



The Scottish Parliament
Pàrlamaid na h-Alba

Published 14 November 2022

SP Paper 259

57th Report, 2022 (Session 6)

Delegated Powers and Law Reform Committee

Work of the Delegated Powers and Law Reform Committee 2021-22



Published in Scotland by the Scottish Parliamentary Corporate Body.

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Delegated Powers and Law Reform Committee

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;

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

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



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Introduction

1. This report reflects upon the work of the Delegated Powers and Law Reform (DPLR) Committee in 2021-22, the first year of the sixth session of the Scottish Parliament. This reporting period covers 13 May 2021 to 12 May 2022ⁱ.
2. 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 Scottish Parliament Bills and UK Government Bills as well as Scottish Statutory Instruments (SSIs).
3. In performing its roles the Committee has two primary objectives:
 - to ensure that Scots law is clear, accessible, and operable; and
 - to hold the responsible authority (primarily the Scottish Government) to account.
4. 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 whilst 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 also 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 respond to issues identified by the Committee.
5. This report is therefore part of a broader process of holding the Scottish Government to account. The Committee will subsequently take evidence from the Minister for Parliamentary Business to respond to issues raised in the report.
6. 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.
7. The Committee met 30 times in the reporting period.

Membership Changes

8. Previous Members of the Committee during the reporting year:
 - Craig Hoy (from 17 June 2021 to 25 May 2022)

ⁱ It is worth noting that the last parliamentary year (2020-21) lasted for 9 months (12 May 2020 to 24 March 2021) and as a result no similar annual report was published to reflect its work.

What is an SSI?

9. Before looking at the instruments which were laid in 2021-22, it is useful to explain what Scottish Statutory Instruments are.
10. 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.
11. 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, prescribing application forms, to providing procedural rules.
12. 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 to ensure:
 - the delegation of the power is appropriate or whether it is so significant that it should instead be on the face of the Bill;
 - if it is to be delegated, the level of parliamentary procedure (e.g. negative or affirmative) that it is proposed it should have in the future is appropriate; and
 - the power has been clearly drafted and goes no further than necessary.
13. Once a Bill is passed, the Committee will then consider the resultant SSIs made under these powers.
14. 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.
15. The policy issues raised by SSIs are considered separately by the Scottish Parliament's various subject committees such as the Criminal Justice Committee, the Net Zero, Energy and Transport Committee and the Rural Affairs, Islands and Natural Environment Committee. These are known as the "lead committees".

Instruments considered in 2021-22

SSI Procedures

16. 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.
17. 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.
18. Since the start of 2020, the Committee has also considered over 150 'made affirmative' instruments. This was previously a relatively unusual procedure but was used frequently to respond to the coronavirus pandemic. More detail of the Committee's work in this area is found later in this report.

How does the Committee report instruments?

19. 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.
20. 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.
21. "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; "Advisory grounds" meanwhile 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. The individual reporting grounds are broken down by their hierarchy below.
22. 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).
23. 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).
24. 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 requirement)
25. 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.

