

# Delegated Powers and Law Reform Committee

## Instruments considered by the Committee during the second quarter of the Parliamentary Year 2021-22

### Summary

1. This reporting period covers **23 September to 8 December 2021**.
2. There was a slight decrease of instruments considered in Quarter 2 of 2021-22 compared to Quarter 1 (83 and 97 respectively). This attributes to an overall decrease of **14%**.
3. The number of made affirmative instruments decreased from **24** in the last quarter to **14** in this reporting period, a decrease of **58%**.
4. In terms of the number of instruments being reported, results for this quarter are higher than the last; **16%** of instruments being reported by the Committee compared to **8%** 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 **11%** and **7%** respectively.
5. Two instruments engaged in significant reporting grounds. In both cases the Scottish Government committed to rectify the errors. In the previous quarter no 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 **5** compared with **3** in the previous quarter.
7. The Committee identified **9** Scottish Government instruments in which minor points were raised, which is the same figure as last quarter.
8. During this period, the Committee considered **4** Bills at Stage 1 and **4** 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 second quarter of the parliamentary year 2021-22 during the period **23 September to 8 December 2021**.
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 23 September to 8 December 2021, a total of **83** instruments were considered by the Committee; **80** were laid by the Scottish Government and **3** by the LPPO.
13. In relation to the **80** SSIs laid by the Scottish Government, these are broken down as follows—
  - **14** made affirmative instruments;
  - **21** affirmative instruments;
  - **32** negative instruments; and
  - **13** laid only instruments.
14. The number of made affirmative instruments decreased from **24** in the last quarter to **14** in this reporting period, a decrease of **58%**. These were laid in response to COVID-19.
15. The **3** 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
<b>80</b>	<b>13</b> reported	<b>16%</b>	<b>3</b>	<b>0</b>	<b>0%</b>
	<b>9</b> excluding breaches of the 28-day rule	<b>11%</b>			

17. These figures show that the Committee considered **80** instruments laid by the Scottish Government, of which **13** were drawn to the Parliament's attention. While this overall figure equates to just over **16%** of instruments considered, **5** of the instruments were reported under reporting ground **(j)** for breaching the 28-day rule. Of these **5**, the Committee was content with the explanations for **4** of the breaches. If you exclude these **4** from the total figure, the Committee reported **9** instruments, equating to **11%** of the instruments considered.
18. This is in comparison to the previous quarter of the parliamentary year 2021-22, when the Committee considered **93** instruments laid by the Scottish Government. The Parliament's attention was drawn to **8** (just over **8%**) of these instruments, although **1** 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, **7** were reported which equates to just over **7%** of instruments considered.

## Reporting grounds

19. 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*

20. 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.
21. 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.
22. 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
<b>General</b> ground	<b>2</b>	<b>0</b>
<b>(j)</b> failure to comply with laying requirements	<b>5</b>	<b>0</b>
<b>(g)</b> the way the enabling powers have been used is unusual or unexpected	<b>1</b>	<b>0</b>
<b>(h)</b> the form or meaning of the SSI could be clearer	<b>3</b>	<b>0</b>
<b>(i)</b> drafting appears to be defective	<b>2</b>	<b>0</b>

23. Two instruments engaged in the more serious reporting grounds.
24. The first of these was the Social Security Administration and Tribunal Membership (Scotland) Act 2020 (Commencement No. 3) Regulations 2021 (SSI 2021/338 (C. 23)). Following a question from the Committee highlighting that Section 8 of the 2020 Act makes transitional provision in consequence of section 7 so should be brought into force at the same time, the Scottish Government acknowledged the oversight and quickly laid SSI 2021/352 (C. 26) to correct the error.
25. The second was the Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Amendment Regulations 2021 (SSI 2021/397). The instrument amended the Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Regulations 2003 in light of changes made to the Code of Conduct for Councillors and the Model Code of Conduct for Members of Devolved Public Bodies. The Committee highlighted to the

Scottish Government an error in regulation 2(2) of the instrument which substituted a new schedule into the 2003 Regulations. The Scottish Government agreed that there was an error and the Committee welcomed its commitment to lay an amending instrument to rectify it.

### **Withdrawal of instruments**

26. Three instruments were withdrawn and re-laid in this period:

- Civic Government (Scotland) Act 1982 (Licensing of Short-term Lets) Order 2022 (SSI 2021/Draft);
- Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Amendment Regulations 2021 (SSI 2021/Draft); and
- Plant Health (EU Exit) (Scotland) (Amendment) (No. 2) Regulations 2021 (SSI 2021/Draft).

27. No instruments were withdrawn and re-laid in the first quarter of the year.

### **Instruments referred to Lead Committees**

#### **Summary**

28. During Quarter 2, the **COVID-19 Committee** had the largest number of Scottish Government instruments referred to them, considering **17** in total. **2** instruments were reported in total, both under 'meaning of the SSI could be clearer'.

#### **Local Government, Housing and Planning Committee**

29. The Local Government, Housing and Planning Committee received **9** instruments. **2** instruments were reported for 'failure to comply with laying requirements' and 'drafting appears to be defective' respectively.

#### **Criminal Justice Committee**

30. The Criminal Justice Committee received **4** instruments and **1** was drawn to the attention of the Parliament under 'failure to comply with laying requirements.'

#### **Social Justice and Social Security Committee**

31. The Social Justice and Social Security Committee received **9** instruments. **3** instruments were reported, one under 'drafting appears to be defective', one under the 'general ground' while the third was 'failure to comply with laying requirements'.

#### **Education, Children and Young People Committee**

32. The Education, Children and Young People Committee received **6** instruments, none of which were drawn to the attention of the Parliament.

