2019/193)*
- Management of Extractive Waste (EU Exit) (Scotland) (Miscellaneous Amendments) Regulations 2019 (2019/273) *corrected errors identified in the Town and Country Planning and Electricity Works (EU Exit) Scotland Amendment Regulations 2019*
- Seed, Propagating Material and Common Agricultural Policy (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/289) *corrected errors identified in the Common Agricultural Policy (EU Exit) (Scotland) (Amendment) (No. 2) Regulations 2019 (SSI 2019/209)*
- Conservation (Natural Habitats, & c) (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/364) *corrected errors in the Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2012 (SSI 2012/228)*
- Environmental Liability (EU Exit) (Scotland) (Amendment etc) Regulations 2019 (SSI 2020/276) *corrected errors in the Sulphur Content of Liquid Fuels (Scotland) Regulations 2014 (SSI 2014/258)*
- Local Government Pension Scheme (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/31) *corrected errors identified in the Local Government Pension Scheme (Increased Pension Entitlement) (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/438)*
- The Planning (Scotland) Act 2019 (Commencement No.2, Saving and Transitional Provisions) Amendment Regulations 2019 (SSI 2020/411) *corrected errors in the Planning (Scotland) Act 2019 (Commencement No.2 Saving and Transitional Provisions) Regulations 2019/377*
- National Health Service Superannuation and Pension Schemes (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/30) *corrected errors identified*

in the National Health Service Superannuation Scheme (Miscellaneous Amendments) (Scotland) Regulations 2017 (SSI 2017/27)

- Council Tax Reduction (Scotland) Amendment (No. 2) Regulations 2020 (SSI 2020/64) *corrected errors identified in the Council Tax Reduction (Scotland) Amendment Regulations 2020 (SSI 2020/25)*

Commitments outstanding from previous years

- Registration of Births, Deaths and Marriages (Scotland) Act 1965 (Prohibition on Disposal of a Body without Authorisation) Regulations 2015 (SSI 2015/166) *to be corrected at the next appropriate opportunity*
- Police Service of Scotland (Senior Officers) (Performance) Regulations 2016 (SSI 2016/51) *to be corrected as soon as is reasonably practical*
- Education (Listed Bodies) (Scotland) Order 2018 (SSI 2018/7) *to be corrected in the next amending instrument*

Commitments from the last parliamentary year (2018-19)

- Forestry and Land Management (Scotland) Act 2018 (Commencement, Transitional and Saving Provisions) Regulations 2019 (SSI 2019/47 (C.1)) [11th Report, 2019. Published 06/03/2019] *commitment to correct the errors at the earliest opportunity*
- Felling (Scotland) Regulations 2019 (SSI 2019/49) [11th Report, 2019. Published 06/03/2019] *commitment to correct the errors at the earliest opportunity*
- Scotland Act 1998 (Specification of Functions and Transfer of Property etc.) Order 2019 (SSI 2019/183) [11th Report, 2019. Published 06/03/2019] *commitment to bring forward an amendment at the earliest opportunity*
- Education (Fees and Student Support) (Miscellaneous Amendments) (EU Exit) (Scotland) Regulations 2019 (SSI 2019/70) [12th Report, 2019. Published 12/03/2019] *commitment to correct when next legislating in student support*

Commitments outstanding from this reporting year

- Food Information, Labelling and Standards (EU Exit) (Scotland) Regulations 2019 SSI 2019/285 [42nd Report, 2019. Published 02/10] - *commitment to amend at next available opportunity*
- Fishing Boats Designation (EU Exit) (Scotland) Order 2019 (SSI 2019/345) [56th Report, 2019. Published 13/11] - *commitment to bring amending instrument before this comes into force.*
- Official Feed and Food Controls (Miscellaneous Amendments) (Scotland) Regulations 2019 (SSI 2019/407) [64th Report, 2019. Published 10/12/19] – *commitment to correct at next available opportunity*
- Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2019 (SSI 2019/419) [3rd Report, 2020. Published 14/01/20] – *commitment to clarify at an early opportunity*

