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The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

58th Report, 2014 (Session 4)

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The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

Remit and membership

Remit:

1. The remit of the Delegated Powers and Law Reform Committee is to consider and report on—
 - (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; and
 - (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; and
 - (h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

Membership:

Richard Baker
Nigel Don (Convener)
Mike MacKenzie
Margaret McCulloch
Stuart McMillan (Deputy Convener)
John Scott
Stewart Stevenson

Committee Clerking Team:

Clerk to the Committee

Euan Donald

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Elizabeth Anderson

Support Manager

Daren Pratt



The Scottish Parliament
Pàrlamaid na h-Alba

Delegated Powers and Law Reform Committee

58th Report, 2014 (Session 4)

Report on Instruments considered in 2013-14

The Committee reports to the Parliament as follows—

EXECUTIVE SUMMARY

1. This report provides an analysis of the Committee's activities in respect of its scrutiny of instruments in 2013-14. In addition, the report reflects on the Committee's work more generally.
2. The Committee makes a number of recommendations throughout the report which are drawn together in this summary. Cross-references are to relevant sections of the main report.

Overview

Number of instruments laid (paragraphs 75 to 84)

3. In this report the Committee notes that the number of instruments laid this session has been fewer than last session. While this is not of immediate concern to the Committee, it would welcome some insight from the Scottish Government into why there has been such a reduction in the number of instruments from the previous session to this session.
4. It would be of concern to the Committee, however, if the reduced numbers at present were a prelude to a significant increase in the number of instruments toward the end of the session.
5. In addition, it should be noted that the exercise of delegated powers is not always by way of subordinate legislation. Where a delegated power is exercised by a direction, for example, the opportunity for parliamentary scrutiny is removed.
6. The Committee would be concerned therefore if the reason for the reduction in the number of instruments was an increase in the Scottish Ministers exercising delegated powers by means not subject to parliamentary scrutiny.

Scheduling of instruments (paragraphs 85 and 86)

7. In reflecting on the reporting year, the Committee notes that there has been a reduction in the size and frequency of peaks in the laying of instruments by the Scottish Government.

8. The Committee welcomes the reduced size and frequency of these peaks and the efforts of the Scottish Government to manage this. The Committee encourages the Scottish Government to maintain its efforts in managing the programme of laying instruments. The Committee asks the Scottish Government to be particularly mindful of this as we move toward the concluding years of this session - a time when the volume of instruments laid has traditionally increased.

Percentage of instruments reported (paragraphs 87 to 92)

9. In 2012-13 18% of instruments were reported upon while this year 16% of instruments were reported upon.

10. The Committee welcomes this reduction in the percentage of instruments reported upon from the last reporting period to this period and from the beginning of the session. The Committee hopes that this improvement can be maintained and the numbers of instruments reported on reduced still further, recognising that the number of instruments reported upon has in the past been lower. The Committee recognises that on past experience, as it gets closer to the end of a session, the number of instruments being laid increases. The Committee hopes that an increase in the number of instruments being laid is not matched by an increase in the number of instruments being reported upon.

11. While welcoming this reduction, it should be noted that this figure is still higher than it was at the end of the last session. As noted above, the reporting period was calculated differently, but it is still interesting to note that in 2010, only 14% of the 367 instruments considered by the Committee were reported upon, 4.5% less than the figure for this year. Therefore, in welcoming the reduction in the percentage of instruments reported upon this year, the Committee notes that there is still room for progress and lower percentage rates have been achieved.

Percentage of instruments broken down by reporting ground

Significant reporting grounds (paragraphs 99 to 104)

12. The Committee welcomes the reduction in the number of instruments reported under the significant reporting grounds. It is particularly pleasing to the Committee to see this reduction given the concerns the Committee expressed in its last report about the number of instruments reported for defective drafting. The Committee welcomes the Scottish Government's response to the criticisms made in the Committee's last report as regards defective drafting and encourages the Scottish Government to maintain its efforts in this regard.

Standard grounds (paragraphs 105 to 116)

13. The Committee encourages the Scottish Government to increase its efforts in terms of improving the accessibility and clarity of instruments. The Committee will return to this issue next year and would hope to see a reduction in the number of instruments reported under this ground.

14. The Committee encourages the Scottish Government to ensure that all efforts are made to avoid any delay in the laying or publication of instruments after they have been made.

15. The general reporting ground covers a range of issues including minor drafting points and failure to follow proper drafting practice.

16. While the Committee appreciates that there are fewer resources available to the Scottish Government it nonetheless invites the Scottish Government to reflect on those processes in an effort to reduce the number of instruments reported under this ground.

17. Moreover, the Committee urges the Scottish Government to pay close regard to the drafting of instruments as a step towards reducing the number of instruments reported on the grounds within its remit, particularly in relation to reducing the number of errors in instruments.

Advisory grounds (paragraphs 117 to 121)

18. Insofar as the advisory grounds are concerned, there were again relatively few reports under these grounds.

19. The Committee is however, disappointed to note that there has been an increase in its dissatisfaction with the reasons given for breaches of the laying requirements under ground (j). The Committee recognises that there will be occasions where such a breach is necessary or even desirable but, wherever possible, the Scottish Government should endeavour to conform to the laying requirements. These requirements are in place to ensure that the Parliament has sufficient time to consider instruments before they come into force and that the wider public has an opportunity to be made aware and respond to them too. As such, the breaching of laying requirements should be avoided wherever possible and the Committee encourages the Scottish Government to put in place appropriate processes and procedures to avoid such breaches.

