

DELEGATED POWERS AND LAW REFORM COMMITTEE

Instruments considered by the Committee during the fourth quarter of the parliamentary year 2018-19

QUARTER 4 - INTRODUCTION

1. The purpose of this report is to provide a record of the Committee's scrutiny of Scottish statutory instruments (SSIs) during the fourth quarter of the parliamentary year 2018-19. The 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](#). It also 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. In addition, the report briefly outlines the Committee's activity in respect of other matters within its remit.
2. This is the fourth and final quarterly report of the parliamentary year. It is intended to be more statistical than analytical and along with the previous quarterly reports will help inform the Committee's annual report which goes in to more detail on the work carried out by the Committee during the parliamentary year.
3. This particular report deals with SSIs considered by the Committee during the period 26 February to 8 May 2019.
4. The report also touches briefly on the general work of the Committee during this quarter.

Overview and Analysis

5. During the period 26 February to 8 May 2019, a total of 83 instruments were considered by the Committee. Of these, 71 instruments were laid by the Scottish Government and 12 instruments were laid by the LPPO.
6. The 71 SSIs laid by the Scottish Government can be broken down as follows—
 - 16 affirmative instruments;¹
 - 49 negative instruments;
 - 6 laid only instruments;
7. Of the 12 SSI laid by the LPPO, 2 were negative and the rest were laid only instruments.

¹ This figure includes the Scottish Landfill Tax (Standard Rate and Lower Rate) Order 2019 (SSI 2019/58) which was subject to the provisional affirmative procedure.

Table 1: Instruments considered by the DPLR Committee during the period 26 February to 8 May 2019 reported on by the Committee

	Scottish Government			LPPO		
	Total SSIs	Total drawn to the Parliament's attention	%	Total SSIs	Total drawn to the Parliament's attention	%
Total	71	15 (22) ²	c.21% (31%)	12	1	c. 8%

8. Table 1 shows that 71 instruments laid by the Scottish Government were considered by the Committee during the fourth quarter of the current parliamentary year with the Parliament's attention drawn to 22 of these instruments which was around 31% of those considered.

9. 56 instruments laid by the Scottish Government were considered by the Committee during the third quarter of the current parliamentary year with the Parliament's attention drawn to 4 of these instruments which was, likewise, around 7% of those considered.

10. **The results for this fourth quarter show an increase in terms of the percentage of instruments reported by the Committee. However, a greater number of instruments were considered this quarter compared to last.**

11. **The Committee was content with 12 instruments laid by the LPPO this quarter with only 1 being reported.**

12. **ANNEX C** comprises graphics showing trends and comparisons between this reporting period and previous reports.

Withdrawal of instruments

13. The following draft affirmative instruments were withdrawn by the Scottish Government during this period—

- Forestry (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft] [draft];
- Plant Health (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft] [draft];
- Private Housing (Tenancies) (Scotland) Act 2016 (Modification of Schedule 1) Regulations 2019

² The higher figure in brackets here and throughout the report includes those instruments that were reported under reporting ground (j) for breaching laying requirements. In each case, the Committee found the reason given by the Scottish Government for the breach to be acceptable so these instruments are excluded from the headline figure

Reporting grounds

14. Under Rule 6.11.1(a) 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

15. The Committee considers some reporting grounds to be of more significance than others. The Committee has therefore determined that it has particular 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.

16. These 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.

17. The following table details the instruments reported on broken down by reporting ground:

**Table 2: Instruments reported on broken down by ground
(No SSIs were reported on under grounds other than those listed below)**

Reporting Ground	Number of SSIs reported	
	Scottish Government	LPPO
General ground	10	0
(h) meaning could be clearer	2	0
(i) the drafting of the SSI is defective-it fails to operate properly	2	0
(h) and General	1	0
(j) meaning failure to comply with laying requirements	7	0
(i) and General	0	1

18. Last quarter, no instruments engaged any of the more serious reporting grounds. However, this quarter, 3 instruments were reported under the serious reporting grounds. In each case, the SSIs were reported under reporting ground (i), the drafting appears to be defective.

