

Delegated Powers and Law Reform Committee

Instruments considered by the Committee during the first quarter of the Parliamentary Year 2021-21

Summary

1. There was a reduction in the number of instruments considered in Quarter 1 of 2021-22 compared with that of the previous Quarter (**97** and **147** respectively). This is due to Quarter 1 only covering 5 meetings due to the Committee being established in late June which was quickly followed by the summer recess period.
2. The number of made affirmative instruments rose from **31** in the last quarter to **37** in this reporting period, an increase of **19%**. These instruments were laid in response to COVID19.
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. In relation to the seriousness of the reporting grounds, no instruments engaged serious grounds, which is the same result as the previous quarter.
5. This quarter saw a significant decrease in the number of instruments being reported under reporting ground **(j)** – breaching of laying requirements, falling from **9** to **3**. One of these instruments was a COVID-19 related negative instrument which breached the 28-day rule. The Committee was content in this case. The Committee was however not satisfied with the reasons given for breach of laying requirements for two instruments referred to the Health, Sport and Social Care Committee.¹
6. The Committee identified **9** Scottish Government instruments in which minor points were raised.
7. During this period, the Committee considered **one** Bill at Stage 1 and **three** 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 first quarter of the parliamentary year 2021-22 during the period 13 May to 22 September 2021.

¹ National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No. 2) Amendment Regulations 2021 (SSI 2021/241); and Milk and Healthy Snack Scheme (Scotland) Amendment (No. 2) Regulations 2021 (SSI 2021/274). Both reported at the Committee's meeting of 31 August

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 13 May to 22 September 2021, a total of **97** instruments were considered by the Committee; **93** were laid by the Scottish Government and **four** by the LPPO.

13. In relation to the 93 SSIs laid by the Scottish Government, these are broken down as follows—

- 19 affirmative instruments;
- 37 made affirmative instruments;
- 24 negative instruments; and
- 13 laid only instruments

14. At both the close of Session 5 and following the election on 6 May, a number of SSIs were laid by the Scottish Government which were unable to be considered by the Committee at its first meeting on 22 June. This was because the SSIs had either already been approved in the Chamber (as was the case with made affirmatives) or were subject to the negative procedure and the 40 days available for parliamentary scrutiny had elapsed. The Committee's legal advisers nevertheless looked at all such instruments in case the Committee had been in a position to meet earlier and wrote to Scottish Government officials on four of these instruments.

15. The number of made affirmative instruments rose from **31** in the last quarter to **37** in this reporting period, an increase of **19%**. These were laid in response to COVID-19.

16. The four instruments laid by the LPPO were laid only instruments.

17. 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	%	Total SSIs	Total drawn to the Parliament's attention	%
Total	93	6 (10)¹	6 (11)²	4	0	0

18. These figures show that the Committee considered **93** instruments laid by the Scottish Government, of which **6** were drawn to the Parliament's attention (disregarding two of the instruments reported under reporting ground (j)), which equates to almost **5%** of instruments considered.

19. This is in comparison to the previous Quarter of the parliamentary year 2020-21, when the Committee considered **147** instruments laid by the Scottish Government. The Parliament's attention was drawn to **15** of these instruments (disregarding the six instruments reported under reporting ground (j)), which equates to **10%** of instruments considered.

Withdrawal of instruments

20. No instruments were withdrawn in this period.

Reporting grounds

22. 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.

Reporting grounds: significant

23. 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.

¹ (3) instruments reported under reporting ground (j) for breaching laying requirements of which the Committee was content, so these are excluded from the headline figure. ² Figure inclusive of 3 instruments reported under reporting ground (j)

24. 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.
25. 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	0
(j) failure to comply with laying requirements	3	0
(g) the way the enabling powers have been used is unusual or unexpected	2	0
(h) the form or meaning of the SSI could be clearer	1 ¹	0

26. The number of instruments being reported for Quarter 1 2021-22 are lower on the numbers recorded at the end of the last reporting period. Two instruments were reported under two grounds.
27. For two of the three instruments reported under reporting ground (j), the Committee was not satisfied with the explanations given by the Scottish Government with regard to the reasons for the breach of laying requirements.
28. During the previous quarter, two instruments engaged in the more serious reporting grounds.

Instruments referred to Lead Committees

Summary

29. During Quarter 1, the COVID-19 Committee had the largest number of Scottish Government instruments referred to them, considering **40** in total. One instrument was reported for breaching laying requirements, one was reported under the general reporting ground and one was reported under both the general and meaning could be clearer grounds.

¹ The Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 (SSI 2021/277) was reported under both the general reporting ground and reporting ground (h).

Local Government, Housing and Planning Committee

30. The Local Government, Housing and Planning Committee received **11** instruments, none of which were drawn to the attention of the Parliament.

Criminal Justice Committee

31. The Criminal Justice Committee received eight instruments, none of which were drawn to the attention of the Parliament.

Social Justice and Social Security Committee

32. The Social Justice and Social Security Committee received seven instruments, one of which was drawn to the attention of the Parliament under the general reporting ground.

