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Delegated Powers and Law Reform Committee

Instruments considered by the Delegated Powers and Law Reform Committee during the third quarter of the Parliamentary Year 2021-22



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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. This reporting period covers **9 December 2021 to 28 February 2022**.
2. There was a slight increase of instruments considered in Quarter 3 of 2021-22 compared to Quarter 2 (89 and 83 respectively). This is an overall increase of **7%**.
3. The number of made affirmative instruments increased from **14** in the last quarter to **16** in this reporting period, an increase of **14%**. This is still lower than the 24 made affirmatives considered during Quarter 1.
4. In terms of the number of instruments being reported, results for this quarter are slightly lower than the last; **11%** of instruments being reported by the Committee compared to **16%** in the previous quarter. Excluding those where the Committee was content with the explanation given for breaching the 28-day rule, these figures fall to **5%** and **11%** respectively.
5. **One** instrument engaged in significant reporting grounds. In the previous quarter **two** instruments were reported under the significant reporting grounds.
6. This quarter saw a higher number of instruments being reported under reporting ground **(j)** (breaching of laying requirements). There were **7** compared with **5** in the previous quarter.
7. The Committee identified **18** Scottish Government instruments in which minor points were raised. This is a rise of **9** from the previous quarter.
8. During this period, the Committee considered **3** Bills at Stage 1, including the revised Coronavirus (Discretionary Compensation for Self-isolation) (Scotland) Bill after Stage 2, and **5** LCMs.

Introduction

9. The purpose of this report is to provide a record of the Committee's scrutiny of Scottish statutory instruments (SSIs) during the third quarter of the parliamentary year 2021-22 during the period **9 December 2021 to 28 February 2022**.
10. 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.
11. 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

12. During the period 9 December 2021 to 28 February 2022, a total of **89** instruments were considered by the Committee; **87** were laid by the Scottish Government and **2** by the LPPO.
13. In relation to the **87** SSIs laid by the Scottish Government, these are broken down as follows—
 - **16** made affirmative instruments;
 - **26** affirmative instruments;
 - **35** negative instruments; and
 - **10** laid only instruments.
14. The number of made affirmative instruments increased from **14** in the last quarter to **16** in this reporting period, an increase of **14%**. These were laid in response to COVID-19.
15. The **2** instruments laid by the LPPO were laid only instruments.
16. Table 1 provides a breakdown of instruments laid by the Scottish Government and the LPPO—

Table 1

Scottish Government			LPPO		
Total SSIs	Total drawn to the Parliament's attention	Percentage	Total SSIs	Total drawn to the Parliament's attention	Percentage
87	10 reported 5 excluding breaches of the 28-day rule	11% 5%	2	2	100%

17. These figures show that the Committee considered **87** instruments laid by the Scottish, of which **10** were drawn to the Parliament's attention. While this overall figure equates to **11%** of instruments considered, **7** of the instruments were reported under reporting ground (j) for breaching the 28-day rule. Of these **7**, the Committee was content with the explanations for **5** of the breaches. If you exclude these **5** from the total figure, the Committee reported **5** instruments, equating to just over **5%** of the instruments considered.
18. This is in comparison to the previous quarter of the parliamentary year 2021-22, when the Committee considered **80** instruments laid by the Scottish Government. The Parliament's attention was drawn to **13 (16%)** of these instruments, **4** of these was reported under reporting ground (j) where the Committee was content with the reasons given for the breach. So, excluding these from the overall figure, **9** were reported which equates to just over **11%** of instruments considered.
19. The table also shows that the Committee considered **2** instruments laid by the LPPO, of which both were drawn to the Parliament's attention. There were **3** instruments considered in the previous quarter of which none were reported on.

Reporting grounds

20. 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.
21. 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.
22. 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.
23. Table 2 provides a breakdown of the number of instruments reported-on by the relevant reporting ground—

Table 2

Reporting Ground	Number of SSIs reported	
	Scottish Government	LPPO
General ground	3	2
(j) failure to comply with laying requirements	7	0
(g) the way the enabling powers have been used is unusual or unexpected	0	0
(h) the form or meaning of the SSI could be clearer	2	0
(i) drafting appears to be defective	1	0

24. One instrument engaged in the more serious reporting grounds. This was the Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment Regulations 2022 (SSI 2022/2).

