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Delegated Powers and Law Reform Committee

Subordinate Legislation considered by the Delegated Powers and Law Reform Committee on 27 October 2026

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Delegated Powers and Law Reform Committee

To consider and report on the following —
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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Introduction

1. At its meeting on 27 October 2026, the Committee considered the following instrument under its remit and agreed to draw it to the attention of the Parliament:

    - The Criminal Legal Assistance (Miscellaneous Amendment) (Scotland) Regulations 2026 (SSI 2026/267)

2. The Committee's recommendations in relation to this instrument are set out in the next section of this report.

3. The Committee also determined that, in terms of its remit, it did not need to draw the Parliament's attention to the instruments in the "No points raised" section of the report.

4. The Committee's observations in relation to the following are contained in the "No points raised" section of this report:

    - The Sale of Tobacco (Miscellaneous and Consequential Amendment) (Scotland) Regulations 2026 (SSI 2026/278); and

    - The re-laid draft Visitor Levy (Amendment of Returns and Miscellaneous Amendment) (Scotland) Regulations 2026.

Scrutiny of instruments under the Committee's remit: instrument drawn to the attention of the Parliament

The Criminal Legal Assistance (Miscellaneous Amendment) (Scotland) Regulations 2026 (SSI 2026/267)

5. The instrument amends the Advice and Assistance (Scotland) Regulations 1996, the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 and the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008.

6. Its principal purpose is to implement a 13% increase in two categories of legal aid fees which were unintentionally omitted from the fee increases made by the Legal Aid and Advice and Assistance (Fees) (Miscellaneous Amendment) (Scotland) Regulations 2026 (SSI 2026/144).

7. SSI 2026/144 was intended to apply a 13% increase across a range of criminal legal assistance fees. However, the fees in Parts 7 and 8 of Schedule 3 to the Advice and Assistance (Scotland) Regulations 1996 were inadvertently omitted. This instrument corrects that omission by applying the increase to those outstanding fees, thereby giving effect to the policy originally intended by SSI 2026/144. The increase applies retrospectively, meaning that work carried out on or after 1 September 2026 is to be paid at the higher rate.

8. The instrument also makes consequential technical amendments to the Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999 and the Criminal Legal Assistance (Fees and Information etc.) (Scotland) Regulations 2008 following changes made by the Criminal Legal Aid and Assistance by Way of Representation (Miscellaneous Amendment) (Scotland) Regulations 2026 (SSI 2026/107). These amendments provide for the apportionment of fees where there is a change of solicitor in summary criminal proceedings and are intended to ensure the provisions operate consistently in practice.

9. The general principle is that delegated legislation should not have retrospective effect unless Parliament has expressly authorised, or clearly intended to authorise, the exercise of the relevant power on a retrospective basis.

10. The Committee therefore asked the Scottish Government to explain its basis for making retrospective provision where the enabling power in the Legal Aid (Scotland) Act 1986 ("the 1986 Act") contains no express authority to legislate retrospectively.

11. In its response, the Scottish Government accepts that the 1986 Act contains no express power to make retrospective provision. It nevertheless maintains that regulation 3 is *intra vires*. Its position is that, in the absence of express statutory authority, the critical question is whether retrospective operation would produce unfairness or detriment to those affected.

12. According to the Scottish Government, the retrospective effect operates solely to the benefit of legal practitioners by enabling claims to be made at the uplifted rates

that were intended to apply from that date. The Scottish Government has also advised that the period of retrospectivity is limited and that, so far as it is aware, no fees have yet been claimed under the affected tables.

13. The lead committee for this instrument is the Equalities, Human Rights and Civil Justice Committee.

14. **The Committee draws this instrument to the attention of the Parliament under reporting ground (c) - that it purports to have retrospective effect where the parent statute confers no express authority so to provide.**

15. **The Committee also notes that it is unusual to make retrospective provision in the absence of express authority to do so, and draws the Scottish Government's reasons for considering such an approach necessary in the circumstances to the attention of the Equalities, Human Rights and Civil Justice Committee.**

No points raised

16. The Committee considered the following instruments under its remit, and agreed not to draw them to the attention of the Parliament.

Climate Action Committee

The Natural Environment (Scotland) Act 2026 (Commencement No. 2) Regulations 2026 (SSI 2026/275 (C. 30))

Education and Gaelic Committee

The draft Qualifications Scotland and His Majesty's Chief Inspector of Education in Scotland (Miscellaneous Listings) Regulations 2026

Health, Care and Sport Committee

The Sale of Tobacco (Miscellaneous and Consequential Amendment) (Scotland) Regulations 2026 (SSI 2026/278)

- In relation to this instrument, the Committee welcomes that this instrument fulfils a commitment made by the Scottish Government in relation to the Tobacco and Vapes Act 2026 (Consequential, Transitional and Saving Provisions) (Scotland) Regulations 2026 (SSI 2026 213), by amending the heading of regulation 7 of the Sale of Tobacco (Registration of Moveable Structures and Fixed Penalty Notices) (Scotland) Regulations 2011.

Rural Affairs Committee

The Scottish Land Commission (Number of Land Commissioners) Regulations 2026 (SSI 2026/284)

The Bluetongue (Scotland) Amendment Order 2026 (SSI 2026/281)

Social Justice, Housing and Local Government Committee

The re-laid draft Visitor Levy (Amendment of Returns and Miscellaneous Amendment) (Scotland) Regulations 2026

- In relation to this instrument, the Committee notes that the original draft of this instrument was withdrawn and the present version re-laid following questions raised by the Committee with the Scottish Government.

The Private Residential Tenancies (Prescribed Notices and Forms) (Scotland) Regulations 2026 (SSI 2026/279)

The Social Security (Amendment) (Scotland) Act 2025 (Commencement No. 3) Regulations 2026 (SSI 2026/274 (C. 29))

The Planning (Scotland) Act 2019 (Commencement No. 15) Regulations 2026 (SSI 2026/280 (C. 31))