#### **Rural Affairs, Islands and Natural Environment Committee**

33. The Rural Affairs, Islands and Natural Environment Committee received **7** instruments. Of these, **2** were drawn to the attention of the Parliament, both under ‘failure to comply with laying requirements’.

### **Health, Social Care and Sport Committee**

34. The Health, Social Care and Sport Committee received **3** instruments, none of which were drawn to the attention of the Parliament.

### **Standards, Procedures and Public Appointments Committee**

35. The Standards, Procedures and Public Appointments Committee received **2** instruments, one of which was reported under reporting ground (g): ‘the way the enabling powers have been used is unusual or unexpected’.

### **Equalities, Human Rights and Civil Justice Committee**

36. The Equalities, Human Rights and Civil Justice Committee received **8** instruments, none of which were drawn to the attention of the Parliament.

### **Net Zero, Energy and Transport**

37. The Net Zero, Energy and Transport Committee received **10** instruments, one of which was reported under reporting ground (g): ‘the form or meaning of the SSI could be clearer’.

### **Economy and Fair Work Committee**

38. The Economy and Fair Work Committee received **4** instruments. **1** was drawn to the attention of the Parliament under the general reporting ground.

### **Finance and Public Administration Committee**

39. The Finance and Public Administration Committee received **1** instrument which was not drawn to the attention of the Parliament.
40. Information detailing specific SSIs and the grounds that they were reported on, is provided in **Annex A**.
41. 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	17	2	0	0
Local Government, Housing and Planning	9	2	0	0

<b>Criminal Justice</b>	4	1	2	0
<b>Social Justice and Social Security</b>	9	3	0	0
<b>Education, Children and Young People</b>	6	0	0	0
<b>Rural Affairs, Islands and Natural Environment</b>	7	2	0	0
<b>Health, Social Care and Sport</b>	3	0	0	0
<b>Standards, Procedures and Public Appointments</b>	2	1	0	0
<b>Equalities, Human Rights and Civil Justice</b>	8	0	0	0
<b>Net Zero, Energy and Transport</b>	10	1	0	0
<b>Economy and Fair Work</b>	4	1	1	0
<b>Finance and Public Administration</b>	1	0	0	0
<b>The Parliament</b>	0	0	0	0
<b>TOTAL</b>	<b>80</b>	<b>13</b>	<b>3</b>	<b>0</b>

## Scottish Statutory Instruments - General

### Commitments

#### *Scottish Government instruments*

42. The following 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—
- Budget (Scotland) Act 2021 Amendment Regulations 2021 (SSI 2021/Draft) *Corrected errors identified in the Budget (Scotland) Act 2021 Amendment Regulations 2021 (SSI 2021/Draft)*
  - Social Security Administration and Tribunal Membership (Scotland) Act 2020 (Commencement No. 4) Regulations 2021 (SSI 2021/338 (C. 23)) *Corrected errors identified in the Social Security Administration and Tribunal Membership (Scotland) Act 2020 (Commencement No. 3) Regulations 2021 (SSI 2021/338 (C. 23))*
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 **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

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 one report on the following Bill at Stage 1—
- [Transvaginal Mesh Removal \(Cost Reimbursement\) \(Scotland\) Bill](#)

### Legislative Consent Memorandums (LCMs)

48. Four LCMs were considered during this reporting period—
- [Police, Crime, Sentencing and Courts Bill \(UK Parliament legislation\)](#)
  - [Health and Care Bill \(UK Parliament legislation\)](#)
  - [Animal Welfare \(Kept Animals\) Bill \(UK Parliament legislation\)](#)
  - [Elections Bill \(UK Parliament legislation\)](#)

## Annex A – Reporting grounds: 23 September to 8 December 2021

## General

- Scottish Child Payment Regulations 2020 and the Disability Assistance for Children and Young People (Scotland) Regulations 2021 (Miscellaneous Amendments) Regulations 2022 (SSI 2021/Draft) **Social Justice and Social Security Committee**
- Public Procurement (Agreement on Government Procurement) (Thresholds etc.) (Amendment) (Scotland) Regulations 2021 (SSI 2021/378) **Economy and Fair Work Committee**

### (j) - failure to comply with laying requirements

- Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2021 (SSI 2021/466) **Criminal Justice Committee**
- Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Amendment (No. 2) Regulations 2021 (SSI 2021/438) **Local Government, Housing and Planning Committee**
- Private Storage Aid Scheme (Pigmeat) (Scotland) Regulations 2021 (SSI 2021/398) **Rural Affairs, Islands and Natural Environment Committee**
- Official Controls (Transitional Staging Period) (Miscellaneous Amendments) (Scotland) (No. 2) Regulations 2021 (SSI 2021/342) **Rural Affairs, Islands and Natural Environment Committee**
- Council Tax Reduction (Scotland) Amendment (No. 4) Regulations 2021 (SSI 2021/337) **Social Justice and Social Security Committee**

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

- 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) (International Travel and Operator Liability) (Scotland) Regulations 2021 (SSI 2021/322) **COVID-19 Recovery Committee**
- Health Protection (Coronavirus) (International Travel and Operator Liability) (Scotland) Amendment (No. 5) Regulations 2021 (SSI 2021/359) **COVID-19 Recovery Committee**
- Storage of Carbon Dioxide (Licensing etc.) (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/354) **Net Zero, Energy and Transport Committee**

### (i) - drafting appears to be defective

- Social Security Administration and Tribunal Membership (Scotland) Act 2020 (Commencement No. 3) Regulations 2021 (SSI 2021/338 (C.23)) **Social Justice and Social Security Committee**
- Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Amendment Regulations 2021 (SSI 2021/397) **Local Government, Housing and Planning 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) [**11<sup>th</sup> 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) [**6<sup>th</sup> 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) [**12<sup>th</sup> 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*