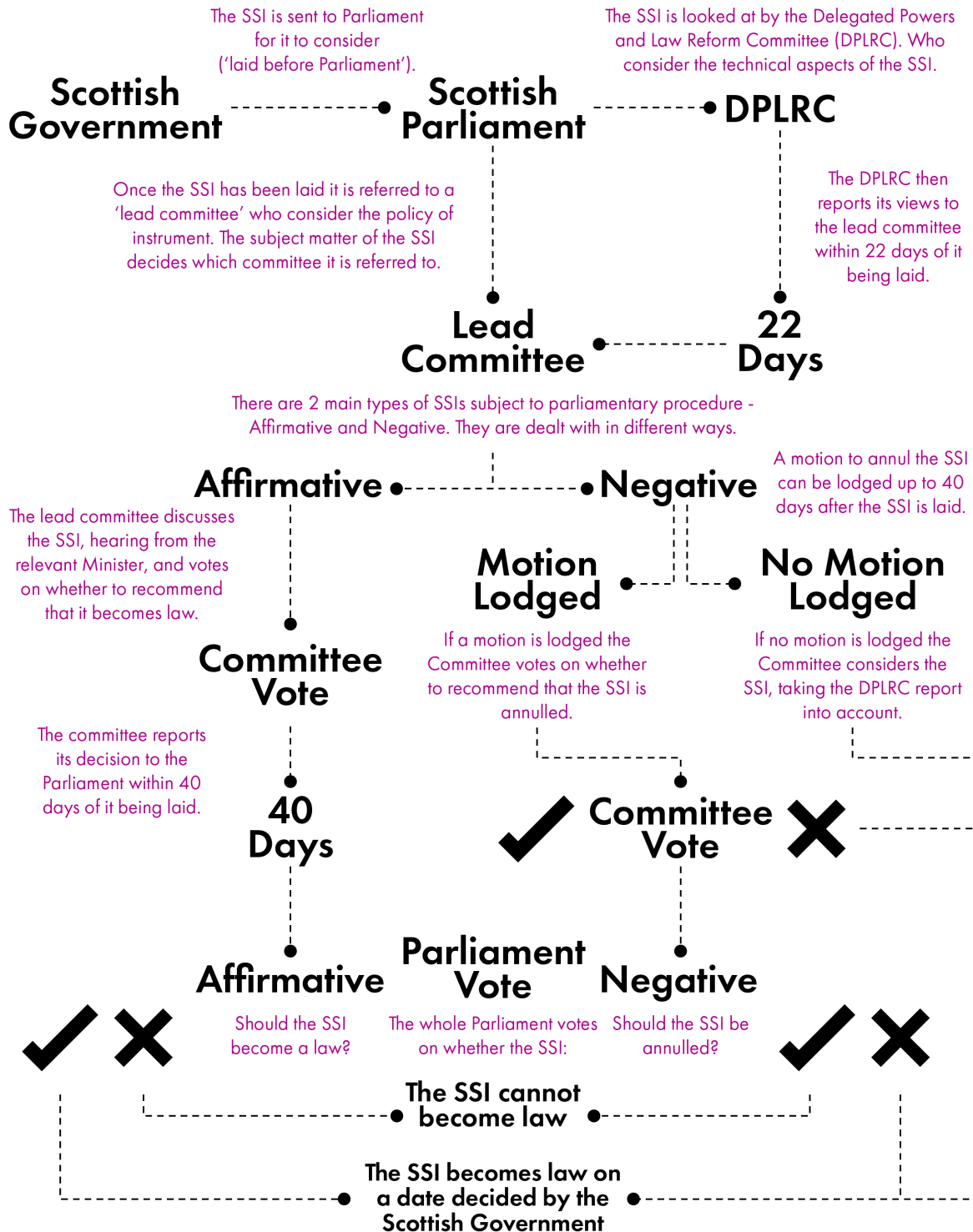
Process of the consideration of an SSI

26. 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.
27. The following infographic explains the process by which an instrument is taken through the Parliament.

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?

28. The Committee considered 334 instruments during this reporting period. This compares with 255 considered in 2019-20.
29. Of the 334 instruments, 325 were laid by the Scottish Government and 9 by the Lord President's Private Office ("LPPO"). This is more Scottish Government instruments than the last reported Parliamentary year (243 in 2019-20) and less LPPO instruments (12 in 2019-20).
30. The 325 SSIs laid by the Scottish Government can be broken down by procedure as follows:
 - 56 Made affirmative
 - 82 Draft affirmatives
 - 128 Negatives
 - 57 Laid, no procedure
 - 2 Documents/Instruments
31. The 9 SSIs laid by the LPPO were all laid, no procedure.
32. This is a high number of made affirmative instruments (there were 10 made affirmative instruments in 2019-20). Of the 56 made affirmative instruments, 55 were in relation to the Coronavirus pandemic. This procedure means that an instrument may come into force as soon as it is made but it will not remain in force beyond a specified period in time (often 28 days in the case of coronavirus instruments) 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.

Number of SSIs laid under each procedure

128

Negatives

82

Draft affirmatives

57

Laid, no procedure

56

Made affirmative

2

Documents/Instruments

Scottish Government instruments

How many instruments were reported on this year?

33. A total of 45 instruments were drawn to the attention of Parliament this year. While this overall figure equates to 14% of instruments considered, 24 of the instruments were reported under reporting ground (j) for breaching the 28-day rule, of which the Committee was content with the Scottish Government's explanations for 21 of the breaches. If these 21 instruments are excluded from the total figure, the Committee reported 24 instruments, equating to 7% of the instruments considered. This is a similar comparison for 2019-20 where 21 instruments were reported (8%).

Summary of use of reporting grounds

34. 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.
35. The infographic below shows a breakdown of reported instruments by reporting ground. A list of the instruments reported under each ground can be found in Annex A.

Advisory grounds

Ground (j)
(non-compliance with laying requirement)

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

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)

Other grounds

The general reporting ground
(which includes minor drafting errors and failures to follow proper drafting practice)

Ground (h)
(clarity of form or meaning)