Subject committees

19. The following table provides a breakdown of the instruments referred to, and reported on, by subject committee.

Table 3: Instruments reported on, broken down by subject committee

Committee	Scottish Government		LPPO	
	Total SSIs	Total reported	Total SSIs	Total reported
Local Government and Communities	11	3		
Justice	5	0	12	1
Rural Economy and Connectivity	26	11		
Health and Sport	9	2		
Environment, Climate Change and Land Reform	11	3		
Economy, Energy and Fair Work	2	1		
Finance and Constitution	2	0		
Education and Skills	3	2		
Social Security	2	0		
TOTAL	71	22	12	1

Summary: subject committees

Environment, Climate Change and Land Reform (ECCLR) Committee

20. One instrument referred to the ECCLR Committee was drawn to the attention of the Parliament under the **(j)** reporting ground (SSI 2019/84). The Committee was content with the reason for non-compliance. Two instruments were reported under the **general** reporting ground (SSI 2019/26 and SSI 2019/draft relating to the Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2019 [draft]). The Scottish Government gave a commitment to correct the errors in SSI 2019/26 by way of correction slip. The other instrument was reported as it contained minor drafting errors. The Committee noted that action was not necessary at that time to correct the error but if, in the future, this Order required to be amended then the Scottish Government should undertake to do the work at that point.

Health and Sport Committee

21. Two instruments referred to the Health and Sport Committee were drawn to the attention of the Parliament under the **general** ground (SSI 2019/32 and SSI 2019/Draft relating to Draft Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft]) ground for failing to follow proper drafting practice. The Committee recommended for the first instrument that the Scottish Government correct the error at the next legislative opportunity. For the second instrument, the Committee called on the Scottish Government to correct.

Local Government and Communities Committee

22. Three instruments referred to the Local Government Committee were drawn to the attention of the Parliament. One was reported under reporting ground **(h)** (SSI 2019/80) in that its meaning could be clearer. As the drafting issues were minor, the Committee was content with the Scottish Government's assurance that it intended to bring forward an amending instrument. One instrument was reported under the **general** (SSI 2019/45) reporting ground and the commitment to amend was met by the laying of instrument SSI 2019/77. The final instrument was reported on reporting ground **(j)** (SSI 2019/116) as the Regulations failed to comply with the requirements of section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. The Committee found the failure to comply with section 28 to be acceptable in the circumstances.

Rural Economy and Connectivity (REC) Committee

Eleven instruments referred to the Rural Economy and Connectivity Committee were drawn to the attention of Parliament. Three instruments were reported on the **general** ground (SSI 2019/47 (C.1)), (SSI 2019/49) and (SSI 2019/118), again for failing to conform to proper drafting practice. The Scottish Government gave a commitment to correct two of the instruments at the earliest opportunity and did not consider corrective action necessary for the third. One instrument was reported under reporting ground **(h)** (SSI 2019/30). A commitment was given by the Scottish Government to bring forward an amendment at the earliest opportunity. Two instruments were reported under reporting ground **(i)** (SSI 2019/183 and 73). The Scottish Government made a commitment to correct the errors at the earliest opportunity and indeed Agriculture Market Measures (EU Exit) (Scotland)

(Amendment) Amendment Regulations 2019 (SSI 2019/89) was laid on the 13 March 2019 to correct the errors identified in no 73. One instrument was reported under reporting grounds **(h)** and **general** (SSI 2019/59). The Committee was content for the Scottish Government to correct the issues at the next available opportunity. Finally, four instruments were reported under reporting ground **(j)** (SSI 2019/87, 2019/88, 2019/89 and (2019/128). On all four occasions, the Committee was content with the reasons given for non-compliance.

Justice

23. One LPPO instrument referred to the Justice Committee was drawn to the attention of the Parliament under reporting grounds **general** and **(i)** (SSI 2019/146). The Committee called on the Lord President's Private Office to lay an amending instrument to rectify these errors at the earliest opportunity.

Economy, Energy and Fair Work

24. One instrument referred to the Economy, Energy and Fair Work Committee was drawn to the attention of the Parliament under the **general** reporting ground (SSI 2019/draft Companies Act 2006 (Scottish public sector companies to be audited by the Auditor General for Scotland) Order 2019 [draft]). Through correspondence with the Scottish Government, it was decided that no further action was required.

Education and Skills

25. Two instruments referred to the Education and Skills Committee were drawn to the attention of the Parliament. One instrument was reported on under the **general** reporting ground (SSI 2019/70). A commitment was given by the Scottish Government to correct the error when next legislating in relation to student support. One instrument was reported on under reporting ground **(j)** (2019/95). The Committee was content with the reason for non-compliance.

Other Committees

26. No other subject committees were referred instruments that were drawn to the attention of the Parliament by the Committee. Information detailing specific SSIs and the grounds that they were reported on is provided in **Annex A**.

