Delegated Powers and Law Reform Committee

Legacy Report
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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on—

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; and

f. proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject.

g. any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

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

i. any Consolidation Bill as defined in Rule 9.18.1 referred to it by the Parliamentary Bureau in accordance with Rule 9.18.3.

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Introduction

1. This is the legacy report for the Delegated Powers and Law Reform Committee for the 4th session of the Scottish Parliament. Such a report was not produced by any of the Committee’s predecessor committees, but given the extensive changes to its role and remit, the Committee agreed that such a report would be beneficial to its successor.

2. This report serves two purposes. Firstly it reflects on the work done by the Committee this session: the way the Committee has worked; the evolving remit of the Committee; the Committee’s successes; and matters which have been of concern to the Committee.

3. The second purpose is to look ahead to next session and the role for the Committee’s successor committee. Drawing on the experience of this session, the report suggests some working practices that have proved effective this session that a successor committee may wish to draw on.
Work undertaken by the Committee this session

4. This session has been a very busy one for the Committee. The following infographic provides an overview of the work undertaken by the Committee during that period.

- **164** Committee meetings
- **73** Bills scrutinised
- **1461** SSIs considered
- **332** Reports published

5. And the following table lists the members who undertook that work.
Scrutiny of Scottish Statutory Instruments (SSIs)

6. This session the greatest proportion of the Committee’s work has been the consideration of SSIs. The Committee has considered 1,461 instruments.

7. These instruments are largely laid by the Scottish Government, but a small proportion of the instruments are laid by the Lord President’s Private Office (LPPO).

Approach to scrutiny

8. Supported by its legal advisers the Committee has applied detailed scrutiny to all instruments laid before the Parliament.

9. In undertaking this scrutiny, the Committee has sought to expand the methods it has used to obtain information. In particular, the Committee has increased the frequency with which it has taken oral evidence to inform its view of particular SSIs. In previous sessions the then Subordinate Legislation Committee rarely took oral evidence. The evidence this Committee has taken has primarily been from Scottish Government officials, but on occasion the Committee has invited Ministers to attend the Committee as well as external stakeholders.

10. Sometimes this need for oral evidence has arisen because of the short order in which the Committee has been required to consider an instrument, but in other instances it has been because it has been considered to be the best means by which the Committee may obtain the necessary information to inform its view of the instrument.

11. The Committee has found that taking oral evidence has been an effective tool in holding the Scottish Government to account and encourages its successor committee to continue with this approach.

Instrument reports

12. Much in the same way as the Committee has striven to improve the accessibility of legislation for the end user, the Committee has also sought to improve the accessibility of its own work and in particular its reports.

13. Over the course of the session the Committee produced 332 reports. With so many reports it has been critical to ensure that the messages the Committee wishes to convey do not become lost in the sheer volume of reports published.

14. Rule 10.3 of Standing Orders provides the grounds under which the Committee reports. These have remained the same, but the Committee has sought to make them more understandable and reflective of the extent of the Committee’s concerns. To that end, the Committee has developed a hierarchy of reporting grounds, which is as follows:
• Significant grounds—
  o ground (e) – (doubt as to whether it is intra vires);
  o ground (f) – (raises a devolution issue); and
  o ground (i) – (drafting appears to be defective).

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

• Advisory grounds—
  o ground (a) – (charges on or payments to the Scottish Consolidated Fund);
  o ground (b) – (made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts);
  o ground (g) – (unusual or unexpected use of the powers conferred by the parent statute); and
  o ground (j) – (non-compliance with laying requirements), where the Committee is satisfied with the reasons given for non-compliance.

15. “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 legitimacy; and “advisory grounds” relate to matters which the Committee wishes to draw to the attention of the Parliament or lead committee, but do not concern the competence or clarity of the instrument.

16. This approach has allowed the Government, lead committees, stakeholders and the public more generally to understand the extent of the Committee’s concerns and respond accordingly.

17. The Committee encourages its successor committee to retain a hierarchy of reporting grounds.

18. The number of instruments the Committee has reported under these various grounds has fluctuated over the course of the session.
19. The tables below set out how the numbers of instruments reported this session peaked in 2014/15 before reducing in the last year of the session. They also note that the last year of the session has represented a session low in numerical and percentage terms for instruments reported.

