

GUIDE TO SCOTTISH STATUTORY INSTRUMENTS

1. Below is a brief introduction to the work of the Delegated Powers and Law Reform Committee (DPLRC) and in particular to its role in scrutinising Scottish Statutory Instruments (SSIs).

What are Scottish statutory instruments (SSIs)?

2. Set out over the following bullet points is a brief introduction to Scottish statutory instruments, which seeks to answer the basic question of what those instruments are—
 - SSIs are a form of law made by the Scottish Ministers (or other responsible authority such as the Lord President) on behalf of the Scottish Parliament;
 - SSIs have the same legal status as primary legislation (Acts) but the process for making this form of law or amending it is quicker and involves less scrutiny;
 - SSIs are usually in the form of regulations, orders, rules or schemes;
 - generally SSIs set out technical details or administrative matters necessary for primary legislation to operate;
 - SSIs can, however, include any subject matter ranging from criminal penalties, licensing schemes, implementing EU obligations, prescribing application forms, to providing procedural rules;
 - the content of SSIs is limited by the terms of the primary legislation which authorises their use – referred to as *the enabling power or parent Act* – and by the general rules on the legislative competence of the Scottish Parliament set out in the Scotland Act 1998;
 - SSIs are also known as secondary, delegated or subordinate legislation;
 - unlike primary legislation, SSIs cannot be amended by the Parliament during the scrutiny process.

What is the DPLR Committee's role in relation to SSIs?

3. Having set out briefly what an SSI is, the following bullet points provide an account of the DPLRC's role in relation to SSIs—
 - The DPLRC'S role is to scrutinise SSIs on behalf of the Parliament to ensure that these laws are within the powers the Parliament has delegated to Ministers in the parent Act – a law which is not within the enabling powers is invalid and has no legal effect;
 - the DPLRC is not involved in scrutinising the policy merits of subordinate legislation – this is for the lead committee (the subject committee within whose remit the subject matter of the instrument falls);
 - the DPLRC does not rule on whether an SSI is invalid, only the courts can declare an SSI invalid;
 - an SSI may be rejected or annulled on policy grounds as well as because there are concerns about its validity;
 - the DPLRC reports to the lead committee and the Parliament so as to inform any decisions as to approval or rejection of the instrument;
 - the DPLRC also checks the quality of each SSI to ensure that it is accurate, achieves the intended policy and the drafting is clear to the end user;
 - through exchange of correspondence and its reports it encourages and polices corrective action by the Scottish Government and other rule making authorities.

What are the types of instrument and what scrutiny is applied to them?

4. The primary legislation which delegates the power to make the SSI determines the procedure to which it is subject.
5. The Interpretation and Legislative Reform (Scotland) Act 2010 provides for 3 levels of procedure (affirmative, negative and simply laying). Within these procedures the types of instrument and the scrutiny applied to them are set out below, starting with the instruments to which the least scrutiny is applied—
 - instruments which are laid before the Parliament for technical scrutiny after they are made but which the Parliament cannot reject are known as **laid only** SSIs;
 - those which can be made and brought into force but which the Parliament can annul by a vote in the Chamber (the most frequent type) are known as **negative** SSIs;
 - those which must be approved by a vote in the Chamber before they can be made are known as **affirmative** SSIs;
 - those which deal with emergency situations – and which can be made and come into force straight away but which require subsequent approval by the Parliament to remain in force –are known as **provisional affirmative** SSIs these are infrequent;
 - those which require to go through a “pre-legislative scrutiny” period involving formal consultation on a draft (or other additional requirements) followed by approval by a vote in the Chamber before they can be made are known as **super-affirmative** SSIs.
6. These are the standard types of SSIs. However, since the level of scrutiny is determined by the Parliament when the power is created, the Parliament can choose to impose a different type of procedure or other pre-conditions such as consultation or the preparation of supporting reports.

How does the DPLR Committee scrutinise an SSI?

7. The following bullet points set out the process by which the DPLRC scrutinises SSIs—
 - the DPLRC requires to report on an SSI within 22 days (not counting recess periods) of it being laid before the Parliament (though it aims to report within 20 days);
 - this is because negative and affirmative instruments then need to be considered by the committee concerned with the subject matter (the lead committee);
 - the grounds for reporting are limited to those set down in Standing Orders (see below);
 - legal advisers attend committee meetings to provide assistance to the Committee as required;

On what grounds can an SSI be reported?