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

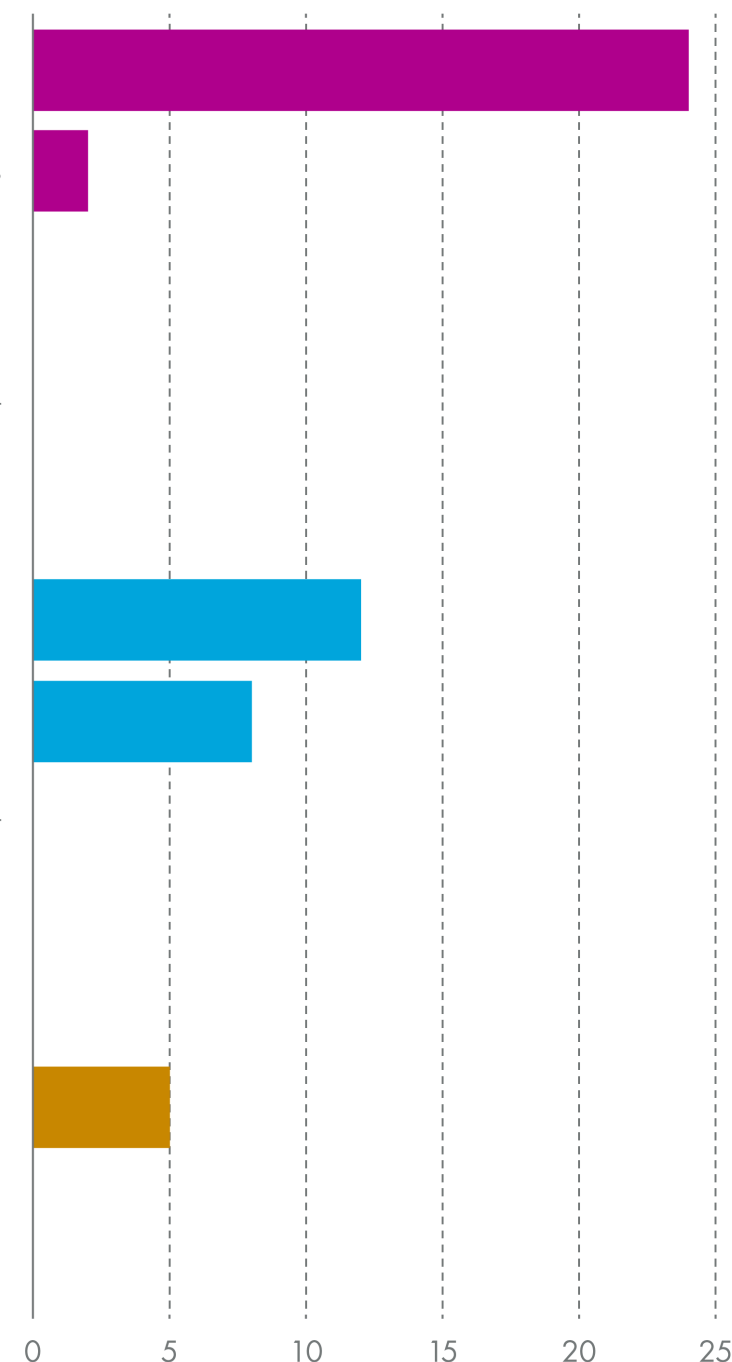
Ground (d)
(unjustifiable delay in publication or laying)

Significant grounds

Ground (i)
(drafting appears to be defective)

Ground (e)
(doubt as to whether it is intra vires)

Ground (f)
(raises a devolution issue)



36. 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 increased from 2019-20 (from 16 to 24). In all cases the instrument was reported for failing to respect the "28-day rule". This rule provides that at least 28 days should elapse between the laying of an instrument subject to the negative procedure before the Parliament and the coming into force of that instrument.
37. The principle behind the 28-day rule is that the law should not generally apply to citizens until the Parliament has had a chance to scrutinise the proposed changes. The rule can however be 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. In all such cases, the Scottish Government must write to the Presiding Officer explaining the reasons for the breach. In this reporting year, 2 of the 24 instruments reported under reporting ground (j) were made in response to