![Graph showing numbers of instruments reported by year]

- 2011-12: 212 Scottish Government SSIs laid, 30 LPPO SSIs laid
- 2012-13: 262 Scottish Government SSIs laid, 22 LPPO SSIs laid
- 2013-14: 237 Scottish Government SSIs laid, 22 LPPO SSIs laid
- 2014-15: 334 Scottish Government SSIs laid, 19 LPPO SSIs laid
- 2015-16: 301 Scottish Government SSIs laid, 22 LPPO SSIs laid

20. It is pleasing to note the reduction in the number and percentage of Scottish Government instruments reported in the last year of the session. It should be noted that this reduction does not apply to the LPPO and the Committee encourages its successor committee to pay particular regard to the quality of drafting by the LPPO.
21. Moreover, there are some continuing concerns about drafting that the Committee encourages its successor committee to be mindful of.

22. Most concerning to the Committee are instruments reported under one of the significant grounds. The following graphic sets out the number of instruments reported under significant grounds during each year of the session—

- **2011-12**
  - 15 of the 44 instruments reported were done so under one of the significant grounds.
  - **equal to 34%**

- **2012-13**
  - 25 of the 46 instruments reported were done so under one of the significant grounds.
  - **equal to 54%**

- **2013-14**
  - 6 of the 38 instruments reported were done so under one of the significant grounds.
  - **equal to 16%**

- **2014-15**
  - 18 of the 56 instruments reported were done so under one of the significant grounds.
  - **equal to 32%**

- **2015-16**
  - 4 of the 38 instruments reported were done so under one of the significant grounds.
  - **equal to 10.5%**
23. The table demonstrates that as we reach the end of the session the percentage of instruments reported under significant grounds is at its lowest level at any point in the session. The table also demonstrates, however, the extent to which these figures have fluctuated over the course of the session and accordingly this Committee’s successor committee should be mindful of any increase in reports under these significant grounds.

Drafting errors

24. More often than not, however, the issues reported by the Committee do not question the legitimacy of the instrument, but instead concern drafting errors which can undermine the clarity of the instrument. In a small number of cases the Committee has considered instruments which have contained so many drafting errors that the operability of the instrument has been brought into question.

25. The Committee has encouraged the Scottish Government by a number of means to improve its quality assurance processes to avoid such drafting errors and the Committee suggests that its successor should continue to encourage the Scottish Government in such efforts.

Packages of instruments

26. Another issue of concern this session has been the management of packages of instruments implementing primary legislation. As the session has progressed, however, the quality of these packages has for the most part improved. This was achieved in part through the implementation of the following recommendations made by the Committee:

- planning for implementation should be undertaken at as early a juncture as possible;
- instruments which cross-refer to one another should be laid at the same time;
- there should be thorough checking of instruments to avoid errors; and
- policy notes should be clear and comprehensive.

27. With so many bills passed at the end of the session, it is likely that the Committee’s successor committee will have to consider a number of implementation packages very early in its existence. The Committee suggests that the above points should be taken into account when scrutinising such packages of instruments.
Transitional provisions within commencement orders

28. A further issue of concern to the Committee has been transitional provisions contained within commencement orders. These concerns arose out of two court judgments which identified fault in the transitional provisions and criticised both the drafting of them and the scrutiny applied to them.

29. In light of these issues the Committee obtained a commitment from the Scottish Government to provide policy notes to accompany such orders and to enable greater time for scrutiny by endeavouring to provide for a full 40 days between the made date and the commencement day.

30. The Committee suggests that its successor committee continue to apply close scrutiny to commencement orders containing transitional provisions. Moreover the Committee suggests that its successor committee should ensure the Scottish Government continues to meet its commitments in relation to such instruments.

Laying of instruments - timetabling

31. One persistent concern throughout previous sessions has been the tendency for there to be significant peaks in the laying of instruments in advance of periods of recess with even greater peaks arising in the last year of a session.

32. Laying so many instruments at one time undermines the ability of this Committee and the Parliament more generally to apply effective scrutiny to them all.

