

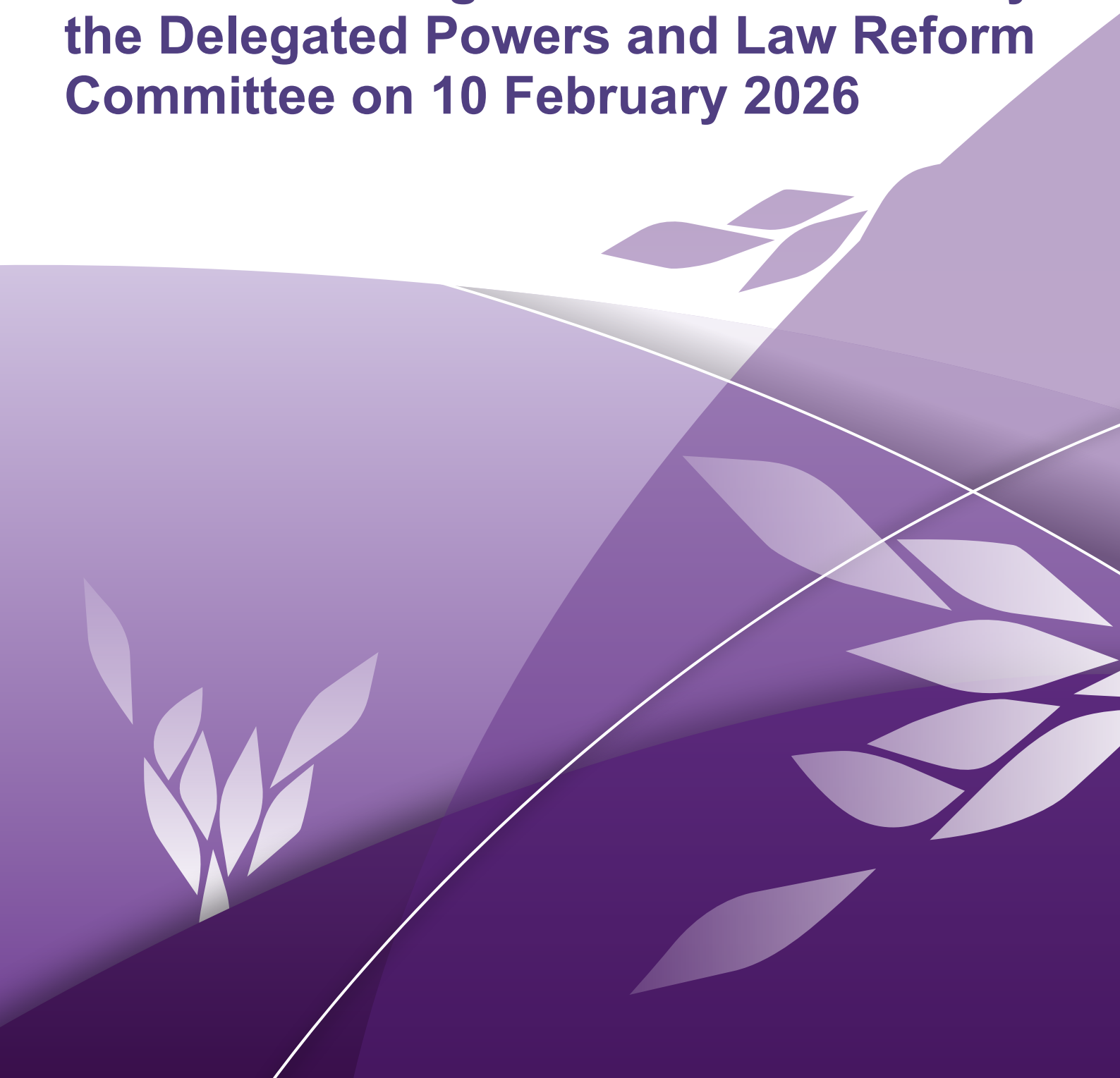


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Pàrlamaid na h-Alba

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Delegated Powers and Law Reform Committee

Subordinate Legislation considered by the Delegated Powers and Law Reform Committee on 10 February 2026



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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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Introduction

1. At its meeting on 10 February 2026ⁱ, the Committee considered the following instruments under its remit and agreed to draw them to the attention of the Parliament:
 - National Health Service (Functions of the Common Services Agency) (Miscellaneous Amendments) (Scotland) Order 2026 (SSI 2026/20)
 - Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Amendment Rules 2026 (SSI 2026/30)
2. The Committee's recommendations in relation to these instruments 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 also considered a proposed draft instrument subject to consultation. It noted several points in relation to this proposed draft instrument, as set out in the final section of the report considering it.