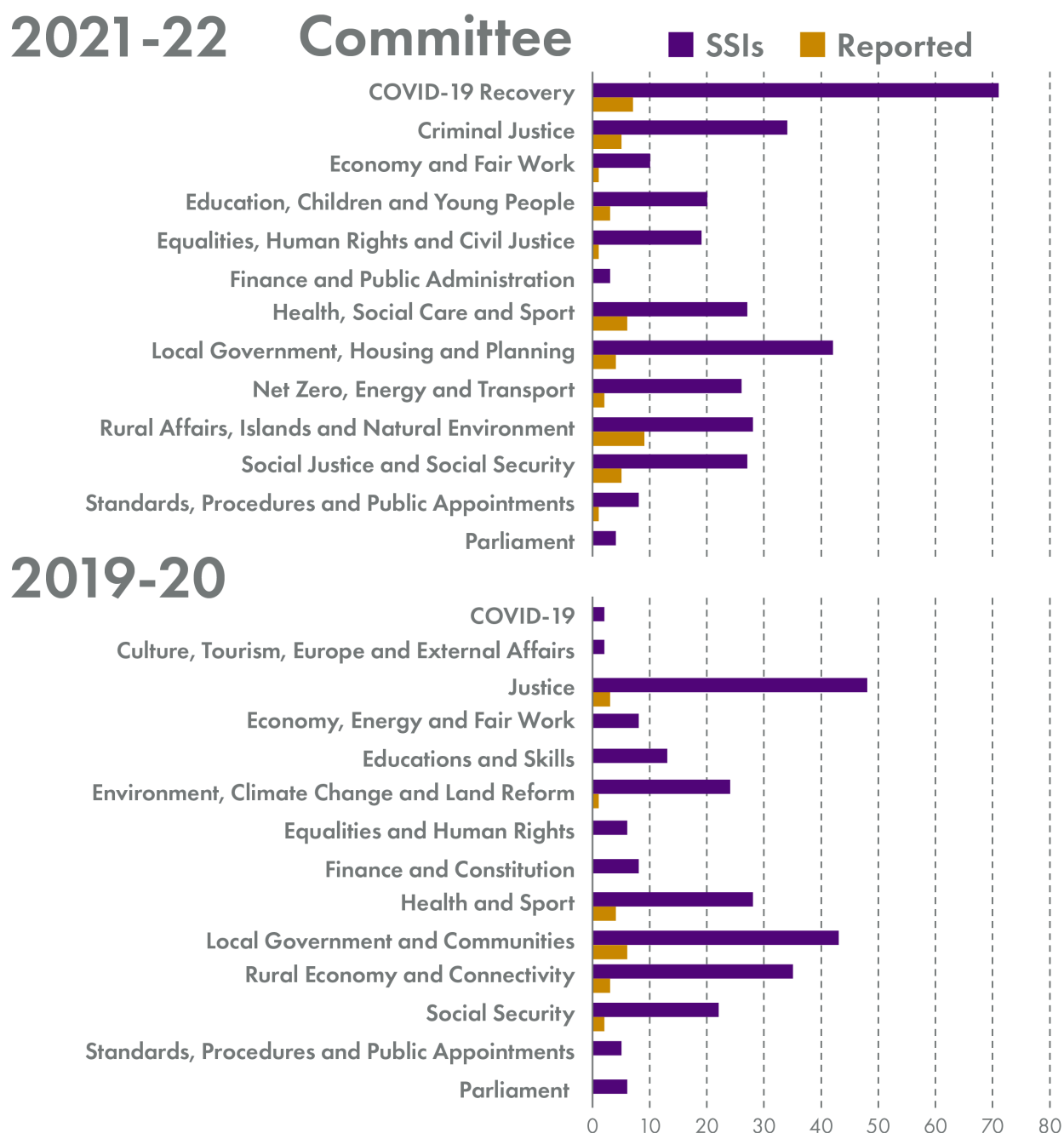
the Coronavirus pandemic.

38. The number of instruments being reported under the most serious reporting grounds has doubled from 2 (2019-20) to 5 this reporting year.

While the Committee acknowledges that this was a busy year of instruments, largely due to the response to the coronavirus pandemic, it calls on the Scottish Government to continue to improve the quality of instruments in 2022-23 so that the number of instruments reported, including on serious grounds, might again fall.

Which Committee received the most instruments

39. The infographic below shows the instruments laid by the Scottish Government (and those reported in 2019-20), broken down by lead committee.



40. The COVID-19 Recovery Committee received the most instruments this year, with a total of 71. All of the instruments considered by this Committee were related to the Coronavirus pandemic.
41. There have been increases in the number of instruments considered by the following Committees, from 2019-20 to 2021-22, however, it is worth noting that the remits of these Committees have significantly changed:

- Education, Children and Young People Committee - 13 to 20
 - Equalities, Human Rights and Civil Justice Committee - 6 to 19
42. In 2019-20 the Culture, Tourism, Europe and External Affairs received 2 instruments in this reporting period, while what is now the Constitution, Europe, External Affairs and Culture Committee, received none.
43. The numbers for other committees remain similar this year, however in 2019-20 the Justice Committee received 48 instruments and in 2021-22, the Criminal Justice Committee received 34. It is worth noting that the remit of this Committee has altered significantly.
44. There have been 4 instruments considered by the Parliament this year (6 in 2019-20). These instruments were in response to the war in Ukraine and the COVID-19 pandemic so the Parliament agreed that for speed of consideration they might go straight to the Chamber for approval.

Instruments from the Lord President's Private Office

45. 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; while
 - Acts of adjournal are concerned with regulating criminal procedure in the High Court of Justiciary and Sheriff Courts.
46. 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.
47. 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.
48. 9 instruments were laid by the LPPO in this reporting period which is a decrease on those laid in 2019-20 (12).
49. There has also been an increase in the proportion of instruments reported. 2 instruments have been reported during this period, under the General reporting ground. None were reported in 2019-2020.

The Committee encourages the LPPO to continue its efforts to keep the number of reported instruments low.