8. The DPLRC can report an SSI on the following grounds (roughly in descending order of importance)—

- **Reporting ground (e)** - there is a doubt that it is within the enabling powers (the legal term is *ultra vires*);
- **Reporting ground (f)** – concerns that the SSI is outwith the limits on legislative competence (it raises a *devolution issue*) – because it relates to reserved matters or is incompatible with EU law or the ECHR;
- **Reporting ground (i)** - the drafting of the SSI is defective – it fails to operate properly;
- **Reporting ground (c)** - the SSI seeks to have retrospective effect without authorisation for that in the enabling power;
- **Reporting ground (g)** - the way the enabling powers have been used is unusual or unexpected;
- **Reporting ground (b)** - the SSI seeks to exclude a matter from review or challenge in the courts;
- **Reporting ground (h)** - the form or meaning of the SSI could be clearer;
- **Reporting ground (j)** - 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;
- **Reporting ground (a)** - the SSI imposes (or fixes the amount of) a charge on the Scottish Consolidated Fund, requires payments into the fund or to other parts of the administration for a licence or services;
- **Reporting ground (d)** - there has been an unjustifiable delay in publication or laying of the SSI;
- for any other reason which is not about the policy matters related to the SSI – most commonly this ground is used to report minor drafting errors.

What happens to SSIs after the DPLR Committee has reported?

9. The following bullet points explain the process by which Scottish statutory instruments proceed through the parliamentary process having been reported on by the DPLRC.

Affirmative SSIs (& super-affirmative SSIs & provisional affirmative SSIs requiring approval)

- The lead committee considers the policy of the SSI and any report made by the DPLRC;
- The lead committee reports to the Parliament on the instrument no later than 40 days after the instrument has been laid before the Parliament.
- the minister responsible for the SSI attends the lead committee to move a motion that the committee recommends that the SSI is to be approved;
- the lead committee votes on whether to recommend to the Parliament that the instrument is to be approved;
- if the lead committee votes for approval the motion to approve the SSI is subsequently put before the Parliament as a Parliamentary Bureau motion and voted on;
- if the lead committee votes against the motion it is for the Parliamentary Bureau to decide whether to schedule time for a motion to approve the instrument to be taken in the Chamber and voted on;
- only if the SSI is approved by the Parliament can the Scottish Ministers (or other responsible authority) go ahead and make the SSI (or in the case of a provisional affirmative SSI can it remain in force beyond the specified date).
- some SSIs of political importance can proceed straight to a debate and vote in the Chamber if the Parliament agrees – for example SSIs setting out how local government is to be funded for the coming year.

Negative SSIs

- The lead committee considers the policy of the SSI and any report made by the DPLRC;
- the process for annulment of an SSI is normally triggered if a motion to annul the SSI is put before the lead committee. Any member can put down a motion provided it is done within 40 days of the instrument being laid (not counting recess periods);
- the lead committee votes on whether to recommend to the Parliament that the SSI is annulled;
- if the lead committee agrees to annul the instrument the Parliament is asked to vote on a Bureau motion to that effect;
- if the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect;
- following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book.) Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled;
- negative SSIs require to be laid before the Parliament for at least 28 days (not counting recess periods) before they come into force (the 28 day rule). This is to allow the opportunity for scrutiny and a debate on annulment before the SSI becomes law. If an SSI does not allow for this 28 day period then the SSI is not invalid but Ministers must write to the Presiding Officer explaining why the 28 day period was not allowed.

Laid-only SSIs

- Whilst the DPLRC reports on laid only instruments as normal, the lead committee is not required to report on these instruments. The lead Committee may however report on these instruments if it chooses to do so.
- However, if a laid only instrument breaches laying requirements by coming into force less than 3 days after it has been laid, the Scottish Government (or other responsible authority) is required to provide an explanation to the Presiding Officer.
- The DPLRC will consider the explanation as part of its report. The lead committee is required to consider the explanation, although it is not obliged to report on the instrument.