33. This is a matter that the Committee has pursued at length with the Scottish Government and accordingly it is pleasing to note that while peaks continue to arise they are not as extreme and there is clearly a concerted effort on the part of the Scottish Government to manage the laying of instruments in a more considered manner.

34. As evidence of this improvement the following chart reflects the significantly fewer number of instruments laid in the last year of this session as compared with the last year of last session.
35. Nonetheless, the Committee encourages its successor committee to continue to pay close attention to the volume of instruments being laid and to continue to encourage the Scottish Government to lay instruments in a managed way.

Commissions

36. In many cases where the Scottish Government or LPPO recognises that it has made an error in an instrument it makes a commitment to the Committee to rectify the error. Sometimes it commits to doing this immediately by way of an amending instrument and sometimes it commits to doing so when the next opportunity arises.

37. This session the Committee has monitored closely the extent to which the Scottish Government in particular has met these commitments. In a number of instances the Committee has found that these commitments have not been met as timeously as it would have hoped and there has been a disappointing increase in the number of outstanding commitments.
38. That said, the Committee appreciates that more recently the Scottish Government has been endeavouring to meet these commitments, particularly some of the more historic ones. Nonetheless, the Committee encourages its successor committee to pay close attention to the Scottish Government’s effectiveness in meeting commitments given to the Committee.

39. The Committee notes that around 20 commitments remain outstanding at the end of this session and considers that these should be pursued in the next session.

Withdrawal of instruments

40. An increasing trend towards the end of the session has been the frequency with which the Scottish Government has either withdrawn or revoked instruments. It has been particularly marked in relation to withdrawals.

41. The following graph illustrates how significant that increase in the number of withdrawals has been:

![Number of affirmative Scottish Government SSIs withdrawn, broken down by parliamentary year](chart)

42. These withdrawals have been largely undertaken to respond to questions and concerns raised by the Committee and on one hand this could be seen as a positive development, but from the Committee’s perspective it has also pointed to
ongoing concerns about the quality control processes within the Scottish Government.

43. The Committee encourages its successor committee to be aware of this trend and to maintain a close check on the quality of instruments laid.

**Scrubtin of delegated powers in primary legislation**

**Committee effectiveness**

44. This session the Committee has scrutinised delegated powers within 73 bills.

45. The Committee has sought to enhance the quality of scrutiny it applies to delegated powers within primary legislation. The Committee has used many methods to do so, but at the core of them all has been perseverance in pursuing matters of concern to the Committee.

46. This session the Committee has regularly taken evidence from Scottish Government bill teams at Stage 1 and also after Stage 2. The Committee has also frequently pursued matters independently of the work of the lead committee, corresponding with the Scottish Government to highlight persisting concerns. In a number of instances the Committee Convener has also contributed to Stage 1 debates to reflect the concerns of the Committee. Finally, the Committee has also lodged amendments in a couple of instances where it has been unable to persuade the Scottish Government of its arguments.

47. The methods adopted by the Committee have proved successful as the following charts illustrate:

![Bills passed during 2014-15 and 2015-16: % of Committee recommendations accepted](chart)

<table>
<thead>
<tr>
<th>Year</th>
<th>% of Committee recommendations accepted</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014-15</td>
<td>77%</td>
</tr>
<tr>
<td>2015-16</td>
<td>73%</td>
</tr>
</tbody>
</table>
48. While the Committee has only been recording this information for the past two years in that time the data indicates that the Committee has been successful in persuading the Scottish Government to accept a large proportion of its recommendations. This also highlights the positive working relationship that the Committee has developed with the Scottish Government and the regard in which the Committee’s views are held.

49. Given the successes the Committee has achieved in relation to primary legislation, the Committee encourages its successor to reflect on the approaches the Committee has taken to achieve these outcomes.

Framework bills

50. One feature of particular concern to the Committee as regards primary legislation has been the increasing frequency of so-called “framework bills”.

51. These are bills where the Parliament is being asked to confer certain wide-ranging powers on the Scottish Ministers in circumstances where the Scottish Government has not informed the Parliament in sufficient detail of its plans for using those powers or of the reasons for taking a particular approach to the framing of certain powers. In most instances they are also bills where it appears that the policy is still to be fully developed.

52. As this session has progressed the frequency with which such bills have been introduced has increased. This appears to have coincided with a reduced time available for policy development.