Other SSI related issues

Amending instruments

Scottish Government Instruments

50. Over the course of the reporting year, the Scottish Government laid 5 amending instruments which corrected errors in instruments that were drawn to the attention of the Parliament by the Committee.
51. 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.
52. The number of outstanding commitments has been pursued by this Committee and its predecessor committee in Session 5.
53. The Minister for Parliamentary Business, George Adam, MSP stated in his letter, following his evidence to the Committee on [21 June 2022](#), that it was the Scottish Government's intention to meet the commitment in relation to the Education (Listed Bodies)(Scotland) Order 2018 (SSI 2018/7) before the end of year 2 of this Parliamentary session.
54. The LPPO laid no amending instruments during this reporting period and has no outstanding commitments.

The Committee continues to encourage the Scottish Government to endeavour to meet outstanding commitments made to the Committee.

Withdrawal of instruments

55. 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.
56. During this reporting year the following 10 instruments were withdrawn:
 - Highland (Electoral Arrangements) Regulations 2021 (2021/Draft)
 - Argyll and Bute (Electoral Arrangements) Regulations 2021 (2021/Draft)
 - Budget (Scotland) Act 2021 Amendment Regulations 2021 (2021/Draft)
 - Plant Health (EU Exit) (Scotland) (Amendment) (No. 2) Regulations 2021 (2021/Draft)
 - Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled

Interest in Land) Amendment Regulations 2021 (2021/Draft)

- Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022 (2021/Draft)
- Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2021 (2021/467)
- Consumer Scotland (Transfer of Functions) Regulations 2022 (SSI/Draft)
- Social Security (Up-rating) (Miscellaneous Amendment) (Scotland) Regulations 2022 (2022/Draft)
- Surrender of Offensive Weapons (Compensation) (Scotland) Regulations 2022 (2022/Draft)

57. This is an increase from 8 withdrawn instruments in 2019-20.

The Committee encourages the Scottish Government to lay instruments of such a standard that they do not require to be withdrawn.

Minor points raised

58. 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.
59. During its scrutiny of instruments in 2021-22, the Committee identified a total of 46 instruments on which minor points were raised. This can be broken down into 45 instruments laid by the Scottish Government and 1 instrument laid by the LPPO.
60. This is a reduction from 2019-20 in which there were 53 instruments with minor points.

The Committee welcomes the improvements that have been made to reduce the number of minor points arising but continues to call on the Scottish Government and the LPPO to continue their efforts to reduce this further.

Consolidation

61. As noted at the beginning of this report one of the Committee's objectives 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.
62. At its meeting on [31 August 2021](#) the Committee welcomed that the Council Tax Reduction (Scotland) Regulations 2012 (SSI 2012/303), known as the “Working Age Regulations”, had been consolidated by the Council Tax Reduction (Scotland) Regulations 2021 (SSI 2021/249). However, the Committee noted that the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012 (SSI 2012/319), known as the “Pension Age Regulations”, had yet to be consolidated.
63. The Committee [wrote to Minister for Parliamentary Business](#) asking whether there were any plans to consolidate the Pension Age Regulations. The [Minister responded](#) stating that it had no plans to do so.

The Committee continues to encourage the Scottish Government to undertake a consolidation of the Council Tax Reduction (State Pension Credit) (Scotland) Regulations 2012, within a reasonable timescale.

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

64. The SSI Protocol was designed to ensure that SSIs laid by the Scottish Government under the European Union (Withdrawal) Act 2018 (“the 2018 Act”), to fix legislative deficiencies stemming from the UK leaving the EU, received the right level of scrutiny. It 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.
65. The protocol required certain instruments laid under the 2018 Act to be considered in terms of the scrutiny procedure attached to the instrument by the Government and the Government’s assessment of the instrument’s significance in terms of policy impact.
66. During this reporting period, 9 SSIs were considered under this protocol (3% of instruments received from the Scottish Government). This is half the number considered under the protocol in the last reporting period of 2019-20 (15 instruments - 6% of instruments received from the Scottish Government).
67. As the number of instruments being considered under the SSI protocol was falling, the Committee agreed at its meeting on [26 April 2022](#) to [write to the Minister for Parliamentary Business](#) to ask if they would be content for it to be discontinued, subject to an assurance that the Scottish Government continues to provide the same level of information in its Policy Notes accompanying any SSIs as that provided for instruments formerly covered by the SSI Protocol.
68. The Committee considered its final instrument under the Protocol on [10 May 2022](#). This was the Environment and Trade in Animals and Related Products (EU Exit) (Scotland) (Miscellaneous Amendment) Regulations 2022 (SSI 2022/138).

Ukraine

69. During the reporting period there were 8 instruments in response to the war in Ukraine, **3** of which were expedited under the affirmative procedure and were considered by the Scottish Parliament in place of the lead committee. The remaining 5 instruments were drawn to the attention of the Parliament under failure to comply with laying requirements. A list of all reporting grounds can be found at Annex A.

