

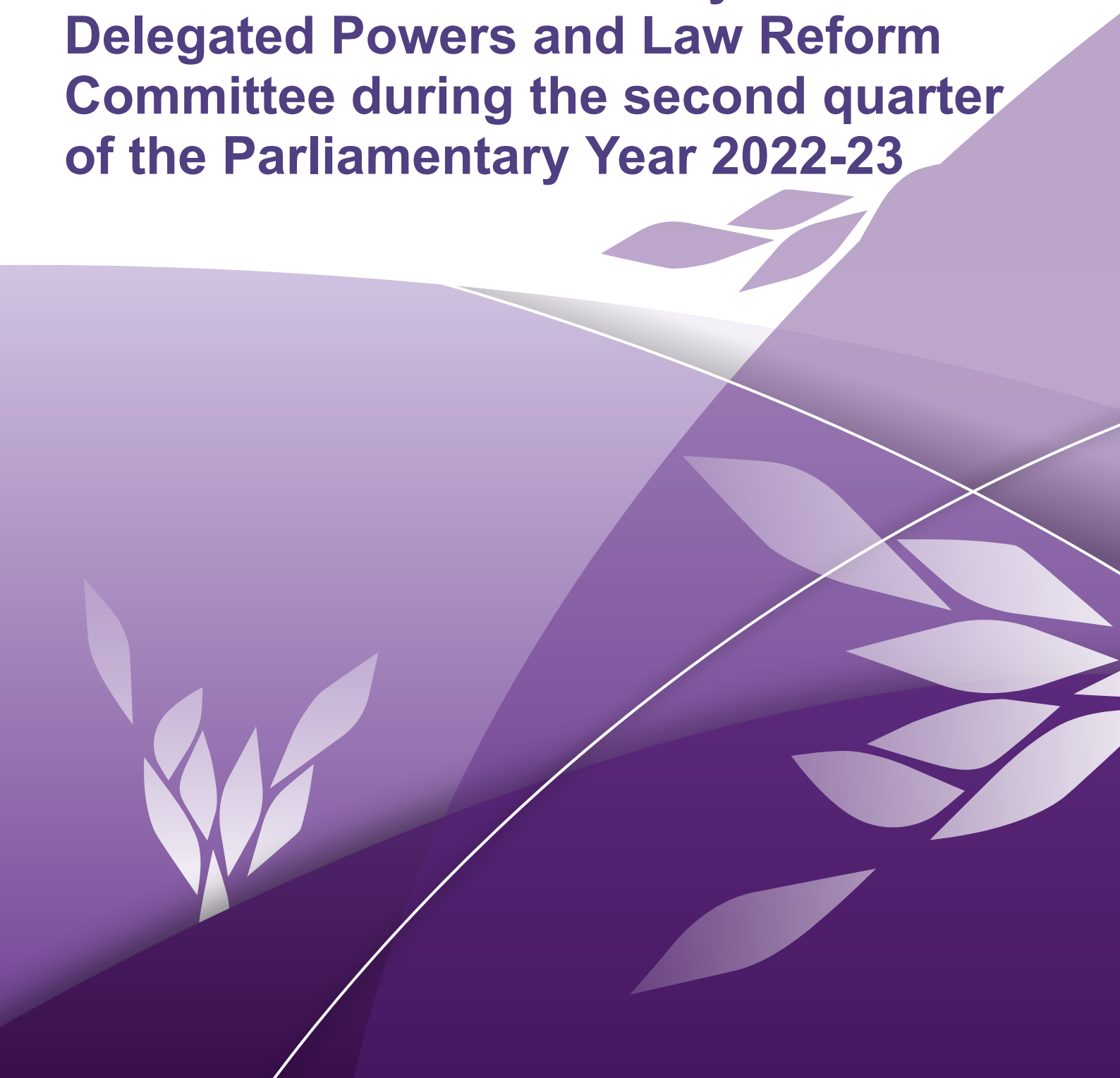


The Scottish Parliament
Pàrlamaid na h-Alba

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Delegated Powers and Law Reform Committee