Reports broken down by lead committee (paragraphs 122 to 159)

20. As in previous years the figures show significant improvement in some areas, but it is pleasing to note that this year that improvement has been achieved across the majority of committees.

21. Indeed, of those committees who were referred a reasonable number of instruments, only two committees, the Education and Culture Committee and the Health and Sport Committee saw an increase in the percentage of instruments referred to them that were reported upon.

Instruments laid by the Lord Presidents Private Office (paragraphs 160 to 173)

22. The Committee welcomes the improvements in the quality of instruments laid by the LPPO. Given the Committee's concerns about the quality of the instruments laid by the LPPO expressed in its last report, it is particularly pleasing to see such a marked improvement in the instruments laid this year. In welcoming these improvements, however, the Committee encourages the LPPO to maintain these standards and endeavour to further improve the quality of the instruments it lays.

23. Overall therefore the number of reports under the various grounds is reflective of the reduction in the number of instruments reported. Although welcoming this reduction, the Committee encourages the LPPO to endeavour to reduce the number of reports under the significant grounds and also those under ground (h).

Quarterly reports (*paragraphs 174 to 179*)

24. The Committee considers that the quarterly reports have been a successful innovation and it intends to continue to produce quarterly reports with a view to them contributing to an overall improvement in the quality of instruments laid.

Annual evidence session with the Minister for Parliamentary Business (*paragraphs 180 to 191*)

25. There has not yet been sufficient time since the Minister appeared before the Committee to assess fully the extent to which the commitments he made have been or will be met, but it is perhaps noteworthy that to date the peaks in the laying of instruments have been less extreme. Also, there has been a significant improvement in the information made available to the Committee as to the programming of packages of instruments.

26. At the same time, however, breaches of the 28-day rule in relation to instruments which implement UK-wide policy have persisted.

27. The Committee will return to these matters when the Minister next appears before the Committee and in its next report when there has been a more considerable period of time to reflect upon the issues.

Commitments: Scottish Government and Lord President's Private Office (*paragraphs 192 to 197*)

28. Throughout periods of reporting, the Scottish Government and the LPPO often make commitments in response to points raised on instruments by the Committee relating to defective drafting or other errors. Such commitments generally involve amending provisions being brought forward to address the Committee's concerns.

29. The Committee welcomes the continued effort made by the Scottish Government, and the Lord President's Private Office in particular, when it comes to meeting the commitments it made to correcting or amending instruments on which the Committee had reported. The Committee welcomes the fact that the LPPO has no outstanding commitments and urges the Scottish Government to complete this process in early course.

Minor Points (*paragraphs 201 to 205*)

30. While the Committee accepts that minor points do not affect the validity of instruments, it urges both the Scottish Government and the LPPO to take steps to ensure that the number of these types of errors decreases.

Transitional Provisions (*paragraphs 215 to 223*)

31. The Committee has reflected again this year on its scrutiny of commencement orders where they contain complex transitional provisions.

32. Given the implications of failings in transitional provisions it is critical that the Committee maintains close scrutiny of such provisions. It is also critical that the Committee is afforded sufficient time and provided with sufficient information to enable it to undertake such scrutiny.

33. Moreover the Committee eagerly awaits the conclusions of the SPPA Committee. The Committee will reflect on this matter further following the conclusion of the SPPA Committee's considerations.

Packages of instruments (*paragraphs 224 to 228*)

34. In its report last year the Committee raised concerns about the laying of packages of instruments.

35. The Minister for Parliamentary Business has committed to effect an improvement in how packages of instruments are planned for and laid as well as an improvement in the quality of the instruments themselves.

36. The Committee therefore welcomes the improvement in planning and discussion and hopes that a similar improvement can be affected in those other areas of concern to the Committee. It is anticipated that the Committee will consider a number of such packages of instruments over the coming year and as such, will be in a position to assess whether improvements have been made in the areas that were of such concern to the Committee last year.

Bills (*paragraphs 236 to 253*)

37. In the course of this reporting year, the Committee encountered significant challenges in its consideration of Bills after Stage 2 in two regards.

38. The Minister gave a commitment to review the gap between Stages 2 and 3 in the legislative process and recognised that the minimum timescales should be a minimum and not become what is commonly observed.¹

39. The Committee welcomes these commitments and hopes that the challenges it encountered in relation to the Marriage and Civil Partnership (Scotland) Bill, Children and Young People (Scotland) Bill and Public Bodies (Joint Working) (Scotland) Bill are not repeated this year. At the same time, the Committee awaits the conclusions of the SPPA Committee and would welcome changes in procedure that ensure such pressures as occurred in relation to the above Bills cannot be repeated.

¹ Delegated Powers and Law Reform Committee, Official Report 29 April Col.1437

Delegated Powers Memorandums (*paragraphs 254 to 258*)

40. The Minister committed to improving the quality of Delegated Powers Memorandums. To that end the Committee clerks are now working with Scottish Government officials to make such an improvement.

41. Mindful of this commitment, and the work ongoing to deliver it, the Committee will be disappointed if, for a second successive year still no improvement has been made to the quality of the DPMs.