Withdrawal of instruments

25. Two instruments were withdrawn in this period:
- Sea Fish (Prohibited Methods of Fishing) (Firth of Clyde) Order 2021 (SSI 2021/467); and
 - Consumer Scotland (Transfer of Functions) Regulations 2022 (SSI 2021/Draft).
26. Three instruments were withdrawn and re-laid in the second quarter of the year.

Instruments referred to Lead Committees

Summary

27. During Quarter 3, the **COVID-19 Committee** had the largest number of Scottish Government instruments referred to them, considering **16** in total. **2** instruments were reported in total, one under the 'general ground' and the second under 'meaning of the SSI could be clearer', 'drafting appears to be defective' and 'failure to comply with laying requirements.'
28. The Criminal Justice Committee received **5** instruments. **3** instruments were reported in total one under the 'general ground' and the other under 'failure to comply with laying requirements.'
29. The Economy and Fair Work Committee received **6** instruments, none of which were drawn to the attention of the Parliament.
30. The Education, Children and Young People Committee received **5** instruments and **1** was drawn to the attention of the Parliament under 'failure to comply with laying requirements.'
31. The Equalities, Human Rights and Civil Justice Committee received **3** instruments, none of which were drawn to the attention of the Parliament.
32. The Finance and Public Administration Committee received **2** instruments, none of which were drawn to the attention of the Parliament.
33. The Health, Social Care and Sport Committee received **9** instruments, none of which were drawn to the attention of the Parliament.
34. The Local Government, Housing and Planning Committee received **11** instruments, none of which were drawn to the attention of the Parliament.
35. The Net Zero, Energy and Transport Committee received **9** instruments, **1** instrument was reported under the 'general ground'
36. The Rural Affairs, Islands and Natural Environment Committee received **10** instruments and **4** were drawn to the attention of the Parliament under 'failure to comply with laying requirements.'
37. The Social Justice and Social Security Committee received **9** instruments. **1** instrument was reported under both the 'general ground' and 'meaning could be clearer'.
38. The Standards, Procedures and Public Appointments Committee received **1** instrument, none of which were drawn to the attention of the Parliament.
39. Information detailing specific SSIs and the grounds that they were reported on, is provided in **Annex A**.
40. Table 3 provides a breakdown of instruments referred to, and reported on, by lead committees—

Table 3

Lead committee	Scottish Government LPO			
	Total SSIs	Total reported	Total SSIs	Total reported
COVID 19-Recovery	16	2	0	0
Criminal Justice	5	1	2	2
Economy and Fair Work Committee	6	0	0	0
Education, Children and Young People Committee	5	1	0	0
Equalities, Human Rights and Civil Justice Committee	3	0	0	0
Finance and Public Administration Committee	2	0	0	0
Health, Social Care and Sport Committee	9	0	0	0
Local Government, Housing and Planning Committee	11	0	0	0
Net Zero, Energy and Transport Committee	9	1	0	0
Rural Affairs, Islands and Natural Environment Committee	10	4	0	0
Social Justice and Social Security Committee	9	1	1	0
Standards, Procedures and Public Appointments Committee	1	0	0	0
The Parliament	0	0	0	0
TOTAL	87	10	2	2

Scottish Statutory Instruments - General

Made affirmative instruments

41. During the reporting period the Committee published its report (dated 10 February 2022) on its inquiry into the use of the made affirmative procedure during the coronavirus pandemic. Among the SSIs considered in the reporting period, there were a considerable number of made affirmative regulations making provision in relation to coronavirus which the Committee drew to the relevant lead committee's attention. In particular:
- SSI 2021/470, relating to international travel, was reported on the general ground for failure to follow proper drafting practice in relation to the title of the instrument.
 - While no technical points were raised on SSIs 2021/475, 496, 497 and 498, which each made amendments to the Requirements Regulations, the Committee disagreed by majority on division that it was content on the basis that these instruments had been laid under the made affirmative procedure rather than the affirmative procedure.
 - SSI 2022/2, relating to international travel, was reported for defective drafting (one of the Committee's particularly serious reporting grounds), meaning could be clearer, and breach of laying requirements.