Education, Children and Young People Committee

33. The Education, Children and Young People Committee received six instruments, none of which were drawn to the attention of the Parliament.

Rural Affairs, Islands and Natural Environment Committee

34. The Rural Affairs, Islands and Natural Environment Committee received six instruments, none of which were drawn to the attention of the Parliament.

Health, Social Care and Sport Committee

35. The Health, Social Care and Sport Committee received five instruments, two of which were drawn to the attention of the Parliament under reporting ground (j).

Standards, Procedures and Public Appointments Committee

36. The Standards, Procedures and Public Appointments Committee received five instruments, one of which was reported under reporting ground (g).

Equalities, Human Rights and Civil Justice Committee

37. The Equalities, Human Rights and Civil Justice Committee received five instruments, one of which was reported under two reporting grounds (g) and (h).

Net Zero, Energy and Transport

38. The Net Zero, Energy and Transport Committee received three instruments, 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		LPPO	
	Total SSIs	Total reported	Total SSIs	Total reported
COVID 19-Recovery	40	3	0	0
Local Government, Housing and Planning	11	0	0	0
Criminal Justice	6	0	2	0
Social Justice and Social Security	7	1	0	0
Education, Children and Young People	6	0	0	0
Rural Affairs, Islands and Natural Environment	6	0	0	0
Health, Social Care and Sport	5	2	0	0
Standards, Procedures and Public Appointments	5	1	0	0
Equalities, Human Rights and Civil Justice	3	1	2	0
Net Zero, Energy and Transport	3	0	0	0
Parliament	1	0	0	0
TOTAL	93	8	4	0

Scottish Statutory Instruments - General

Commitments

Scottish Government instruments

41. The following amended 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—

- Health Protection (Coronavirus) (International Travel etc.) (Miscellaneous Amendments) (Scotland) (No. 7) Regulations 2021 (SSI 2021/278)

Corrected errors identified in the Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 15) Regulations 2021 (SSI 2021/275).

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

LPPO instruments

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

Minor Points

43. The Committee identified a total of 9 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

44. 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

45. The Committee published one report on the following Bill at Stage 1—

- [Carer's Allowance Supplement \(Scotland\) Bill](#)

Legislative Consent Memorandums (LCMs)

46. Three LCMs were considered during this reporting period—

- [Environment Bill \(UK Parliament legislation\)](#)
- [Social Security \(Up-rating of Benefits\) Bill](#)
- [Professional Qualifications Bill](#)

Annex A – Reporting grounds: 13 May to 22 September 2021

General

- Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 (SSI 2021/277) **COVID-19 Recovery Committee**
- Health Protection (Coronavirus) (International Travel) (Scotland) Amendment (No. 17) Regulations 2021 (SSI 2021/301) **COVID-19 Recovery Committee**
- Council Tax Reduction (Scotland) Regulations 2021 (SSI 2021/249) **Social Justice and Social Security Committee**

(j) - failure to comply with laying requirements

- Coronavirus (Scotland) Act 2020 (Early Expiry of Provisions) (No. 2) Regulations 2021 (SSI 2021/236) **COVID-19 Recovery Committee**
- National Health Service (Travelling Expenses and Remission of Charges) (Scotland) (No. 2) Amendment Regulations 2021 (SSI 2021/241) **Health, Sport and Social Care Committee**
- Milk and Healthy Snack Scheme (Scotland) Amendment (No. 2) Regulations 2021 (SSI 2021/274) **Health, Sport and Social Care Committee**

(g) - the way the enabling powers have been used is unusual or unexpected

- Age of Criminal Responsibility (Scotland) Act 2019 (Register of Child Interview Rights Practitioners) Regulations 2021 (SSI 2021/233) **Equalities, Human Rights and Civil Justice Committee**
- Local Electoral Administration and Registration Services (Scotland) Act 2006 (Commencement No. 6 and Transitional Provision) Order 2021 (SSI 2021/314 (C. 21)) **Standards, Procedures and Public Appointments Committee**

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

- Health Protection (Coronavirus) (Requirements) (Scotland) Regulations 2021 (SSI 2021/277) **COVID-19 Recovery Committee**

Outstanding Scottish Government commitments from this quarter

There is one outstanding commitment from this quarter.

- Council Tax Reduction (Scotland) Regulations 2021 (SSI 2021/249) [**2nd Report, 2021. Published 2 September 2021**] *lay amending instrument before the Regulations come into force on 1 April 2022.*

Annex B – Historic Commitments Scottish Government

- [Education \(Listed Bodies\) \(Scotland\) Order 2018](#) (SSI 2018/7) *to be corrected in the next amending instrument*
- [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 \(Fees and Student Support\) \(Miscellaneous Amendments\) \(EU Exit\) \(Scotland\) Regulations 2019](#) (SSI 2019/70) [**12th Report, 2019. Published 12/03/2019**] *commitment to correct when next legislating in student support*
- [Education \(Fees and Student Support\) \(EU Exit\) \(Scotland\) \(Amendment\) Regulations 2021](#) (SSI 2021/ 28) [6th Report 2021, published 10/02/21] *Commitment to amend at next available opportunity*