Overall conclusions (*paragraphs 276 to 280*)

42. Having considered different aspects of the Committee's year in isolation, it is worth reflecting on the year in its entirety.

43. In general terms the Committee welcomes the improvements it has seen in the quality of instruments laid by the Scottish Government. The overall reduction in the proportion of instruments reported upon is very welcome, particularly as it follows on from an improvement in the figures from last year.

44. This improvement was very welcome and, mindful of the commitments given to the Committee by the Minister for Parliamentary Business in oral evidence, the Committee hopes that improvements can also be effected in terms of policy notes, DPMs, breaches of laying requirements and the opportunity for committees to scrutinise bills after Stage 2.

45. The Committee also welcomes the improvements made in the quality of the instruments laid by the LPPO. Given the disappointment the Committee expressed in the quality of the instruments laid by the LPPO last year it is particularly pleasing to see such a significant improvement.

46. In addition, the Committee eagerly awaits the conclusions of the SPPA Committee and hopes that its report can effect changes which will enable the Committee to undertake ever more effective scrutiny. The Committee will return to this issue following the conclusion of the SPPA Committee's inquiry.

INTRODUCTION

47. As part of its scrutiny role, the Delegated Powers and Law Reform Committee produces an annual report containing details of the Scottish statutory instruments (SSIs) considered by the Scottish Parliament in the previous year. The purpose of the annual report is to provide an analysis of the Committee's activities in respect of its scrutiny of instruments. In particular, the report sets out details of instruments considered by the Committee which were drawn to the attention of the Parliament on one or more of the reporting grounds set out in Standing Orders during the reporting period. It also itemises 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.

48. The annual reporting process was introduced following a recommendation of the Committee in its 14th report of 2007, *Inquiry into the Regulatory Framework in Scotland (SP Paper 751)*², published in Session 2 of the Parliament.

49. The Committee's role in scrutinising instruments is of considerable importance in improving the quality of legislation, particularly in its efforts to increase the accessibility to the law for the user. One means by which it does this is by seeking to ensure that legislation is as accurate and up to date as possible. The Committee considers the annual report to be a key part of this process.

50. One of the Committee's main objectives is to see all subordinate legislation presented to be as accurate and well-drafted as possible. In addition, legislative competence is vested in the Parliament. It is therefore incumbent on the Committee to conduct its supervisory role effectively, ensuring that subordinate legislation under consideration falls within the powers delegated to the responsible authority by the Parliament and that these powers are exercised appropriately.

51. The Committee considers a measure of effectiveness includes circumstances where its conclusions are accepted and either amending legislation is brought forward or the instrument in question is withdrawn. However, it also accepts that the Scottish Government or the LPPO may not always be in agreement with the conclusions that it draws. In particular, in relation to the more complex legislative questions that can be raised in relation to devolution or vires issues (as explained on page 3), it accepts that these can be, by their nature, subject to a range of legal interpretations. In such cases, where satisfied that there is a doubt over the matter, it is not for the Committee to offer a definitive view on the matter, but to draw alternative views to the attention of the Parliament. Ultimately it will be for the courts to determine the legal position.

52. Therefore, as well as endeavouring to ensure the accuracy of legislation, the Committee considers that the scrutiny process provides a forum for an exchange of views which should ensure more robust legislation is produced having been subject to rigorous scrutiny. As such, it considers the scrutiny process to be an important tool in assisting the Parliament to ensure that legislation is fit for purpose, clear and accessible to the public.

53. The report provides the opportunity to monitor the action that has been taken on the commitments made by the Scottish Government and the LPPO. The Committee considers this to be an important aspect of improving the quality of legislation. The report also helps to identify the range of issues that have arisen during the course of the year regarding its activities in relation to its scrutiny.

54. In pursuing the objective of the accessibility of legislation to the end user, the Committee has a number of projects ongoing, including examining the feasibility of consolidating SSIs and examining ways of enabling improved scrutiny of transitional provisions. These points are discussed later in the report.

² Scottish Parliament Subordinate Legislation Committee, 14th Report, 2007 (Session 2). [Report on the Inquiry into the Regulatory Framework in Scotland \(SP Paper 751\)](#).

55. In order to provide an overview of the Committee's activities in the previous year, details of the number of Bills, Legislative Consent Memorandums and Public Body Consent Memorandums considered by the Committee during the reporting period are also set out.

56. This report covers the third parliamentary year of Session 4 (11 May 2013 to 10 May 2014).

Reporting grounds

57. 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 Orders³ and are as follows—

Ground (a) (charges on or payments to the Scottish Consolidated Fund, and payments to local and public authorities) – draws to the Parliament's attention instruments imposing payments to local or public authorities in return for any licence, consent or services, or requiring payment to or a charge on the Scottish Consolidated Fund.

Ground (b) (made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts) – draws to the Parliament's attention where the Scottish Ministers have exercised the power in such a way that it is excluded from challenge in the courts.

Ground (c) (where the instrument has retrospective effect where the parent statute confers no express authority so to provide) – this may raise questions on the validity of an instrument, but does not necessarily do so. This ground may raise serious issues which ought to be drawn to the Parliament's attention before it takes a view on the disposal of the instrument.

Ground (d) (unjustifiable delay in publication or laying) – raises an issue of parliamentary process that may affect public awareness of the effect of the instrument and hinder that awareness where there is an unjustifiable delay in the instrument being available in the public domain.