ⁱ Roz McCall MSP submitted apologies for this meeting, and Oliver Mundell MSP attended as her substitute.

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

National Health Service (Functions of the Common Services Agency) (Miscellaneous Amendments) (Scotland) Order 2026 (SSI 2026/20)

5. The instrument is made under powers in the [National Health Service \(Scotland\) Act 1978](#). It dissolves NHS Education for Scotland (“NES”) and transfers its functions, property, rights, liabilities and obligations to the Common Services Agency for the Scottish Health Service (“the Agency”). It also makes consequential and transitional provision.
6. The lead committee for this instrument is the Health, Social Care and Sport Committee. It is subject to the negative procedure and will come into force on 1 April 2026.
7. [The Committee asked the Scottish Government](#) about the consequential amendments and repeals that the instrument is making to primary legislation, and why the Scottish Government considers that the enabling powers permit this. The question was:

” The instrument is, amongst other things, making consequential amendments and repeals to primary legislation. Please can you explain what power is being relied upon to make these amendments and repeals and why it is considered that this is permitted by the enabling power.

Please confirm whether any corrective action is proposed, and if so, what action and when.

8. The Scottish Government response, in its entirety, was:

” We are relying on the power at section 105(7) of the National Health Service (Scotland) Act 1978 to make consequential provision to make the consequential amendments and repeals to primary legislation in Part 1 of the schedule of the National Health Service (Functions of the Common Services Agency) (Miscellaneous Amendments) (Scotland) Order 2026 (SSI 2026/20).

This is a permitted and well-established use of the power at section 105(7), as evidenced, for instance, by the reliance on it to make consequential amendments and repeals to primary legislation in Part 1 of schedule 2 of the Public Health Scotland Order 2019 (SSI 2019/336). The Delegated Powers and Law Reform Committee considered that instrument at its meeting on 19 November 2019 (and did not raise an issue with the use of the power for these purposes).

No corrective action is proposed.

9. Accordingly, the Scottish Government is relying solely on section [105\(7\)](#) of the 1978 Act, which provides general ancillary powers. That provision says:

” *Any power conferred by this Act to make regulations, orders or directions may be exercised—*

1. *either in relation to all cases to which the power extends, or in those cases subject to exceptions, or in relation to any specified cases or classes of case, and*
2. *subject to such other exceptions or conditions as the Secretary of State thinks fit,*

and shall include power to make such supplementary, incidental, consequential, transitory, transitional or saving provision as appears to the Secretary of State to be expedient.

Absence of express power

10. The Committee notes that the ability to amend primary legislation is generally explicitly stated in the enabling Act if that is the intention, and the ability to amend primary legislation through subordinate legislation is generally understood to be the exception rather than the rule. Powers to amend primary legislation also usually have a correspondingly higher level of scrutiny attached.
11. There is no express power to amend primary legislation in section 105(7).
12. The Committee considers that the response to its question does not assist as it fails to provide any reasoning as to why power to amend primary legislation should be “read in” to this general consequential power.
13. The Committee takes into account that section 105(7) is drafted in wide terms. More importantly, it takes into account that the use being made of it here is to make amendments which are genuinely minor and consequential to the transfer of functions from NES to the Agency. The effect is to make the Agency responsible, instead of NES, under legislation governing the conduct of public bodies, by replacing reference to NES with reference to the Agency.
14. The Committee also takes into account that other enabling powers exist, in other Acts, which would allow Ministers to make at least some of the amendments in question by subordinate legislation, albeit that some of those powers are subject to procedures higher than the negative procedure.