SCOTTISH STATUTORY INSTRUMENTS - GENERAL Commitments

27. In terms of the Scottish Government committing to the laying of amending instruments to correct errors identified and reported on by the Committee, the following amending instruments were laid during this period—

- Police Pensions (Miscellaneous Amendments) (Scotland) Regulations 2019 (2019/68) **corrected errors identified in Police Pensions (Miscellaneous Amendments) (Scotland) Regulations 2016 (SSI 2016/75) and Police Pension Scheme (Scotland) Amendment Regulations 2017 (SSI 2017/387)**

- Teachers' Superannuation and Pension Scheme (Scotland) (Miscellaneous Amendments) Regulations 2019 (SSI 2019/48) **corrected errors identified in Teachers' Superannuation and Pension Scheme (Additional Voluntary Contributions) (Scotland) Regulations 2017 (SSI 2017/283)**
- Agriculture Market Measures (EU Exit) (Scotland) (Amendment) Amendment Regulations 2019 (SSI 2019/89) **corrected errors identified in Agriculture Market Measures (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/73)**

28. The Scottish Government also withdrew and re-laid the—

- Plant Health (EU Exit) (Scotland) (Amendment etc.) Regulations 2019
- Forestry (EU Exit) (Scotland) (Amendment etc.) Regulations 2019
- Private Housing (Tenancies) (Scotland) Act 2016 (Modification of Schedule 1) Regulations 2019

29. There are a number of outstanding Scottish Government commitments in terms of the instruments that were laid this quarter—

- Environment (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 (SSI 2019/26) *commitment to correct by way of correction slip* [[10th Report, 2019. Published 27/02/2019](#)]
- Materials and Articles in Contact with Food (Scotland) Amendment Regulations 2019 (SSI 2019/32) [[10th Report, 2019. Published 27/02/2019](#)] *commitment to correct the error at the next legislative opportunity*
- Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2019 [draft] [[12th Report, 2019. Published 12/03/2019](#)] *commitment to correct error the next time the order was required to be amended*
- Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft] [[14th Report, 2019. Published 20/03/2019](#)] *committee called on the Scottish Government to correct*
- Town and Country Planning and Electricity Works (EU Exit) (Scotland) (Miscellaneous Amendments) Regulations 2019 (SSI 2019/80) [[15th Report, 2019. Published 26/03/2019](#)] *commitment to bring forward an amending instrument*
- Forestry and Land Management (Scotland) Act 2018 (Commencement, Transitional and Saving Provisions) Regulations 2019 (SSI 2019/47 (C.1)) [[11th Report, 2019. Published 06/03/2019](#)] ***commitment to correct the errors at the earliest opportunity***
- Felling (Scotland) Regulations 2019 (SSI 2019/49) [[11th Report, 2019. Published 06/03/2019](#)] *commitment to correct the errors at the earliest opportunity*
- Equine Animal (Identification) (Scotland) Regulations 2019 (SSI 2019/30) [[10th Report, 2019. Published 27/02/2019](#)] *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) [[11th Report, 2019. Published 06/03/2019](#)] *commitment to bring forward an amendment at the earliest opportunity*
- Seed and Propagating Material (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/59) [[12th Report, 2019. Published 12/03/2019](#)] *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*

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

LPPO instruments

31. There is one outstanding LPPO commitment from this quarter SSI 2019/146. The Committee called on the Lord President's Private Office to lay an amending instrument to rectify these errors at the earliest opportunity.

Minor Points

32. The Committee identified a total of 22 instruments on which minor points were raised. 20 of these instruments were laid by the Scottish Government, 2 by the LPPO.

OTHER BUSINESS

33. 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 of other matters.

Bills

34. The Committee published reports on the following bills at Stage 1—

- [Scottish National Investment Bank Bill](#)

35. The Committee published reports on the following bills at Stage 2—

- [Health and Care \(Staffing\) \(Scotland\) Bill](#)
- [Age of Criminal Responsibility \(Scotland\) Bill](#)
- [Planning \(Scotland\) Bill](#)

Legislative Consent Memorandums

36. The Committee published a report on the following Legislative Consent Memorandum—

- [Immigration and Social Security Co-Ordination \(EU Withdrawal\) Bill](#)

European Union (Withdrawal) Act 2018

37. The Committee began to scrutinise Scottish Statutory Instruments laid by Scottish Ministers using powers contained within the European Union (Withdrawal) Act 2018.

38. 25 Brexit related SSIs were considered under the [protocol agreed between the Scottish Government and the Scottish Parliament](#) which sets out a shared understanding on the process for considering Scottish Statutory Instruments laid under the Act.