Instruments considered by the Delegated Powers and Law Reform Committee during the second 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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Committee Membership



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Scottish Conservative
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Summary

1. There was a decrease of instruments considered in Quarter 2 of 2022-23 compared to Quarter 1 (43 and 64 respectively). This is an overall decrease of 33%.
2. In terms of the number of instruments being reported, results for this quarter are lower than the last; 12% of instruments being reported by the Committee compared to 15% in the previous quarter. Excluding those where the Committee was content with the explanation given for breaching the 28-day rule, these figures then slightly reduce to 5% in Quarter 2 compared with 6% in Quarter 1.
3. In relation to the seriousness of the reporting grounds, no instruments engaged serious grounds. There was also none in the previous quarter.
4. This quarter also saw a lower number of instruments being reported under reporting ground (j) (breaching of laying requirements); 4 compared with **7** in the previous quarter.
5. The Committee identified **5** Scottish Government instruments in which minor points were raised. There were 11 in the previous quarter.
6. During this period, the Committee considered **5** Bills at Stage 1 and **7** LCMs.

Introduction

7. 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 23 September to 8 December 2022.
8. 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.
9. 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

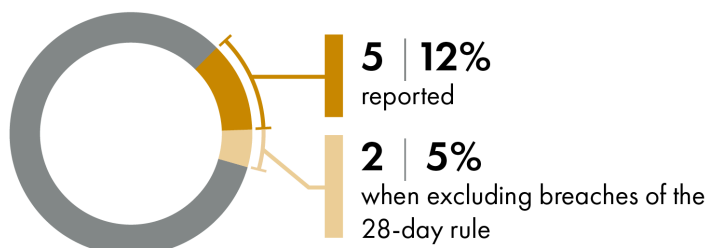
10. During the period 23 September to 8 December 2022, a total of 43 instruments were considered by the Committee. Two were laid by the LPPO.
11. The 41 instruments laid by the Scottish Government are broken down as follows—
 - 1 made affirmative instrument;
 - 12 affirmative instruments;
 - 17 negative instruments;
 - 10 laid only instruments; and
 - 1 instrument / document subject to approval.
12. The infographic below provides a breakdown of instruments laid by the Scottish Government and the LPPO:

Scottish Government

Total SSIs

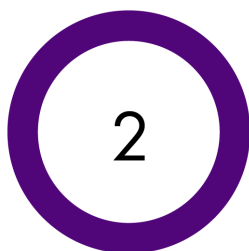


Total drawn to the Parliament's attention



LPPO

Total SSIs



Total drawn to the Parliament's attention

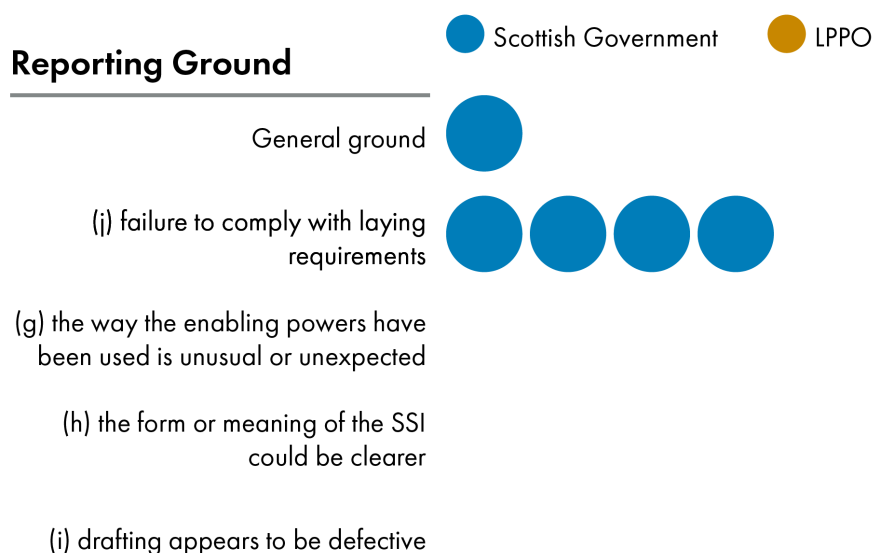
None were reported on

13. The above infographic shows that of the 41 instruments laid by the Scottish Government considered by the Committee, 5 were drawn to the Parliament's attention. While this overall figure equates to 12% of instruments considered, 4 of the instruments were reported under reporting ground (j) for breaching the 28-day rule, of which the Committee was content with 3 of the explanations of the breaches. If the 3 instruments are excluded from the total figure, the Committee reported 2 instruments, equating to 5% of the instruments considered.
14. This is in comparison to the previous quarter, when the Committee considered 64

instruments laid by the Scottish Government. The Parliament's attention was drawn to 10 (15%) of these instruments, of which 7 were reported under reporting ground (j). The Committee was content with 6 of the explanations of the breaches. So, excluding these from the overall figure, 4 were reported which equates to 6% of the instruments considered.

Reporting grounds

15. 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.
16. 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.
17. 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.
18. The infographic below is a breakdown of the number of instruments reported-on by the relevant reporting ground—



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

Withdrawal of instruments

20. Two instruments were withdrawn and re-laid in this period:
- Dentists, Dental Care Professionals, Nurses, Nursing Associates and Midwives (International Registrations) Order 2022 (SI 2022/Draft); and
 - Budget (Scotland) Act 2022 Amendment Regulations 2023 (SSI 2022/Draft).
21. By comparison, in quarter 1, one instrument was withdrawn and re-laid.

Instruments referred to Lead Committees

Summary

22. The COVID-19 Committee received 1 instrument, which was not drawn to the attention of the Parliament.
23. The Criminal Justice Committee received 6 instruments, none of which were drawn to the attention of the Parliament.
24. The Economy and Fair Work Committee received 1 instrument, which was not drawn to the attention of the Parliament.
25. The Education, Children and Young People Committee received 3 instruments, none of which were drawn to the attention of the Parliament.
26. The Equalities, Human Rights and Civil Justice Committee received 2 instruments, none of which were drawn to the attention of the Parliament.
27. The Finance and Public Administration Committee received 1 instrument, which was not drawn to the attention of the Parliament.
28. The Health, Social Care and Sport Committee received 4 instruments, 1 of which was reported under the general reporting ground.
29. The Local Government, Housing and Planning Committee received 6 instruments, 2 of which were drawn to the attention of the Parliament for failure to comply with laying requirements.
30. The Net Zero, Energy and Transport Committee received 10 instruments, none of which were drawn to the attention of the Parliament.
31. The Rural Affairs, Islands and Natural Environment Committee received 4 instruments, none of which were drawn to the attention of the Parliament.
32. The Social Justice and Social Security Committee received 5 instruments, 2 of which were drawn to the attention of the Parliament for failure to comply with laying requirements.
33. Information detailing specific instruments, and the grounds that they were reported on, is provided in Annex A.
34. 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 second quarter of the Parliamentary Year 2022-23, 10th Report, 2023 (Session 6)