Previous SSI

15. The Scottish Government’s response gives one example of where this power has been used before to amend primary legislation: [SSI 2019/336](#), and highlights that the (Session 5) Delegated Powers and Law Reform Committee at that time did not draw that instrument to the attention of the Parliament in respect of the use of the consequential power.
16. The Committee disagrees, however, that this is evidence of permitted and well-established use of the power.
17. It appears that this power has been used in this way only once before, in the 2019 SSI mentioned in the response. The Committee has been unable to find any other

examples.

18. The other instruments that have been made under this power, as far as the Committee has been able to identify, make amendments and repeals to subordinate legislation only, or make amendments that are explicitly provided for in the other cited enabling powers.
19. **The Committee draws this instrument to the attention of the Parliament on reporting ground (g), on the basis that provisions in part 1 of the schedule have been made by what appears to be an unusual or unexpected use of the powers conferred by the parent statute, in the absence of an express power to amend primary legislation and in the absence of a fuller explanation from the Scottish Government.**
20. **The Committee highlights that:**
 - **It would have welcomed a fuller answer from the Scottish Government in response to its question;**
 - **Where a power being relied upon to amend primary legislation does not expressly permit this, the Committee will expect a full explanation from the Scottish Government of why it considers this use of the power to be within *vires*; and**
 - **The fact that a previous similar use was not reported by a delegated powers committee is not necessarily endorsement of that approach and does not prevent that committee, or any future committee, from raising the same issue on another instrument.**

Children's Hearings (Scotland) Act 2011 (Rules of Procedure in Children's Hearings) Amendment Rules 2026 (SSI 2026/30)

21. This instrument amends the [Children's Hearings \(Scotland\) Act 2011 \(Rules of Procedure in Children's Hearings\) Rules 2013. Section 34](#) of the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 introduced a duty on all tribunals and courts to refer any compatibility question to the relevant authorities: namely the Children and Young Persons Commissioner, the Scottish Human Rights Commission and the Lord Advocate. The amendments set out the procedure for raising a compatibility question, including how it should be intimated.
22. The lead committee for this instrument is the Education, Children and Young People Committee. The instrument is subject to the negative procedure and comes into force on 1 April 2026.
23. [The Committee asked the Scottish Government](#) why the amending provisions are not in the usual order: the instrument first inserts a new provision after rule 100 and then inserts a new provision after rule 93. The Scottish Government advised that this is due to a late drafting change.
24. The Scottish Government considers, and the Committee agrees, that this does not impact the operation of the amendments being made under the instrument.

25. **The Committee draws this instrument to the attention of the Parliament on the general reporting ground because the order in which the amending provisions appear in the instrument is not in line with standard drafting practice.**

No points raised

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

Criminal Justice Committee

Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Domestic Homicide and Suicide Reviews) (Scotland) Amendment Order 2026 (SSI 2026/Draft)

Police Service of Scotland (Vetting) Regulations 2026 (SSI 2026/46)

Education, Children and Young People Committee

Care Leaver Payment (Scotland) Regulations 2026 (SSI 2026/Draft)

- In relation to this instrument, the Committee welcomes that the Scottish Government will address the typographical error in regulation 11(2) (to change “responsible authority” to “relevant authority”) either by correction slip or at the next suitable legislative opportunity.

Qualifications Scotland (Strategic Advisory Council) (Establishment) Regulations 2026 (SSI 2026/36)

Equalities, Human Rights and Civil Justice Committee

Legal Aid and Advice and Assistance (Fees) (Miscellaneous Amendment) (Scotland) Regulations 2026 (SSI 2026/Draft)

- In relation to this instrument, the Committee welcomes that, through this instrument, the Scottish Government has, at the next suitable legislative opportunity, fulfilled a commitment made to the Committee in relation to the Draft Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2026, to correct the erroneous references in the Civil Legal Aid (Scotland) Regulations 2002, and the minor drafting point that instrument introduced in the Advice and Assistance (Assistance by Way of Representation) (Scotland) Regulations 2003.