39. 19 of these Brexit related SSIs were also subject to the Committee's usual technical scrutiny of instruments during this period.

Evidence session with the Minister for Parliamentary Business and Veterans

40. On 07 May 2019, the Minister for Parliamentary Business and Veterans, Graeme Dey MSP, appeared before the Committee to answer questions on matters arising from the work carried out by the Committee during the parliamentary year 2018-19. The Minister was also questioned by Members on future Scottish Government business, including expected secondary legislation relating to Brexit. Click [here](#) to watch the footage.

ANNEX A - REPORTING GROUNDS: 26 FEBRUARY 2019 to 8 MAY 2019

(h) meaning could be clearer

- Equine Animal (Identification) (Scotland) Regulations 2019 (SSI 2019/30) **Rural Economy and Connectivity**
- Town and Country Planning and Electricity Works (EU Exit) (Scotland) (Miscellaneous Amendments) Regulations 2019 (SSI 2019/80) **Local Government and Communities**

General reporting ground

- Environment (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 (SSI 2019/26) **Environment, Climate Change and Land Reform**
- Materials and Articles in Contact with Food (Scotland) Amendment Regulations 2019 (SSI 2019/32) **Health and Sport**
- Non-Domestic Rating (Valuation of Utilities) (Scotland) Amendment Order 2019 (SSI 2019/45) **Local Government & Communities**
- Forestry and Land Management (Scotland) Act 2018 (Commencement, Transitional and Saving Provisions) Regulations 2019 (SSI 2019/47 (C.1)) **Rural Economy and Connectivity**
- Felling (Scotland) Regulations 2019 (SSI 2019/49) **Rural Economy and Connectivity**
- Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2019 [draft] **Environment, Climate Change and Land Reform**
- Education (Fees and Student Support) (Miscellaneous Amendments) (EU Exit) (Scotland) Regulations 2019 (SSI 2019/70) **Education and Skills**

- Cross-border Health Care (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 [draft] **Health and Sport**
- Companies Act 2006 (Scottish public sector companies to be audited by the Auditor General for Scotland) Order 2019 [draft] **Economy, Energy and Fair Work**
- Transmissible Spongiform Encephalopathies (Scotland) Amendment Regulations 2019 (SSI 2019/118) **Rural Economy and Connectivity**

(i) the drafting of the SSI is defective – it fails to operate properly

- Scotland Act 1998 (Specification of Functions and Transfer of Property etc.) Order 2019 (SSI 2019/183) **Rural Economy and Connectivity**
- Agriculture Market Measures (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/73) **Rural Economy and Connectivity**

h and general

- Seed and Propagating Material (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/59) **Rural Economy and Connectivity**

/ meaning a negative SSI has been brought into force fewer than 28 days after it was laid (in breach of the 28 day rule) or a laid only SSI has not been laid before it comes into force

- Wildlife and Countryside Act 1981 (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/84) **Environment, Climate Change and Land Reform**
- Sea Fish Licensing (Foreign Vessels) (EU Exit) (Scotland) Order 2019 (SSI 2019/87) **Rural Economy and Connectivity**
- Sea Fishing (Licences and Notices) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/88) **Rural Economy and Connectivity**
- Agriculture Market Measures (EU Exit) (Scotland) (Amendment) Amendment Regulations 2019 (SSI 2019/89) **Rural Economy and Connectivity**
- Teachers' Superannuation and Pension Scheme (Scotland) (Miscellaneous Amendments) Amendment Regulations 2019 (SSI 2019/95) **Education and Skills**
- Non-Domestic Rates (Relief for New and Improved Properties) (Scotland) Amendment Regulations 2019 (SSI 2019/116) **Local Government and Finance**
- Disabled Persons (Badges for Motor Vehicles) (EU Exit) (Scotland) (Amendment) Regulations 2019 (SSI 2019/128) **Rural Economy and Connectivity**

i and General

- Act of Sederunt (Rules of the Court of Session 1994 and Summary Applications, Statutory Applications and Appeals etc. Rules 1999 Amendment) (Proceeds of Crime) 2019 (SSI 2019/146) **Justice**