Inquiry into use of the made affirmative procedure during the coronavirus pandemic

70. The made affirmative procedure allows an SSI to be made and come into force even though it has not yet been approved by the Parliament. However, it cannot remain in force beyond a specified period of time (often 28 days) unless it is subsequently approved by the Parliament.
71. On [9 November 2021](#) the Committee agreed to hold an inquiry into the use of the made affirmative procedure during the coronavirus pandemic. It [published its report on 10 February 2022](#) and held a Chamber debate on 22 February.
72. The Committee acknowledged in its report that made affirmative instruments have allowed the Scottish Government to respond quickly to the many challenges presented by coronavirus. However, the Committee considered that bringing such substantial changes into force immediately, before any parliamentary scrutiny, should only be used if essential. Such emergency powers should not, as the Committee heard from witnesses during the inquiry, become a habit.
73. The Committee's recommendations were to ensure a balance of power between the Scottish Parliament and the Scottish Government. It therefore highlighted a set of principles that might provide the basis for parliamentary scrutiny where legislation includes such provisions.
74. The Committee restated these recommendations in its [Stage 1 report on the Coronavirus \(Recovery and Reform\) \(Scotland\) Bill](#). The Scottish Government subsequently brought forward amendments to the Bill to respond to a number of these recommendation which were agreed by Parliament.

Primary Legislation

75. 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 ten bills at Stage 1:

- Carer's Allowance Supplement (Scotland) Bill
- Transvaginal Mesh Removal (Cost Reimbursement) (Scotland) Bill
- Good Food Nation (Scotland) Bill
- Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill
- Budget (Scotland) Bill
- Coronavirus (Recovery and Reform) (Scotland) Bill
- Scottish Local Government Elections (Candidacy Rights of Foreign Nationals) Bill
- Fireworks and Pyrotechnics Articles (Scotland) Bill
- Hunting with Dogs (Scotland) Bill
- Gender Recognition Reform (Scotland) Bill

76. The Committee also considered and reported on one Bill after Stage 2:

- Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill

77. This is an important part of the Committee's work and can shape the legislation that is passed by the Parliament. An example of this is the Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill. During its consideration of the powers at Stage 1, the Deputy First Minister and Cabinet Secretary for Covid Recovery agreed to bring forward amendments to one of the powers to address a concern raised by the Committee about lack of consultation with health boards.

78. During Stage 2 consideration of the Bill, the Deputy First Minister acknowledged the work of the Committee and that the amendments introducing the consultation provisions:

“...give effect to the commitment that I made to the Delegated Powers and Law Reform Committee to examine the matter, following its suggestion that consultation with health boards should be required before regulations altering the expiry date are made.”

Legislative Consent Memorandums

79. The Committee considered Legislative Consent Memorandums (LCMs) in relation to the following twelve UK Parliament Bills:
- Environment Bill (UK Parliament legislation)
 - Social Security (Up-rating of Benefits) Bill (UK Parliament legislation)
 - Professional Qualifications Bill (UK Parliament legislation)
 - Police, Crime, Sentencing and Courts Bill (UK Parliament legislation)
 - Health and Care Bill (UK Parliament legislation)
 - Animal Welfare (Kept Animals) Bill (UK Parliament legislation)
 - Elections Bill (UK Parliament legislation)
 - Cultural Objects (Protection from Seizure) Bill (UK Parliament legislation)
 - Public Service Pensions and Judicial Offices Bill (UK Parliament legislation)
 - Building Safety Bill (UK Parliament legislation)
 - Economic Crime (Transparency and Enforcement) Bill (UK Parliament legislation)
 - High Speed Rail (Crewe - Manchester) Bill (UK Parliament legislation)
80. LCMs are lodged by the Scottish Government in relation to UK Parliament bills which seek to change the law in relation to devolved mattersⁱⁱ.
81. As with Bills before the Scottish Parliament, the Committee considers any powers to make subordinate legislation that are being delegated to Scottish Ministers.
82. In recent years, the Committee has also noted that a number of UK Parliament Bills confer delegated powers on UK Ministers which are exercisable for Scotland within the Scottish Parliament's legislative competence. Since the start of Session 6, the Committee has highlighted in its reports on a number of the above LCMs such as the [Professional Qualifications Bill](#), [Police, Crime, Sentencing and Courts Bill](#), [Health and Care Bill](#), [Elections Bill](#) and the [Building Safety Bill](#) that:
- The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
 - Where such powers are exercised by UK Ministers in devolved areas, there is no formal means by which the Scottish Parliament can scrutinise such regulations or be notified that they had been laid before the UK Parliament.

ⁱⁱ LCMs can also be lodged by Members. 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.

- Powers conferred on UK Ministers should be subject to a requirement for the Scottish Ministers' consent when exercised within devolved competence.
 - As a minimum, powers exercisable by UK Ministers in devolved areas should be subject to the process set out in the [SI Protocol 2](#) ⁱⁱⁱ (this is an agreement between the Scottish Parliament and the Scottish Government which provides the Parliament a role in scrutinising the Scottish Government's proposals to consent to UK SIs which apply to Scotland and would be within the Scottish Parliament's legislative competence).
83. Many of the powers in UK Parliament Bills considered by the Committee recently contain no statutory requirement for the UK Government to obtain the Scottish Ministers' consent before exercising the powers. This is the case for at least one power in each of the five bills mentioned in paragraph 82.
84. While outwith the period of this report, the Committee [subsequently wrote to the UK Government](#) to ask, given these themes, what it considers when seeking a delegation of powers to UK Ministers in devolved areas within the competence of the Scottish Parliament and whether it takes into account the points raised by this Committee in its work. It [received a response in August 2022](#) and has since [written to the Minister for Intergovernmental Relations](#).