Ground (e) (doubt as to whether the instrument is intra vires) – raises questions on the validity of an instrument, or provisions in it, because it appears to exceed the power conferred.

Ground (f) (raises a devolution issue) – raises questions on the validity of an instrument, or provisions in it, because the instrument appears to conflict with the devolution settlement.

Ground (g) (unusual or unexpected use of powers) – raises issues on the proper exercise or use of the powers conferred that may on occasion affect the operation of the instrument, or may raise questions of propriety and transparency.

³ [Scottish Parliament Standing Orders, Rule 10.3.1.](#)

Ground (h) (clarity of form or meaning) – raises issues on the clarity of the instrument, which may on occasion affect the operation of the instrument, or delivery of the intended policy.

Ground (i) (defective drafting) – raises serious issues of the efficacy of the drafting that may on occasion impede or prevent the delivery of the intended policy.

Ground (j) (non-compliance with laying requirements) – draws attention to any non-compliance with the laying requirements set out in section 28(2), 30(2) or 31 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“the 2010 Act”) and evaluates the reasons given for doing so from the Committee’s perspective.

The **general** reporting ground is a residual ground for reporting any other issues not impinging on the substance or policy of the instrument, including minor drafting errors which do not affect the proper operation of the instrument, failures to follow proper drafting practice or legislative process.

Reporting grounds: significant

58. The Committee considers some reporting grounds to be of more significance than others. 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.

59. These are referred to throughout this report 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 or effectiveness of the instrument to be questioned.

60. The Committee recognises that points raised on these grounds will often be subject to a difference of opinion. However, raising questions on these grounds offers the opportunity for public debate on these points which is an important part of the scrutiny process. This in turn allows for more robust legislation.

Reporting grounds: standard

61. While emphasising the importance of the significant reporting grounds, the Committee cannot lose sight of the standard grounds. Issues reported under one of the standard grounds are not regarded necessarily as fundamental but at the same time even minor drafting errors can have an adverse impact on the efficacy of the instrument. This, amongst other things, can make it difficult to determine what the intention of the instrument is. Also, although not as significant in terms of the fundamental legal issues that the significant grounds raise, in terms of the overarching objective of ensuring the accessibility of legislation to the end user, the Committee regards the scrutiny of these grounds to be just as relevant.

62. The standard grounds are as follows—

- ground (c) - (where the instrument has retrospective effect where the parent statute confers no express authority so to provide);
- ground (d) - (unjustifiable delay in publication or laying);
- ground (h) - (clarity of form or meaning); and
- the general reporting ground (which includes minor drafting errors and failures to follow proper drafting practice).

63. The Committee may have serious concerns where an instrument is drawn to the attention of the Parliament on any of these standard grounds. For example, concerns which are raised on ground (h) (clarity of form or meaning) could attract a varying level of concern. Such concerns may be seen as relatively minor if the defects do not affect the operation of the instrument, however, where an instrument is reported more than once on this ground it may be difficult to determine what the SSI originally set out to do.

64. In addition, where an instrument is reported on a combination of these standard grounds or more than once on the same ground, this may cause the Committee to question whether overall the instrument is fit for purpose or whether it should be amended or replaced. Any concerns that the Committee has in relation to particular SSIs are therefore highlighted on a case-by-case basis. This report provides an analysis of instruments reported on these grounds and the Committee will continue to pursue these points robustly.

Reporting grounds: advisory

65. The Committee also notes that some of the reporting grounds need not indicate issues with regard to validity or clarity but provide a means of drawing matters to the attention of the lead committee and the Parliament for consideration as part of their related scrutiny of the overall policy and effect of the instrument. For the purposes of this report the Committee refers to these grounds as advisory in nature.

66. The matters the Committee raises under these grounds do not concern questions of competency, validity or accuracy. Rather they are matters that the Committee considers the Parliament should be aware of in exercising its general supervisory role and considering whether to allow the legislation to proceed. Often they relate to policy matters (such as the imposition of significant charges) and so are matters which the lead committees should have regard to when considering the instruments. As such, instruments which engage these grounds are drawn to the lead committee's attention to inform its consideration of instruments.

67. The Committee considers the following grounds to be advisory in nature—

- ground (a) - (charges on or payments to the Scottish Consolidated Fund);
- ground (b) - (made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts);
- ground (g) – (unusual or unexpected use of the powers conferred by the parent statute); and

- ground (j) - (non-compliance with laying requirements), where it is satisfied with the reasons given for non-compliance.

68. The Delegated Powers and Law Reform Committee's primary role is to consider the technical drafting of instruments, as well as their accuracy and its legal competence. In its scrutiny of instruments, the Committee will highlight to the lead committee where other circumstances exist which are of greater concern to the lead committee. To reflect this, the numbers of times instruments have been drawn to the Parliament's attention on these advisory grounds have been removed from the overall figures (although the overall figures are recorded for the purpose of completeness). The only exception to this is where an instrument has been drawn to the Parliament's attention on ground (j) (non-compliance with laying requirements) and the Committee has not been satisfied with the reasons given as this does have an impact on the accessibility of legislation.

Minor points

69. Minor points are inaccuracies within the instrument or its supporting documentation which do not merit a report under the formal reporting grounds. They are of less importance and are therefore dealt with informally rather than in the Committee's published reports. However, they are still of interest to the Committee when assessing the quality of legislation and so this report also contains a brief examination of them.