Upper Tribunal for Scotland (Procedure Rules) (Miscellaneous Amendment) Regulations 2026 (SSI 2026/33)

First-tier Tribunal for Scotland (Procedure Rules) (Miscellaneous Amendment) Regulations 2026 (SSI 2026/34)

Mental Health Tribunal for Scotland (Practice and Procedure) (No. 2) Amendment Rules 2026 (SSI 2026/35)

Finance and Public Administration Committee

Scottish Aggregates Tax (Miscellaneous Amendment) Regulations 2026 (SSI 2026/Draft)

Health, Social Care and Sport Committee

Care Home Services (Visits to and by Care Home Residents) (Scotland) Regulations 2026 (SSI 2026/Draft)

- In relation to regulation 8 of this draft instrument, which imposes a statutory requirement on care home service providers to have regard to a Code of Practice in carrying out the duties imposed by the instrument:
 - given the importance of allowing time for affected service providers to prepare to comply with this new requirement, the Committee welcomes that the Scottish Government now intends to publish the Code of Practice in advance of the requirement coming into force; and
 - the Committee highlights to the lead committee, for its information, [its correspondence with the Scottish Government on this point](#).

National Health Service (General Medical Services Contracts and Primary Medical Services Section 17C Agreements) (Miscellaneous Amendment) (Scotland) Regulations 2026 (SSI 2026/37)

Local Government, Housing and Planning Committee

Private Housing Rent Control (Exempt Property) (Scotland) Regulations 2026 (SSI 2026/Draft)

Non-Domestic Rate (Scotland) Order 2026 (SSI 2026/39)

Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment Order 2026 (SSI 2026/44)

Net Zero, Energy and Transport Committee

National Bus Travel Concession Schemes (Miscellaneous Amendment) (Scotland) Order 2026 (SSI 2026/Re-laid Draft)

- In relation to this instrument, the Committee notes that the original draft of this instrument, which was laid on 4 December 2025, was withdrawn and the present version was re-laid to enable a draft Code to be provided to the lead committee to aid its scrutiny of the draft instrument.
- The Committee will note this context when reporting on this instrument in its next quarterly report (that the instrument was not withdrawn as a result of defects in the instrument or questions from this Committee).

Rural Affairs and Islands Committee

Marine Licensing (Exempted Activities) (Scottish Inshore Region) Amendment Order 2026 (SSI 2026/Draft)

Scottish Parliament (subject to agreement of [Bureau Motion S6M-20755](#))

Local Government Finance (Scotland) Order 2026 (SSI 2026/Draft)

Social Justice and Social Security Committee

Social Security (Up-rating) (Miscellaneous Amendments) (Scotland) Regulations
2026 (SSI 2026/Draft)

- The Committee welcomes that this instrument fulfils a commitment by the Scottish Government to correct an error in the Carer's Assistance (Miscellaneous and Consequential Amendments, Revocation, Transitional and Saving Provisions) (Scotland) Regulations 2025.

Proposed Draft Instrument

Health, Social Care and Sport Committee

27. Proposed Draft Order: The Mental Health (Care and Treatment) (Scotland) Act 2003 Remedial Order 2026 (SG/2026/33).

In relation to this proposed draft instrument, the Committee agreed to note that:

- the proposed order appears capable of remedying the incompatibility with Convention rights identified in *X v Mental Health Tribunal for Scotland*;
- the proposed order goes beyond addressing the specific incompatibility identified by the Court, which concerned recorded matters in the context of Compulsion Orders, by extending the recorded matters framework to other types of forensic orders, but that this is permitted by the scope of the power in section 12 of the Convention Rights (Compliance) (Scotland) 2001 Act;
- full technical scrutiny of the instrument will be carried out by the Committee when the finalised draft order is laid under the affirmative procedure; and
- the incompatibility was identified in October 2022, and that the proposed order is not expected to come into force until November 2026. The incompatibility is capable of affecting not only the individual petitioner in the case of *X*, but others in an analogous position, namely persons subject to forensic (as opposed to civil) mental health orders, who are currently unable to have recorded matters specified. It is unclear how many persons may have been (and may continue to be) detrimentally affected during this period. It draws this point to the attention of the lead committee on this draft order.