53. The Committee is of the view that delegated powers should not be taken simply to give the Scottish Ministers flexibility because the policy has not been fully developed in order to put more specific provisions on the face of the Bill.
54. The Committee considers that there is a clear need for delegated powers to be fully explained, their terms appropriately framed and their scope clearly delineated.

55. The Scottish Government has advised the Committee that it sees there is a place for such bills.

56. The Committee encourages its successor to be particularly watchful for such bills and to discourage the Parliament from agreeing to delegate powers in circumstances where it does not seem appropriate.

57. It is likely that instruments will be laid under powers within these framework bills early in the new session.

58. The Committee encourages its successor committee to apply careful scrutiny when considering instruments arising out of these bills. The Committee also suggests to its successor committee that it may wish to take an overview of the quality of secondary legislation arising out of such bills.

Ancillary powers

59. The Committee has expressed concern about the inconsistency in the drafting of ancillary powers. This concern has arisen in relation to a number of bills. Where the effect of the ancillary powers is intended to be the same, the Committee has been of the view that there should be consistency in drafting. The Committee highlighted this matter to the Scottish Government on a number of occasions and understands that the Government is considering it.

60. The Committee suggests that its successor committee may wish to continue to pursue these concerns about the drafting of ancillary powers with the Government.

Gaps between Stages 2 and 3

61. An ongoing concern to the Committee this session has been the limited time available to it to scrutinise delegated powers within bills between Stages 2 and 3. The Committee wants to be in a position to consider delegated powers within bills after Stage 2 in sufficient time before Stage 3 to enable it to take appropriate action if necessary. The Committee also needs to have sufficient information within the Supplementary Delegated Powers Memorandum or the Revised Delegated Powers Memorandum to consider the Bill. On a number of occasions the Committee found itself lacking the time and information to enable it to make informed decisions.
62. The Committee encourages its successor committee to press the Scottish Government to give it sufficient time and information to enable it to make informed decisions about bills after Stage 2.

Annual reporting process

63. Last session the Committee produced an annual report of the instruments considered and reported upon. This session the Committee has developed that report into an annual review of the work of the Committee. This includes the statistical information at the core of the previous reports, but the report now also interrogates those figures and highlights areas of particular concern to the Committee. The report also identifies trends and concerns about delegated powers within primary legislation. The Committee has directed this report to the Minister for Parliamentary Business who has thereafter given evidence to the Committee on the issues arising out of the report.

64. In order to inform the annual report, the Committee has also produced quarterly statistical reports, enabling the Committee to identify issues as they arise.

65. The Committee has found the quarterly reports, the annual report and the associated evidence session with the Minister for Parliamentary Business to be an effective means of holding the Scottish Government to account and believes it has contributed to an improvement in the quality of legislation.

66. The Committee encourages its successor committee to retain the practice of producing both an annual report and quarterly reports.

Improving public awareness

67. Many very significant matters are provided for in secondary legislation.

68. Accordingly this session the Committee has sought to develop public understanding and awareness of secondary legislation. This has taken the form of videos, infographics and improved guidance for the website.

69. The Committee also held its first engagement event on secondary legislation, which was well received by those who attended. This was targeted at groups who have an interest in and regularly engage with secondary legislation.
70. The Committee’s engagement work has not been limited to secondary legislation and the Committee also produced videos to explain to stakeholders and the public more generally about consolidation bills and Scottish Law Commission bills and the Committee’s role in relation to them. A screenshot from the consolidation bill video can be found below.
71. The Committee encourages its successor committee to persist with these efforts. More informed stakeholders can only help to improve the quality of scrutiny applied to secondary legislation.

Role and remit of the Committee

72. The role of the Committee has changed significantly over the course of this session. Indeed, after three sessions of being known as the Subordinate Legislation Committee, in 2013 the Committee’s name was changed to the Delegated Powers and Law Reform Committee to more accurately reflect the work it undertakes.

73. The Committee’s role has developed to encompass consideration of certain Scottish Law Commission bills and consolidation bills.