ANNEX B - OUTSTANDING COMMITMENTS

Outstanding Scottish Government commitments

- Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2012 (SSI 2012/228) **to be amended in due course** [41st Report, 2012. Published 07/09/2012]
- Sulphur Content of Liquid Fuels (Scotland) Regulations 2014 (SSI 2014/258) **to be amended in due course** [59th Report, 2015. Published 29/10/2014]
- Registration of Births, Deaths and Marriages (Scotland) Act 1965 (Prohibition on Disposal of a Body without Authorisation) Regulations 2015 (SSI 2015/166) **to be corrected at the next appropriate opportunity** [27th Report, 2015. Published 06/05/2015]
- Police Service of Scotland (Senior Officers) (Performance) Regulations 2016 (SSI 2016/51) **to be corrected as soon as is reasonably practical** [15th Report, 2016. Published 24/02/2016]
- Town and Country Planning (General Permitted Development) (Scotland) Amendment Order 2016 (SSI 2016/126) **to be corrected at the next available opportunity** [21st Report, 2016. Published 08/03/2016]
- National Health Service Superannuation Scheme (Miscellaneous Amendments) (Scotland) Regulations 2017 (SSI 2017/27) **to be corrected when the Regulations are next amended** [10th Report, 2017. Published 22/02/2017]
- Education (Listed Bodies) (Scotland) Order 2018 (SSI 2018/7) **to be corrected in the next amending instrument** [5th Report, 2018. Published 30/01/2018]
- Local Government Pension Scheme (Scotland) Regulations 2018 (SSI 2018/141) **to be corrected by way of correction slip** [22nd Report, 2018. Published 15/05/2018]

Outstanding Scottish Government commitments from this quarter

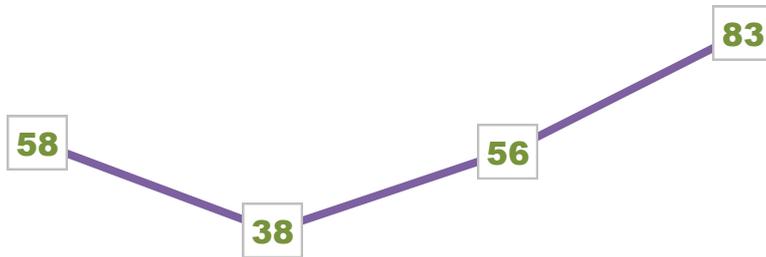
- Environment (EU Exit) (Scotland) (Amendment etc.) Regulations 2019 (SSI 2019/26) **commitment to correct by way of correction slip** [10th Report, 2019. Published 27/02/2019]
- Materials and Articles in Contact with Food (Scotland) Amendment Regulations 2019 (SSI 2019/32) [10th Report, 2019. Published 27/02/2019] **commitment to correct the error at the next legislative opportunity**
- Scotland Act 1998 (Transfer of Functions to the Scottish Ministers etc.) Order 2019 [draft] [12th Report, 2019. Published 12/03/2019] **commitment to correct error the next time the order was required to be amended**
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- Forestry and Land Management (Scotland) Act 2018 (Commencement, Transitional and Saving Provisions) Regulations 2019 (SSI 2019/47 (C.1)) [11th

Report, 2019. Published 06/03/2019] commitment to correct the errors at the earliest opportunity

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ANNEX C - GRAPHICS AND CHARTS

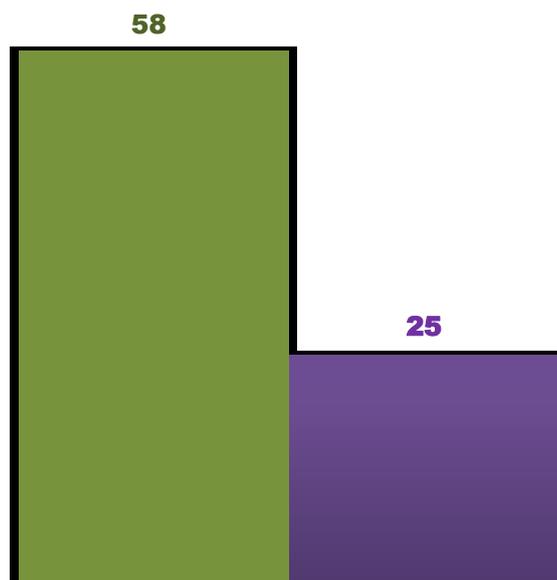
Line chart showing the number of Scottish Government instruments considered by the Committee over the course of the last 4 reporting periods



Quarter 1 2018-19 Quarter 2 2018-19 Quarter 3 2018-19 Quarter 4 2019

Chart showing the number of Brexit related SSIs and non-Brexit related SSIs considered by the Committee during the reporting period

Non-Brexit related | Brexit related



Number of instruments that were referred to the various subject committees during the third quarter of the parliamentary year 2018-19