Analysis of information in this report

70. Primary responsibility for complying with the laying requirements which apply to SSIs is placed on the responsible authority. The Scottish Ministers are given this responsibility for instruments made by them, the First Minister or the Lord Advocate, and for instruments which are Orders in Council or Orders of Council⁴. However, in practice, the Scottish Ministers are also the authority with whom the Committee corresponds in relation to instruments made by other responsible authorities within the Scottish Administration; for example the Registrar General and the Keeper of the Registers. The Committee also corresponds with the Scottish Ministers in relation to UK statutory instruments which are subject to procedure in the Scottish Parliament. Accordingly this report considers all of these instruments in one section.

71. Acts of Sederunt and Acts of Adjournal made by the Court of Session and the High Court of Justiciary are treated separately for the purposes of this report. The 2010 Act now requires all such instruments to comply with the laying requirements set out in the Act. In practice the LPPO now assumes responsibility for these matters.

Overview

72. In the 2013-14 parliamentary year, a total of 259 instruments laid before the Parliament were considered by the Committee. Of these, 237 instruments were

⁴ Orders in Council are made by Her Majesty with the advice of the Privy Council and Orders of Council are made by the Privy Council in exercise of powers conferred upon the Privy Council alone

laid by the Scottish Government and 22 instruments were laid by the Lord President's Private Office.

73. The 237 SSIs laid by the Scottish Government can be broken down as follows—

- 1 draft document subject to approval;
- 1 draft document subject to rule 10.5 of Standing Orders;
- 3 super-affirmative instruments;
- 38 affirmative instruments;
- 163 negative instruments;
- 31 laid no-procedure instruments.

74. The 22 SSIs laid by the LPPO can be broken down as follows—

- 3 negative instruments
- 19 laid no-procedure instruments

THE SCOTTISH GOVERNMENT

Overview

Table 1: Instruments laid by the Scottish Government in 2012-13 and 2013-14 reported on by the Delegated Powers and Law Reform Committee

| | 2013-14 | | | 2012-13 | | |
|-------|------------|---|-------------|------------|---|-----------|
| | Total SSIs | Total drawn to the Parliament's attention | % | Total SSIs | Total drawn to the Parliament's attention | % |
| Total | 237 | 38 (44) ⁵ | 16% (18.5%) | 262 | 46 (62) | 18% (24%) |

75. Table 1 provides the overall figure for the number of instruments laid in 2013-14 by the Scottish Government which were considered by the Delegated Powers and Law Reform Committee and the number of those that have been reported upon. The table also includes the information from the previous year for the purposes of comparison.

76. In 2013-14 237 instruments were laid as against 262 in 2012-13, representing a 10% reduction in the number of instruments laid from last year. This is still, however, higher than the first year of this session when 212 instruments were laid.

⁵ The figures in brackets here and in the tables throughout the report show the total number of instruments drawn to the Parliament's attention which includes instruments reported on the advisory grounds, (in all cases, ground (g)), and, with regard to ground (j), where the Committee was satisfied with the reasons given for non-compliance with the laying requirements. To provide an overall picture of matters of concern to the Delegated Powers and Law Reform Committee, these have been removed from the overall figure.

77. It is difficult to discern a particular reason for the reduction in the number of instruments laid this year.

78. Moreover, prior to this session, although a different approach was taken to the preparation of this report and a calendar year rather than a parliamentary year was used for the reporting period, it is nonetheless interesting to note that in 2009, the third year of the previous parliamentary session, 354 instruments were considered by what was then the Subordinate Legislation Committee.

79. Last session the number of instruments considered by the Committee each year never dropped below 330, rising to 415 in the final year of the session.

80. It is perhaps not surprising that in the first year of this session there were fewer instruments laid than in the preceding years, given that it is unlikely that any bills will have been passed yet at the point in the session and the tendency for there to be fewer instruments laid in the immediate aftermath of an election. It is less easy to explain the reduction in the number of instruments laid in the following years. The number of Bills passed by the Parliament each year remains relatively stable. For example, in 2010 18 Bills were passed, while 15 Bills were passed in 2013. Therefore this would not appear to be the reason for the reduction in the number of instruments.

81. While this is not of immediate concern to the Committee, it would welcome some insight from the Scottish Government into why there has been such a reduction in the number of instruments from the previous session to this session.

82. It would be of concern to the Committee, however, if the reduced numbers at present were a prelude to a significant increase in the number of instruments toward the end of the session.

83. In addition, it should be noted that the exercise of delegated powers is not always by way of subordinate legislation. Where a delegated power is exercised by a direction, for example, the opportunity for parliamentary scrutiny is removed.

84. The Committee would be concerned therefore if the reason for the reduction in the number of instruments was an increase in the Scottish Ministers exercising delegated powers by means not subject to parliamentary scrutiny.

85. Separately, it should be noted that the reduction in the number of instruments laid has been matched by a reduction in the size and frequency of the peaks in the laying of instruments.

86. The Committee welcomes the reduced size and frequency of these peaks and the efforts of the Scottish Government to manage this. The Committee encourages the Scottish Government to maintain its efforts in managing the programme of laying instruments. The Committee asks the Scottish Government to be particularly mindful of this as we move toward the concluding years of this session - a time when the volume of instruments laid has traditionally increased.

