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Pàrlamaid na h-Alba

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Delegated Powers and Law Reform Committee

Instruments considered by the Delegated Powers and Law Reform Committee during the first quarter of the Parliamentary Year 2022-23



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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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Summary

1. There was a decrease of instruments considered in Quarter 1 of 2022-23 compared to Quarter 4 (2021-22) (64 and 67 respectively). This is an overall decrease of 4%.
2. In terms of the number of instruments being reported, results for this quarter are lower than the last; 15% of instruments being reported by the Committee compared to 19% in the previous quarter. However, excluding those where the Committee was content with the explanation given for breaching the 28-day rule, these figures rise to 6% in Quarter 1 compared with 4% in Quarter 4.
3. In terms of the number of instruments being reported, results for this quarter are slightly reduced than the last; 6% of instruments being reported by the Committee (excluding reporting ground (j) in cases where the Committee was content with the reasons) compared to 10% in the previous quarter.
4. No instrument engaged in significant reporting grounds. There was 1 in Quarter 4.
5. This quarter saw a lower number of instruments being reported under reporting ground (j) (breaching of laying requirements). There were 7 compared with 10 in the previous quarter. Of these, 1 was in response to the war in Ukraine and the Committee was satisfied with the Scottish Government's reasons for the breach.
6. The Committee identified 11 Scottish Government instruments in which minor points were raised. There were 10 in the previous quarter.
7. During this period, the Committee considered 3 Bills after Stage 2 and 3 LCMs.

Introduction

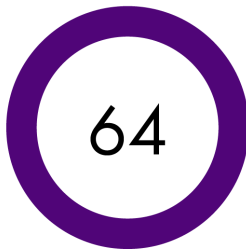
8. The purpose of this report is to provide a record of the Committee's scrutiny of instruments (e.g., Scottish statutory instruments (SSIs) and UK Statutory Instruments subject to joint procedure in the Scottish Parliament) during the first quarter of the parliamentary year 2022-23 during the period 13 May to 22 September 2022.
9. This report—
 - sets out details of instruments considered by the Committee which were drawn to the attention of the Parliament during the reporting period on one or more of the reporting grounds set out in Standing Orders;
 - touches briefly on the commitments made by the Scottish Government and the Lord President's Private Office (LPPO) in response to the Committee's comments and details any action that has been taken; and
 - outlines the Committee's activity in respect of other matters within its remit.
10. As with previous quarterly reports, this report is intended to be more statistical than analytical to help inform the Committee's annual report which goes into more detail on the work carried out by the Committee during the parliamentary year. However, the statistics can still be used to highlight emerging themes in advance of the annual report.

Overview and analysis

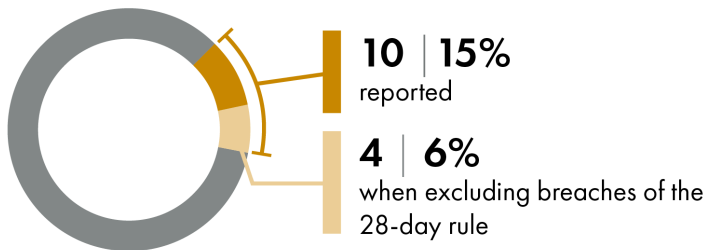
- 11. During the period 13 May to 22 September 2022, a total of 64 instruments were considered by the Committee and laid by the Scottish Government. One was laid by the LPPO.
- 12. The 64 instruments laid by the Scottish Government are broken down as follows—
 - 1 made affirmative instruments;
 - 12 affirmative instruments;
 - 42 negative instruments;
 - 8 laid only instruments; and
 - 1 instruments / documents subject to approval
- 13. The number of made affirmative instruments decreased from 2 in the last quarter to just 1 in this reporting period.
- 14. The infographic below provides a breakdown of instruments laid by the Scottish Government and the LPPO:

Scottish Government

Total SSIs

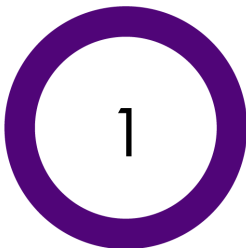


Total drawn to the Parliament’s attention

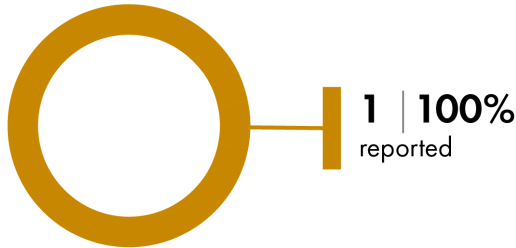


LPPO

Total SSIs



Total drawn to the Parliament’s attention



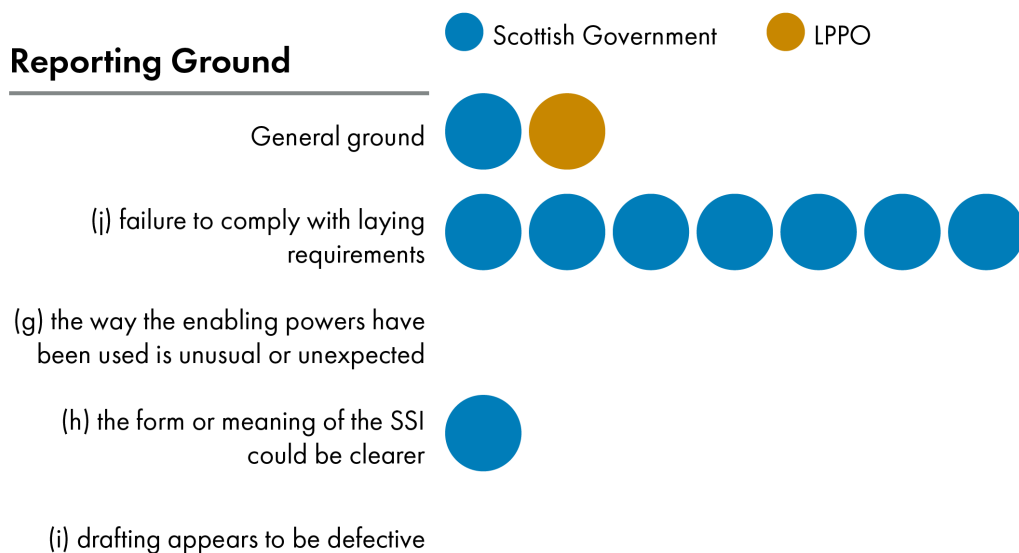
- 15. These figures show that the Committee considered 64 instruments laid by the Scottish Government, of which 10 were drawn to the Parliament’s attention. While this overall figure equates to 15% of instruments considered, 7 of the instruments were reported under reporting ground (j) for breaching the 28-day rule, of which the Committee was content with 6 of the explanations of the breaches. If the 6

instruments are excluded from the total figure, the Committee reported 4 instruments, equating to 6% of the instruments considered.

16. This is in comparison to the previous quarter of the parliamentary year 2021-22, when the Committee considered 67 instruments laid by the Scottish Government. The Parliament's attention was drawn to 13 (19%) of these instruments, of which 10 were reported under reporting ground (j) where the Committee was content with the explanations of the breaches (5 of those reported were in response to the war in Ukraine). So, excluding these from the overall figure, 3 were reported which equates to 4% of the instruments considered.
17. The infographic also shows that the Committee considered one instrument laid by the LPPO which was reported under the general reporting ground. There were no instruments considered in the previous quarter.

Reporting grounds

18. Under paragraph (a) of Rule 6.11 of Standing Orders, the Committee may determine that the attention of the Parliament should be drawn to an SSI on one or more of a range of technical and legal grounds. These grounds are set out in Rule 10.3.1 of the Standing Orders.
19. The Committee considers some reporting grounds to be of more significance than others. The Committee has therefore determined that it has concerns where an instrument is drawn to the attention of the Parliament on one of the following 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.
20. These reporting grounds are referred to as *the significant reporting grounds*. The Committee considers every report under one of these grounds to be a serious matter as these raise fundamental legal questions and so there is the potential for the validity of the instrument to be questioned.
21. The infographic below is a breakdown of the number of instruments reported-on by the relevant reporting ground—



22. No instrument engaged in the more serious reporting grounds.

Withdrawal of instruments

23. One instrument was withdrawn and re-laid in this period:

- Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 2) Regulations 2022 (SSI 2022/Draft).