ⁱⁱⁱ see further information in Annex C

Scottish Law Commission Bills

85. 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.
86. During 2021-22 the Committee did not consider any SLC Bills. However, since the end of the current reporting period the Committee has been designated as the lead Committee for the [Moveable Transactions \(Scotland\) Bill](#). The Committee's scrutiny of this SLC Bill is ongoing.

Annex A - Reporting Grounds: 13 May 2021-12 May 2022

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

- Age of Criminal Responsibility (Scotland) Act 2019 (Register of Child Interview Rights Practitioners) Regulations 2021 (SSI 2021/233)
- Local Electoral Administration and Registration Services (Scotland) Act 2006 (Commencement No. 6 and Transitional Provision) Order 2021 (SSI 2021/314 C.21))

(h) meaning could be clearer

- Disability Assistance for Working Age People (Scotland) Regulations 2022 (SSI 2021/ Draft)
- Age of Criminal Responsibility (Scotland) Act 2019 (Register of Child Interview Rights Practitioners) Regulations 2021 (SSI 2021/233)
- Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 (SSI 2021/277)
- Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Regulations 2021 (SSI 2021/322)
- Storage of Carbon Dioxide (Licensing etc.) (EU Exit) (Scotland) (Amendment)

Regulations 2021 (SSI 2021/354)

- Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 5) Regulations 2021 (SSI 2021/359)
- Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment Regulations 2022 (SSI 2022/2)
- Rural Support (Controls) (Coronavirus) (Scotland) Regulations 2022 (SSI 2022/107)

(i) drafting appears to be defective

- Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 21) Regulations 2021 (2021/193)
- Social Security Administration and Tribunal Membership (Scotland) Act 2020 (Commencement No. 3) Regulations 2021 (SSI 2021/338 (C.23))
- Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Amendment Regulations 2021 (SSI 2021/397)
- Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment Regulations 2022 (SSI 2022/2)
- Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) Regulations 2022 (SSI 2022/90)

(j) failure to comply with laying requirements

- Milk and Healthy Snack Scheme (Scotland) Amendment (No. 2) Regulations 2021 (SSI 2021/274)
- Coronavirus (Scotland) Act 2020 (Early Expiry of Provisions) (No. 2) Regulations 2021 (SSI 2021/236)
- Council Tax Reduction (Scotland) Amendment (No. 4) Regulations 2021 (SSI 2021/337)
- Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 2) Regulations 2021 (SSI 2021/342)
- Private Storage Aid Scheme (Pigmeat) (Scotland) Regulations 2021 (SSI 2021/398)
- Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Amendment (No. 2) Regulations 2021 (SSI 2021/438)
- National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No. 2) Amendment Regulations 2021 (SSI 2021/241)
- Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2021 (SSI 2021/446)
- Red Rocks and Longay Urgent Marine Conservation (No. 2) Order 2021 (SSI 2021/463)

- Nutritional Requirements for Food and Drink in Schools (Scotland) Amendment Regulations 2021 (SSI 2021/481)
- Private Storage Aid Scheme (Pigmeat) (Scotland) Amendment Regulations 2021 (SSI 2021/492)
- Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 3) Regulations 2021 (SSI 2021/493)
- Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment Regulations 2022 (SSI 2022/2)
- Sea Fish (Prohibition on Fishing) (Firth of Clyde) (No. 2) Order 2022 (SSI 2022/35)
- Police Act 1997 (Criminal Records) (Scotland) Amendment Regulations 2022 (SSI 2022/97)
- National Health Service Pension Schemes (Scotland) Amendment Regulations 2022 (SSI 2022/100)
- Police Pensions (Scotland) Amendment Regulations 2022 (SSI 2022/101)
- Teachers' Pension Scheme (Scotland) Amendment Regulations 2022 (SSI 2022/102)
- Firefighters' Pension Scheme (Scotland) Amendment Regulations 2022 (SSI 2022/103)
- National Health Service (Charges to Overseas Visitors) (Scotland) Amendment Regulations 2022 (SSI 2022/114)
- National Health Service Superannuation and Pension Schemes (Miscellaneous Amendments) (Scotland) Regulations 2022 (SSI 2022/117)
- Council Tax (Exempt Dwellings) (Scotland) Amendment Order 2022 (SSI 2022/124)
- Council Tax Reduction and Council Tax (Discounts) (Miscellaneous Amendment) (Scotland) Regulations 2022 (SSI 2022/125)
- Non-Commercial Movement of Pet Animals (Scotland) Amendment Regulations 2022 (SSI 2022/131)