87. Insofar as the percentage of instruments reported upon is concerned, there has been a reduction from last year. In total 44 instruments were reported upon representing 18.5% of the total number of instruments. This compares favourably with the figure in 2012-13 when 24% of instruments were reported upon. That in itself was a reduction on the figure for 2011-12 when 26% of instruments were reported upon.

88. Since the start of this session therefore, there has been a 5.5% decrease in the number of instruments reported upon.

89. While welcoming this reduction, it should be noted that this figure is still higher than it was at the end of the last session. As noted above, the reporting period was calculated differently, but it is still interesting to note that in 2010, only 14% of the 367 instruments considered by the Committee were reported upon, 4.5% less than the figure for this year. Therefore, in welcoming the reduction in the percentage of instruments reported upon this year, the Committee notes that there is still room for progress and lower percentage rates have been achieved.

90. The total number of instruments reported on includes those drawn to the Parliament's attention on two of the advisory grounds – (g) and (j). As regards, ground (j), this is engaged when, in relation to negative instruments, there are fewer than 28 days between laying the instrument and it coming into force and, for laid only instruments, when the instrument comes into force before it is laid. Where there is such a breach of the laying requirements, the instrument must be accompanied by a letter to the Presiding Officer explaining why this breach has occurred. In all bar one of the cases where an instrument was reported under ground (j), the Committee was content with the explanation provided in the letter to the Presiding Officer. Indeed, in a number of cases the reason for the breach was to respond to a concern raised by the Committee where the Government has laid an amending instrument to respond to that concern.

91. Therefore, in assessing the number of instruments reported upon, it is perhaps more helpful to discount those instruments reported under the advisory grounds and where the Committee was content with the reason for the breach of the laying requirements. In doing so, for 2013-14 this reduces the number of instruments reported on to 38, which represents 16% of the total number of instruments laid. When comparing like for like, this represents a decrease of 2% on the number instruments reported in 2012-13.

92. The Committee welcomes this reduction in the percentage of instruments reported upon from the last reporting period to this period and from the beginning of the session. The Committee hopes that this improvement can be maintained and the numbers of instruments reported on reduced still further, recognising that the number of instruments reported upon has in the past been lower. The Committee recognises that on past experience, as it gets closer to the end of a session, the number of instruments being laid increases. The Committee hopes that an increase in the number of instruments being laid is not matched by an increase in the number of instruments being reported upon.

93. In welcoming the reduction in the percentage of instruments reported upon overall, it is also interesting to note the extent to which there has been a reduction in the number of instruments reported upon within each quarter. The bar charts below set out the number of reports by quarter for each of the three reporting periods this session.

94. In all except the first quarter, the reports were the lowest this session and although the number of reports in that quarter was higher than last year it remained significantly lower than the comparable figure for 2011-12.

95. This consistent improvement is particularly pleasing to the Committee. It is also welcome to see that there is not a huge discrepancy in the numbers between each of the four quarters. There are points in the year when inevitably more instruments are laid than others and it is welcome that these have not prompted a significant increase in the percentage of instruments being reported.