24. By comparison, in the fourth quarter of the parliamentary year 2021/22, 3 instruments were withdrawn, of which 2 where re-laid.

Instruments referred to Lead Committees

Summary

25. The COVID-19 Committee received 4 instruments, one of which was reported for failure to comply with laying requirements.
26. The Criminal Justice Committee received 11 instruments. 1 LPPO instrument was reported under the general reporting ground.
27. The Economy and Fair Work Committee received 3 instruments, none of which were drawn to the attention of the Parliament.
28. The Education, Children and Young People Committee received 6 instruments. 1 instrument was reported for failure to comply with laying requirements and another on ground (h) (clarity of form or meaning).
29. The Equalities, Human Rights and Civil Justice Committee received 12 instruments, one of which was reported for failure to comply with laying requirements.
30. The Finance and Public Administration Committee received 1 instrument which was not drawn to the attention of the Parliament.
31. The Health, Social Care and Sport Committee received 10 instruments, 3 of which were drawn to the attention of the Parliament for failure to comply with laying requirements.
32. The Local Government, Housing and Planning Committee received 4 instruments, none of which were drawn to the attention of the Parliament.
33. The Net Zero, Energy and Transport Committee received 1 instrument which was not drawn to the attention of the Parliament.
34. The Rural Affairs, Islands and Natural Environment Committee received 6 instruments, 1 of which was drawn to the attention of the Parliament for failure to comply with laying requirements.
35. The Social Justice and Social Security Committee received 6 instruments, 1 of which was reported under the general reporting ground.
36. Information detailing specific instruments, and the grounds that they were reported on, is provided in Annex A.
37. The infographic below provides a breakdown of instruments referred to, and reported on, by lead committees—

Delegated Powers and Law Reform Committee

Instruments considered by the Delegated Powers and Law Reform Committee during the first quarter of the Parliamentary Year 2022-23, 65th Report, 2022 (Session 6)