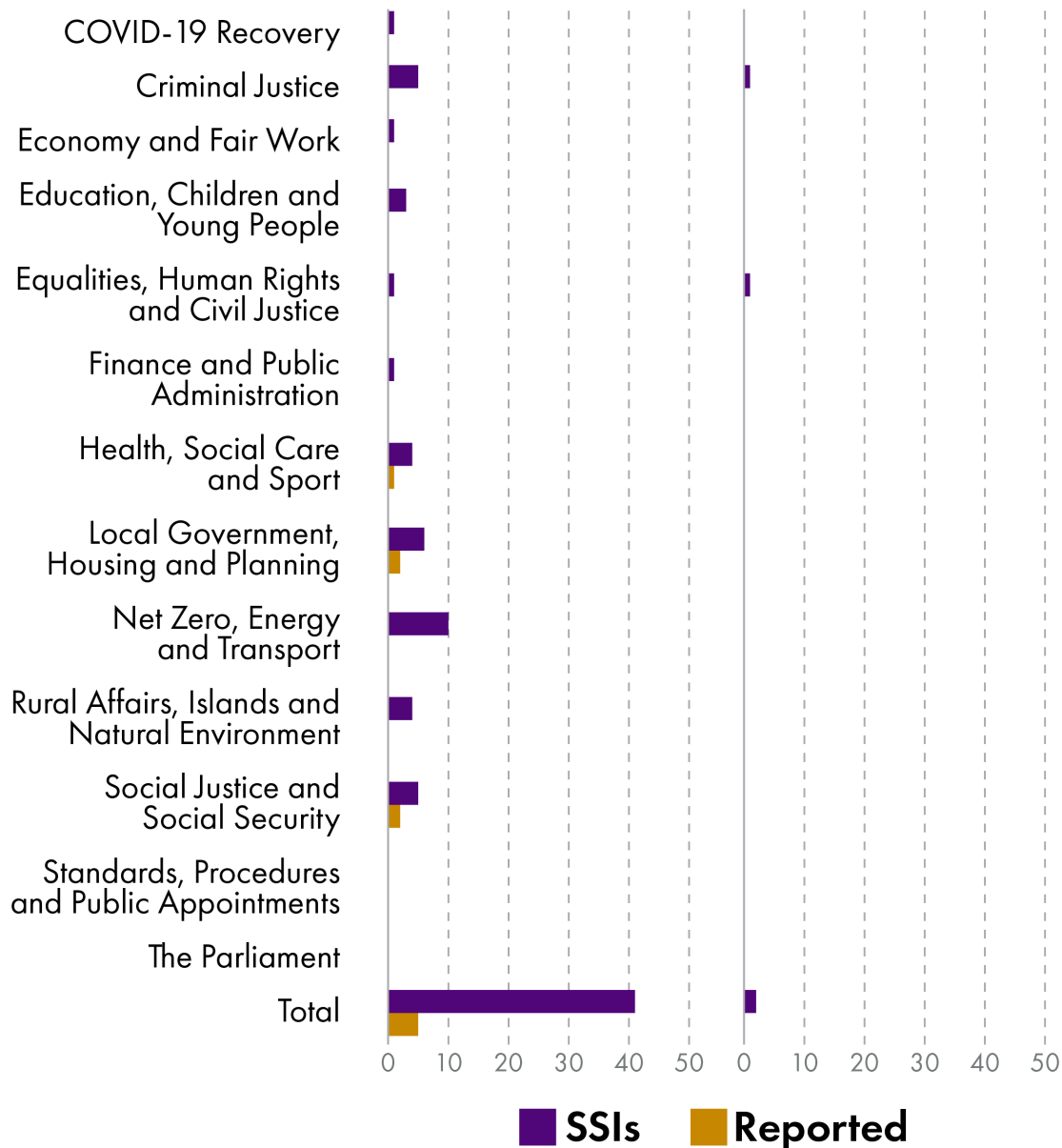
Lead committee



Scottish Government



LPPO



Scottish Statutory Instruments - General

Commitments

Scottish Government instruments

35. One instrument was 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:
- the Education (Listed Bodies) (Scotland) Order 2018 (SSI 2018/7) was corrected by the Education (Listed Bodies) (Scotland) Amendment Order 2022 (SSI 2022 294).
36. A list of all outstanding Scottish Government commitments can be found at Annex B.

LPPO instruments

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

Minor Points

38. The Committee identified a total of 5 instruments on which minor points were raised (generally relating to typographical or referencing errors) compared with 11 instruments identified in Quarter 1. All of the relevant instruments were laid by the Scottish Government.

Summary

39. 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

40. The Committee published three reports on the following Bills—
- [Delegated powers provisions in the Moveable Transactions \(Scotland\) Bill at Stage 1](#)
 - [Patient Safety Commissioner for Scotland Bill at Stage 1](#)
 - [Report on the Moveable Transactions \(Scotland\) Bill at Stage 1](#)

Legislative Consent Memorandums (LCMs)

41. 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.