General

- Disability Assistance for Working Age People (Scotland) Regulations 2022 (SSI 2021/Draft)
- Scottish Child Payment Regulations 2020 and the Disability Assistance for Children and Young People (Scotland) Regulations 2021 (Miscellaneous Amendments) Regulations 2022 (SSI 2021/Draft)
- Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2021 (SI 2021/1455)
- Council Tax Reduction (Scotland) Regulations 2021 (SSI 2021/249)

- Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 (SSI 2021/277)
- Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 17) Regulations 2021 (SSI 2021/301)
- Public Procurement (Agreement on Government Procurement) (Thresholds etc.) (Amendment) (Scotland) Regulations 2021 (SSI 2021/378)
- Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules 1999 and Sheriff Appeal Court Rules Amendment) (Age of Criminal Responsibility (Scotland) Act 2019) 2021 (SSI 2021/452)
- Act of Sederunt (Sheriff Appeal Court Rules) 2021 (SSI 2021/468)
- Health (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 13) Regulations 2021 (SSI 2021/470)
- National Health Service Superannuation and Pension Schemes (Miscellaneous Amendments) (Scotland) Regulations 2022 (SSI 2022/117)
- Genetically Modified Food and Feed (Authorisations) (Scotland) Regulations 2022 (SSI 2022/137)

(h) and (General)

- Disability Assistance for Working Age People (Scotland) Regulations 2022 (SSI 2021/ Draft)
- Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 (SSI 2021/277)

(g) and (h)

- Age of Criminal Responsibility (Scotland) Act 2019 (Register of Child Interview Rights Practitioners) Regulations 2021 (SSI 2021/233)

(h) (i) and (j)

- Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment Regulations 2022 (SSI 2022/2)

(General) and (j)

- National Health Service Superannuation and Pension Schemes (Miscellaneous Amendments) (Scotland) Regulations 2022 (SSI 2022/117)

LPPO instruments

2 LPPO instruments were drawn to the attention of the Parliament, under General reporting ground, during this reporting period:

- Act of Sederunt (Summary Applications, Statutory Applications and Appeals etc. Rules 1999 and Sheriff Appeal Court Rules Amendment) (Age of Criminal Responsibility (Scotland) Act 2019) 2021 (SSI 2021/452); and

- Act of Sederunt (Sheriff Appeal Court Rules) 2021 (SSI 2021/468).

Annex B - Commitments: 13 May 2021-12 May 2022

Commitments outstanding from this reporting year

- Education (Listed Bodies) (Scotland) Order 2018 (SSI 2018/7) *commitment to bring forward an amendment 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) (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/ 28) [6th Report 2021, published 10/02/21] *commitment to bring forward an amendment at the earliest opportunity*

Annex C - SI Protocol 2

During the process of EU withdrawal and since the end of the UK/EU transition period (31 December 2020), there has been an increase in the use of UK statutory instruments to make provision within the legislative competence of the Scottish Parliament. The Scottish Parliament has no formal role in relation to subordinate legislation in devolved areas made by UK Ministers as that legislation is laid in the UK Parliament alone.

The [first SI Protocol](#) was agreed between Scottish Ministers and the Scottish Parliament in November 2018 and applied to UK SIs made under powers in the European Union (Withdrawal) Act 2018. Its purpose was to enable the Scottish Parliament to hold the Scottish Ministers to account for their decisions on whether or not to consent to UK Ministers making such legislation. A revised protocol ([SI Protocol 2](#)) was agreed in January 2021 with an extended scope applying to all powers to make UK SIs in devolved areas formerly governed by EU law.

SI Protocol 2 gives the Scottish Parliament a role in relation to UK subordinate legislation where it would otherwise have none. It enables lead committees to be sighted on and ask questions about devolved policy developments which are proposed to be regulated through the UK Parliament rather than the Scottish Parliament. Where lead committees do not agree with a proposal to include the devolved matter in UK regulations, they can recommend that the Scottish Ministers refuse consent and either make the provision in Scottish legislation, or do not proceed with the provision at this time.

SI Protocol 2 establishes a proportionate scrutiny approach and categorises SI notifications into “type 1” and “type 2”. For type 1 SI notifications, the Scottish Parliament’s agreement is sought before the Scottish Government gives consent to the UK Government making secondary legislation in devolved competence. Except in respect of urgent notifications, the Scottish Parliament should have a minimum of 28 days to consider type 1 notifications. For type 2 SI notifications, however, the Scottish Government will notify the Scottish Parliament within five days after giving consent. Type 2 procedure applies where all aspects of the proposed instrument are either clearly technical, do not involve a policy decision or update references in legislation that are no longer appropriate following EU exit. All other proposals fall into the type 1 category. During the reporting period, lead committees received 28 type 1 notifications and three type 2 notifications.