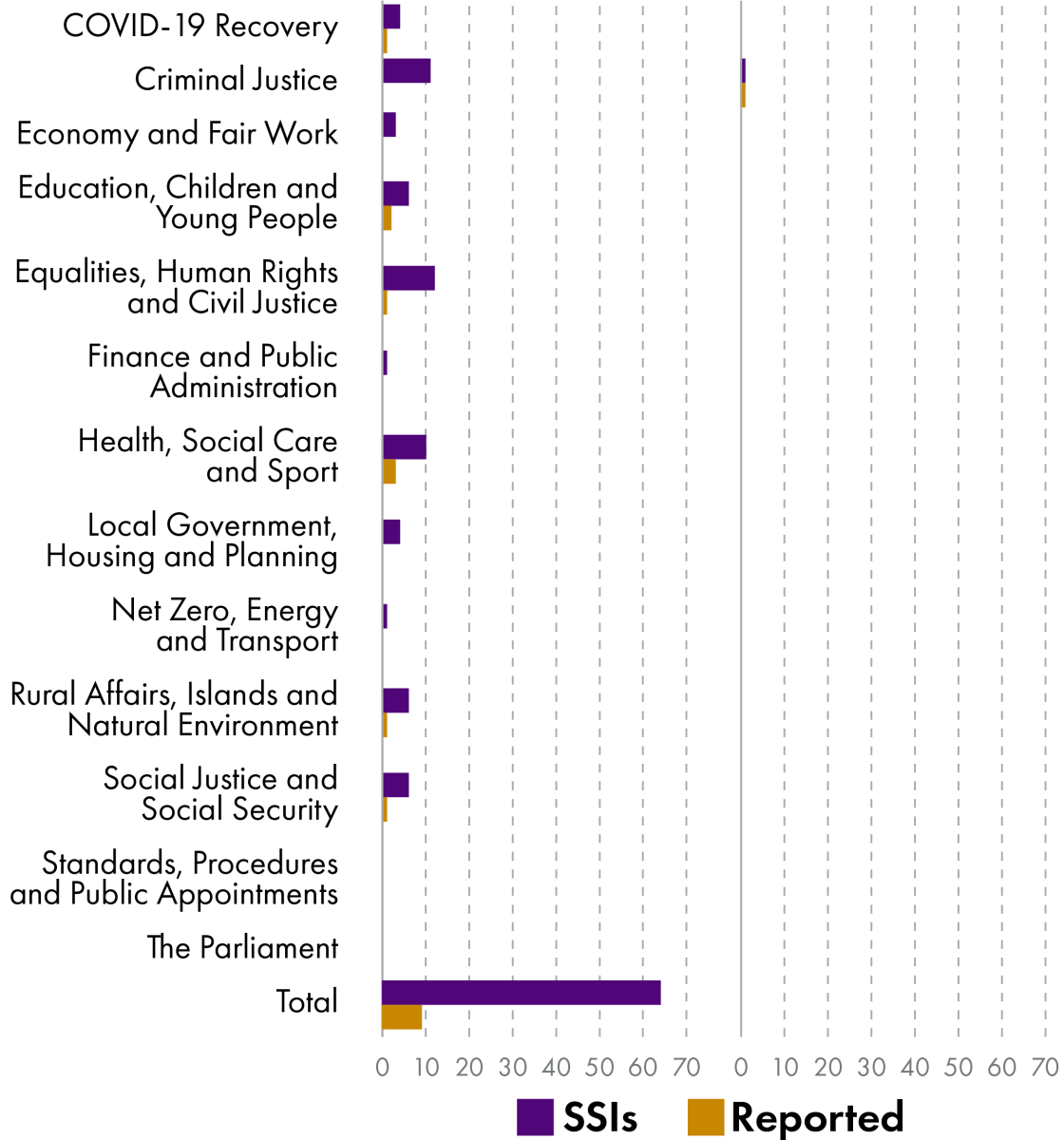
Lead committee



Scottish Government



LPPO



Scottish Statutory Instruments - General

Ukraine

38. During the reporting period there was one instrument in response to the war in Ukraine which was drawn to the attention of the Parliament under failure to comply with laying requirements. However, the Committee was satisfied with the Scottish Government's reasons for the breach.

Commitments

Scottish Government instruments

39. No instruments were laid by the Scottish Government during this period in relation to its commitment to lay amending instruments to correct errors identified and reported on by the Committee.
40. A list of all outstanding Scottish Government commitments can be found at Annex B.

LPPO instruments

41. There are no outstanding LPPO commitments from this quarter, or from previous reporting periods.

Minor Points

42. The Committee identified a total of 11 instruments on which minor points were raised (generally relating to typographical or referencing errors) compared with 10 instruments identified in Quarter 4. All of the relevant instruments were laid by the Scottish Government.

Summary

43. Although the focus of this report is primarily on the Committee's activities in relation to its scrutiny of instruments, the following section briefly outlines the Committee's activity in respect to other matters.

Bills

44. The Committee published three reports on the following Bills—
- [Good Food Nation \(Scotland\) Bill after Stage 2](#)
 - [Fireworks and Pyrotechnic Articles \(Scotland\) Bill as amended at Stage 2](#)
 - [Coronavirus \(Recovery and Reform\) \(Scotland\) Bill after stage 2](#)

Legislative Consent Memorandums (LCMs)

45. Paragraph 6 of Rule 9B.3 of Standing Orders provides that where a UK Bill that is the subject of a Legislative Consent Memorandum (LCM) contains provisions conferring on the Scottish Ministers powers to make subordinate legislation, the

Delegated Powers and Law Reform Committee shall consider and may report to the lead committee on those provisions.