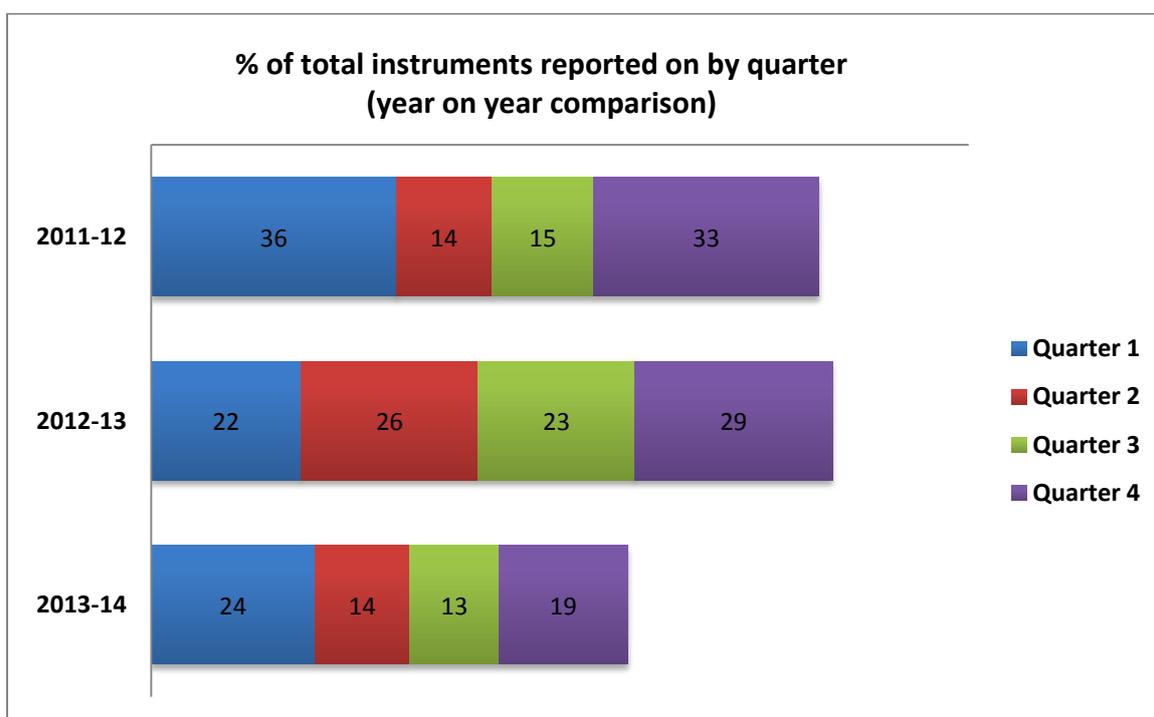


Table 2: Instruments reported on broken down by ground: Scottish Government

| Ground | 2013-14 | | 2012-13 | |
|---|---------|--------------------------|---------|--------------------------|
| | No. | % of all SSIs laid (237) | No. | % of all SSIs laid (262) |
| Significant | | | | |
| (e) doubt as to whether the instrument is intra vires | 2 | <1% | 3 | 1% |
| (f) raises a devolution issue | 0 | 0 | 2 | 1% |
| (i) drafting appears to be defective | 4 | 1.5% | 20 | 8% |

| Standard | | | | |
|---|-------|-----------|--------|---------|
| (c) retrospective effect where the parent statute confers no express authority so to provide | 0 | 0 | 0 | 0 |
| (d) unjustifiable delay in the publication or the laying of it before parliament | 2 | <1% | 0 | 0 |
| (h) form or meaning could be clearer | 16 | 7% | 17 | 6.5% |
| General ground (e.g. failures to follow proper drafting practice or legislative process) | 15 | 6.5% | 23 | 9% |
| Advisory | | | | |
| (a) charge on the Scottish Consolidated Fund | 0 | 0 | 0 | 0 |
| (b) made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts | 0 | 0 | 0 | 0 |
| (g) unusual or unexpected use of the powers conferred by the parent statute | 1 | <1% | 3 | 1% |
| (j) failure to comply with laying requirements | 6 (5) | 2.5% (2%) | 2 (13) | 1% (5%) |

96. Table 2 breaks down the grounds on which the instruments were reported. A number of instruments were reported upon under more than one ground. As such, although 44 instruments were reported upon, there are 46 grounds under which instruments were reported.

97. In reflecting on the number of instruments as against the number of reports, it is interesting to note therefore the infrequency with which instruments have been reported on more than one ground.

98. As previously explained, the grounds are divided up into three groups – significant, standard and advisory. Over the following paragraphs the figures for each of these groups are considered in greater detail.

Significant grounds

99. Where the Committee has reported an instrument under a significant ground, the Committee generally has most concern about the potential operation of the instrument.

100. Last year the Committee expressed its concern about the number of instruments reported under significant grounds. In particular, concern was

expressed about the number of instruments reported for defective drafting. Twenty instruments were reported last year for defective drafting, representing 8% of all instruments considered by the Committee.

101. The Committee is therefore pleased to note a substantial reduction in the number of instruments reported for defective drafting both in percentage and numerical terms. Only four instruments were reported this year for defective drafting, representing 1.5% of the total number of instruments considered by the Committee. This figure is not only an improvement on last year, but also on 2011-12 when ten instruments were reported, reflecting 5% of the total number of instruments considered by the Committee.⁶

102. Reflecting on the position in the last session and mindful of the different reporting periods, this figure of 1.5% is also significantly lower than the percentage of instruments reported under ground (i) in each of the years of the last session, when the lowest figure was 10% in 2008.

103. Reports under grounds (e) and (f) have also been reduced from last year: indeed, there were no reports under ground (f). It should be noted that the numbers of instruments reported under these grounds was already low, but it is pleasing to see a further reduction achieved.

104. The Committee therefore welcomes the reduction in the number of instruments reported under the significant reporting grounds. It is particularly pleasing to the Committee to see this reduction given the concerns the Committee expressed in its last report about the number of instruments reported for defective drafting. The Committee welcomes the Scottish Government's response to the criticisms made in the Committee's last report as regards defective drafting and encourages the Scottish Government to maintain its efforts in this regard.

Standard grounds

105. There has also been a reduction in the number of instruments reported under one of the standard reporting grounds. Forty instruments were reported under one of the standard reporting grounds last year while that figure has been reduced to 33 this year. In percentage terms, however, the figures remain relatively static with 14% of instruments considered this year reported under one of the other reporting grounds and 15% last year.

106. Within that, the highest figure both in numerical and percentage terms related to ground (h) (form or meaning could be clearer). It also represents an increase in percentage terms on the number of instruments reported under ground (h) from last year. The clarity and accessibility of instruments is something on which the Committee places considerable import. The end users of instruments should be able to understand the legislation they are making use of and it is therefore disappointing to the Committee that such a high number of instruments were reported under ground (h).

107. The Committee encourages the Scottish Government to increase its efforts in terms of improving the accessibility and clarity of instruments. The Committee will return to this issue next year and would hope to see a reduction in the number of instruments reported under this ground.

⁶ <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/56857.aspx>

108. The Committee also notes that there has been an increase in the number of instruments reported under ground (d) (unjustifiable delay in the publication or the laying of it before parliament). From no instruments reported under this ground last year, this figure has increased to two. Although this represents a very small proportion of the overall number of instruments it is nonetheless disappointing that in these instances there was a reduced opportunity for the public to become aware of these instruments.