74. Irrespective, however, of what the Committee has been considering, throughout this session the Committee has seen its primary role as holding the Scottish Government to account. The Committee has applied rigorous scrutiny to all legislation passing before it, endeavouring to ensure that the Parliament is passing legislation that is operable, accessible and fit for purpose. In doing so, the Committee has acted with thoroughness and with a sense of cross-party unanimity on which the Committee prides itself.

75. The Committee encourages its successor committee to apply high standards of care when considering legislation. The primary purpose of a Parliament is to legislate and this Committee has a critical role in ensuring the quality of that legislation. In its endeavours the Committee has greatly benefited from the willingness of members from all parties to work together to hold the Government to account.

Committee remit

76. The Committee’s remit has grown this session to encompass the consideration of consolidation bills and certain Scottish Law Commission bills.

77. Scottish Law Commission bills are bills emanating from Scottish Law Commission reports which meet the following criteria, as determined by the Presiding Officer—

(a) where there is a wide degree of consensus amongst key stakeholders about the need for reform and the approach recommended;

(b) which does not relate directly to criminal law reform;

(c) which does not have significant financial implications;
(d) which does not have significant European Convention on Human Rights implications; and

(e) where the Scottish Government is not planning wider work in that particular subject area.¹

78. The Committee gained these additional responsibilities on the basis that they were in keeping with the Committee’s existing responsibilities.

79. In the course of the session the Committee considered two Scottish Law Commission bills and one consolidation bill. All three pieces of legislation were largely consistent with the Committee’s pre-existing work.

80. This expansion of the Committee’s role obviously impacted significantly on the Committee. The Committee’s work has for the most part continued to be of a technical nature, but the Committee has become undeniably busier. Prior to this session the Committee’s predecessor committees had in total considered one bill as lead committee. This session alone the Committee considered three bills as lead committee.

81. Nonetheless, the Committee was able to apply effective scrutiny to these bills without having a detrimental effect on its other existing work.

82. The Committee has welcomed these additions to its remit and considers that there is scope for the remit of its successor committee to expand further to encompass other legislation of a similar technical nature.

83. For example, the Committee believes that there may be merit in its successor committee being able to consider a wider scope of Scottish Law Commission bills. There remain challenges in terms of the parliamentary time available to consider such bills and accordingly widening the remit of the Committee might improve the implementation rate of Scottish Law Commission reports.

84. The Committee believes, however, that there should continue to be some limits on the type of Scottish Law Commission bills than can be referred to the Committee. For example, the Committee does not suggest that the remit should be broadened to encompass bills directly relating to criminal law or which have significant financial implications.

85. However, the Committee suggests that a future committee could consider bills on which there was not consensus amongst stakeholders. That said, the Committee would not want to see bills referred to a successor committee which were of a politically divisive nature and which might jeopardise the effective cross-party working that has been intrinsic to the work of this Committee.

86. Both of the Scottish Law Commission bills considered by the Committee could be considered to cover matters of “private law” that is to say, matters which deal with law that affects relationships between individuals rather than between persons
and the state. It would seem that some matters of a similar nature may also be appropriate for a successor committee to consider, although in some cases the policy significance of such matters may mean that they are more appropriately considered by a policy committee.

87. The Committee also suggests that its core role should continue to be the scrutiny of SSIs and delegated powers within primary legislation and any additions to its remit should not be to the cost of this core work.

88. That said, the Committee would argue against any move toward reverting to a more limited remit for the successor committee. The Committee has proved capable of doing this work in addition to its core work and the Parliament has benefited from the additional capacity created by the Committee’s enhanced remit.

Committee size and membership

89. The size of the Committee’s membership has been reduced this session from seven to five.

90. With a reduced membership combined with an expansion in remit, there was an increased burden upon the Committee.

91. The Committee considers, however, that this reduction in size did not undermine its ability to perform its role.

92. The Committee believes that a successor committee can continue to work effectively, even with only five members.

93. However, for a successor committee to work effectively with an increasing remit and a reduced membership, the Committee suggests that careful consideration be given to identifying members with an appropriate level of experience, skills and interest in applying detailed and technical scrutiny to legislation.

Recommendations

94. The Committee encourages its successor committee to note the above suggestions as it develops its working practices and considers what its role should be.

95. The Committee also draws those recommendations on the membership and remit of the Committee to the attention of business managers as they establish committees at the beginning of the session.