46. Rule 6.11.1(b) of Standing Orders provides that the remit of the Committee includes considering and reporting on proposed powers to make subordinate legislation in particular bills “or other proposed legislation”. The Committee and its predecessor Committee have considered powers conferred on UK Ministers in devolved areas in various UK bills over the course of sessions 5 and 6.
47. The Committee’s position in relation to powers in UK bills conferred on UK Ministers in devolved areas has been as follows:
- a. The Scottish Parliament should have the opportunity to effectively scrutinise the exercise of all legislative powers within devolved competence.
 - b. Where such powers are exercised by the Secretary of State 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.
 - c. Powers conferred on the Secretary of State should be subject to a requirement for the Scottish Ministers’ consent when exercised within devolved competence.
 - d. As a minimum, powers when exercised by the Secretary of State in devolved areas should be subject to the process set out in the SI Protocol 2 where the power is within the scope of that protocol.
48. Three LCMs were considered during this reporting period in relation to the following UK Parliament Bills —

(To note that the figures below were correct at the time of the Committee’s consideration on each LCM. The numbers may have changed since its progress through UK Parliament).

- [Online Safety Bill \(UK Parliament legislation\)](#)

Lodged on 31 March and the Committee considered this on 24 May 2022. The Committee published its [report](#) on the powers in the bill on 1 June. The bill confers delegated powers on the Scottish Ministers.

- [Procurement Bill \(UK Parliament legislation\)](#)

Lodged on 25 May 2022 and the Committee initially considered this on 6 September 2022. The bill confers powers exercisable in devolved areas on UK Ministers alone and on UK and Scottish Ministers concurrently.

- [Trade \(Australia and New Zealand\) Bill \(UK Parliament legislation\)](#)

Lodged on 13 June 2022 and the Committee initially considered this on 6 September 2022. The bill confers a power exercisable in devolved areas on UK Ministers and Scottish Ministers concurrently.

Annex A – Reporting grounds: 13 May to 22 September 2022

General

- Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Court Sitings) 2022 (SSI 2022/250) **Criminal Justice Committee**
- Disability Assistance for Working Age People (Transitional Provisions and Miscellaneous Amendment) (Scotland) Regulations 2022 (SSI 2022/Draft) **Social Justice and Social Security Committee**

(j) - failure to comply with laying requirements

- Coronavirus (Scotland) Acts (Saving Provision) Regulations 2022 (SSI 2022/261) **COVID-19 Recovery Committee content**
- Police Act 1997 (Criminal Records) (Homes for Ukraine Sponsorship Scheme) (Scotland) Amendment Regulations 2022 (SSI 2022/158) **Education, Children and Young People Committee content**
- Sheriff Court Fees Amendment Order 2022 (SSI 2022/214) **Equalities, Human Rights and Civil Justice Committee** (the Committee wrote to the Scottish Government on [1 July 2022](#) asking why errors within the SSI were not identified at an earlier stage. The Scottish Government responded on [17 August 2022](#)).
- Public Health etc. (Scotland) Act 2008 (Notifiable Diseases and Notifiable Organisms) Amendment Regulations 2022 (SSI 2022/212) **Health, Social Care and Sport Committee content**
- National Health Service (Charges to Overseas Visitors) (Scotland) Amendment (No. 2) Regulations 2022 (SSI 2022/213) **Health, Social Care and Sport Committee content**
- Food Information (Transitional Provisions) (Miscellaneous Amendments) (Scotland) Regulations 2022 (SSI 2022/265) **Health, Social Care and Sport Committee**
- Non-Commercial Movement of Pet Animals (Scotland) Amendment (No. 2) Regulations 2022 (SSI 2022/262) **Rural Affairs, Islands and Natural Environment Committee**

(h) - the form or meaning of the SSI could be clearer

- St Mary's Music School (Aided Places) (Scotland) Amendment Regulations 2022 (SSI 2022/173) **Education, Children and Young People Committee** – this was reported on the basis that the meaning of the residential criteria applying to children of EEA nationals could be clearer

Annex B – Historic Commitments Scottish Government

- 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*