42. 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.

43. Seven LCMs were considered during this reporting period in relation to the following UK Parliament Bills —

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

Lodged on 13 June and the Committee considered this on 6 September and 4 October 2022. The Committee published its [report](#) on relevant powers in the bill on 11 October. The bill confers a power exercisable in devolved areas on UK Ministers and Scottish Ministers concurrently.

- [Procurement Bill](#)

Lodged on 25 May 2022 and the Committee considered this on 4 October 2022. The Committee published its [report](#) on relevant powers in the bill on 11 October. The bill confers powers exercisable in devolved areas on UK Ministers alone and on UK and Scottish Ministers concurrently.

- [UK Infrastructure Bank Bill](#)

Lodged on 2 September 2022 and the Committee considered this on 25 October 2022. The Committee published its [report](#) on relevant powers in the bill on 11 October. The bill confers a power exercisable by UK Ministers in devolved areas.

- [UK Northern Ireland Protocol Bill](#)

Lodged on 19 August 2022 and the Committee considered this on 4 October and 1 November 2022. The Committee published its [report](#) on relevant powers in the bill on 3 November 2022. The bill confers powers exercisable by UK Ministers in devolved areas, and enables UK Ministers to sub-delegate these powers to the Scottish Ministers.

- [Northern Ireland Troubles \(Legacy and Reconciliation\) Bill](#)

Lodged on 20 October 2022 and the Committee considered this on 8 and 15 November 2022. The Committee published its [report](#) on relevant powers in the bill on 15 November 2022. The bill confers powers exercisable in devolved areas on UK Ministers alone and on UK and Scottish Ministers concurrently.

- [Levelling Up and Regeneration Bill](#)

Lodged on 27 July 2022 and the Committee considered this on 27 September, 8 and 15 November 2022. The Committee published its [report](#) on relevant powers in the bill on 16 November 2022. The bill confers powers exercisable by UK Ministers in devolved areas.

- [Retained EU Law \(Revocation and Reform\) Bill](#)

Lodged on 8 November 2022 and the Committee considered this on 29 November. The bill confers powers within devolved areas on both Scottish Ministers and UK

Ministers.

44. At its meeting on 22 November, the Committee's position in relation to powers in UK bills conferred on UK Ministers in devolved areas, in general terms, was changed to:

- 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. If such powers contain a requirement for the Scottish Ministers' consent when exercised within devolved competence, the Scottish Parliament can scrutinise the Scottish Ministers' consent decision.

The Committee will scrutinise powers conferred on UK Ministers not subject to a requirement for Scottish Ministers' consent and may suggest matters for the lead committee to consider.

- 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.
45. The Committee's previous position, as set out below, has been reflected in its scrutiny of subsequent LCMs (where appropriate), including in its questions to the UK Government and Scottish Government and in its reports to lead committees.
- 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.

Annex A – Reporting grounds: 23 September to 8 December 2022

General

- Official Controls (Import of High Risk Food and Feed of Non-Animal Origin) Amendment (Scotland) Regulations 2022 (SSI 2022/341) **Health, Social Care and Sport Committee**

(j) - failure to comply with laying requirements

- Scottish Child Payment (Saving Provisions) Regulations 2022 (SSI 2022/302) **Social Justice and Social Security Committee**
- Assured Tenancies and Private Residential Tenancies (Prescribed Notices and Forms) (Miscellaneous Temporary Modifications) (Scotland) Regulations 2022 (SSI 2022/307) **Local Government, Housing and Planning Committee**
- Scottish Child Payment (Ancillary Provision) Regulations 2022 (SSI 2022/326) **Social Justice and Social Security Committee**
- Building (Scotland) Amendment (Amendment) (No. 2) Regulations 2022 (SSI 2022/340) **Local Government, Housing and Planning Committee**

Annex B – Historic Commitments Scottish Government

- 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^j*

^j This will require a further SAO to be brought forward at Westminster. The Scottish Government do not consider that the problems identified are particularly problematic nor that they will impede proper functioning of the devolution arrangements for forestry.