Commitments

42. 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.
43. A list of all outstanding Scottish Government commitments and commitments met can be found at **Annex B**.

LPPO instruments

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

Minor Points

45. The Committee identified a total of **18** instruments on which minor points were raised (generally relating to typographical or referencing errors). All of these instruments were laid by the Scottish Government.

Other business

Summary

46. 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

47. The Committee published three reports on the following Bills at Stage 1—
- [Coronavirus \(Discretionary Compensation for Self-isolation\) \(Scotland\) Bill](#)
 - [Good Food Nation \(Scotland\) Bill at Stage 1](#)
 - [Budget \(Scotland\) Bill](#)
48. The Committee published one report on the following Bill after Stage 2—
- [Coronavirus \(Discretionary Compensation for Self-isolation\) \(Scotland\) Bill](#)

Legislative Consent Memorandums (LCMs)

49. Five LCMs were considered during this reporting period—
- [Building Safety Bill \(UK Parliament legislation\)](#)
 - [Professional Qualifications Bill \(UK Parliament legislation\)](#)
 - [Health and Care Bill \(UK Parliament legislation\)](#)
 - [Cultural Objects \(Protection from Seizure\) Bill \(UK Parliament legislation\)](#)
 - [Public Services Pensions and Judicial Offices Bill \(UK Parliament legislation\)](#)

Annex A – Reporting grounds: 9

December 2021 to 28 February 2022

General

- Health (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 13) Regulations 2021 (SSI 2021/470) **COVID-19 Recovery Committee**
- 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) **Criminal Justice Committee**
- Act of Sederunt (Sheriff Appeal Court Rules) 2021 (SSI 2021/468) **Criminal Justice Committee LPPO**
- Greenhouse Gas Emissions Trading Scheme (Amendment) Order 2021 (SSI 2021/1455) **Net Zero, Energy and Transport Committee**
- Disability Assistance for Working Age People (Scotland) Regulations 2022 (SSI 2021/ Draft) **Social Justice and Social Security Committee**

(j) - failure to comply with laying requirements

- Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment Regulations 2022 (SSI 2022/2) **COVID-19 Recovery Committee**
- Nutritional Requirements for Food and Drink in Schools (Scotland) Amendment Regulations 2021 (SSI 2021/481) **Education, Children and Young People Committee**
- Red Rocks and Longay Urgent Marine Conservation (No. 2) Order 2021 (SSI 2021/463) **Rural Affairs, Islands and Natural Environment Committee**
- Private Storage Aid Scheme (Pigmeat) (Scotland) Amendment Regulations 2021 (SSI 2021/492) **Rural Affairs, Islands and Natural Environment Committee**
- Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 3) Regulations 2021 (SSI 2021/493) **Rural Affairs, Islands and Natural Environment Committee**
- Prisons and Young Offenders Institutions (Scotland) Amendment Rules (SSI 2021/446) **Criminal Justice Committee**
- Sea Fish (Prohibition on Fishing) (Firth of Clyde) (No. 2) Order 2022 (SSI 2022/35) (SSI 2022/35) **Rural Affairs, Islands and Natural Environment Committee**

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

- Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment Regulations 2022 (SSI 2022/2) **COVID-19 Recovery Committee**

- Disability Assistance for Working Age People (Scotland) Regulations 2022 (SSI 2021/
Draft) **Social Justice and Social Security Committee**

(i) - drafting appears to be defective

- Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland)
Amendment Regulations 2022 (SSI 2022/2) **COVID-19 Recovery Committee**

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*

Historic Commitments met by Scottish Government

- Education (Fees and Student Support) (Miscellaneous Amendments) (EU Exit) (Scotland) Regulations 2019 (SSI 2019/70) [**12th Report, 2019. Published 12/03/2019**] *as amended by the Education (Fees and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2020 (SSI 2020/213) which came into force on 11th September 2020.*