109. With this in mind, the Committee encourages the Scottish Government to ensure that all efforts are made to avoid any delay in the laying or publication of instruments after they have been made.

110. The general reporting ground covers a range of issues including minor drafting points and failure to follow proper drafting practice.

111. The Committee notes a small reduction in the number of times the general reporting ground was engaged between 2012-13 and 2013-14 and also that there has been an overall reduction in the proportion of instruments reported on the general ground.

112. There are still, however, a significant proportion of instruments reported on the general ground in relation to matters such as minor drafting defects or failures to follow proper drafting practice. While accepting that points raised under this ground are often of a less serious nature, the Committee notes that these types of errors can cumulatively have an impact on the operation of the instrument and it would therefore welcome a greater reduction in the points raised on this ground.

113. The Committee is aware that there has been a reduction in the checking processes applied to instruments by the Scottish Government. Errors of this sort may be attributable to a reduction in the checking processes.

114. As a general conclusion, in considering the objective of ensuring accessibility of the law to the end user, the Committee cannot lose sight of these other reporting grounds and so the Committee would wish to see a reduction of instruments being reported on these grounds in future.

115. While the Committee appreciates that there are fewer resources available to the Scottish Government it nonetheless invites the Scottish Government to reflect on those processes in an effort to reduce the number of instruments reported under this ground.

116. Moreover, the Committee urges the Scottish Government to pay close regard to the drafting of instruments as a step towards reducing the number of instruments reported on the grounds within its remit, particularly in relation to reducing the number of errors in instruments.

Advisory grounds

117. Insofar as the advisory grounds are concerned, there were again relatively few reports under these grounds.

118. There has, however, been a reduction in the number of reports under ground (g) and a continuation of the absence of reports under grounds (a) and (b).

119. There has again this year been a relatively significant number of instruments reported under ground (j), reflecting a failure to comply with laying requirements. Where there is a breach of the laying requirements a letter to the Presiding Officer

explaining why the breach has occurred is required. Where such a letter is submitted, it is incumbent on the Committee to consider whether it accepts the explanation provided.

120. In considering the reasons given for breaches of the laying requirements, there has been an increase in the instances where the Committee has not been content with the explanation provided. Explanations with which the Committee has not been content have ranged from failures in communication within the Scottish Prison Service (Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014)) to a lack of planning and prioritisation with the Scottish Government (Landfill (Scotland) Amendment Regulations 2013 (SSI 2013/222)).

121. The Committee is disappointed to note that there has been an increase in its dissatisfaction with the reasons given for breaches of the laying requirements under ground (j). The Committee recognises that there will be occasions where such a breach is necessary or even desirable but, wherever possible, the Scottish Government should endeavour to conform to the laying requirements. These requirements are in place to ensure that the Parliament has sufficient time to consider instruments before they come into force and that the wider public has an opportunity to be made aware and respond to them too. As such, the breaching of laying requirements should be avoided wherever possible and the Committee encourages the Scottish Government to put in place appropriate processes and procedures to avoid such breaches.

Table 3: Instruments laid by the Scottish Government in 2012-13 and 2013-14 reported on by the Delegated Powers and Law Reform Committee, broken down by lead committee

| Lead Committee | 2013-14 | | | 2012-13 | | |
|---|------------|----------------|-------------|------------|----------------|-----------|
| | Total SSIs | Total reported | % | Total SSIs | Total reported | % |
| Rural Affairs, Climate Change and Environment | 48 | 9 (12) | 19% (25%) | 52 | 11 (16) | 21% (31%) |
| Health and Sport | 46 | 9 | 19.5% | 27 | 3 (5) | 11% (19%) |
| Justice | 40 | 5 (8) | 12.5% (20%) | 64 | 15 (21) | 23% (33%) |
| Local Government and Regeneration | 22 | 1 | 4.5% | 28 | 7 | 25% |
| Education and Culture | 41 | 11 | 27% | 24 | 2 (3) | 8% (12%) |

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| | | | | | | |
|---------------------------------------|----|---|-----|----|-------|-------------|
| Infrastructure and Capital Investment | 19 | 1 | 5% | 43 | 3 (4) | 7% (9%) |
| Economy, Energy and Tourism | 7 | 0 | 0 | 8 | 2 (3) | 25% (37.5%) |
| Finance | 2 | 0 | 0 | 3 | 0 | 0 |
| Equal Opportunities | 0 | 0 | 0 | 0 | 0 | 0 |
| Welfare Reform | 5 | 1 | 20% | 9 | 2 | 22% |
| SPPA | 1 | 0 | 0 | 1 | 1 | 100% |
| Referendum (S) Bill | 2 | 0 | 0 | 1 | 0 | 0 |
| European and External Relations | 2 | 1 | 50% | 0 | 0 | 0 |
| Parliament | 2 | 0 | 0 | 2 | 0 | 0 |

Introduction

122. Table 3 provides a breakdown of the instruments reported on by lead committee in 2013-14 in comparison with the equivalent figures for instruments laid in 2012-13.

123. As discussed earlier, in order to focus on the issues of concern to the Committee, the instruments reported on grounds which it considers to be advisory are not included in the analysis of the overall figures although they are included in the bracketed figure in the table above. Figures relating to the number of reports raised on ground (j) are not included in the analysis where the Committee was satisfied with the reasons given for non-compliance with the laying requirements.

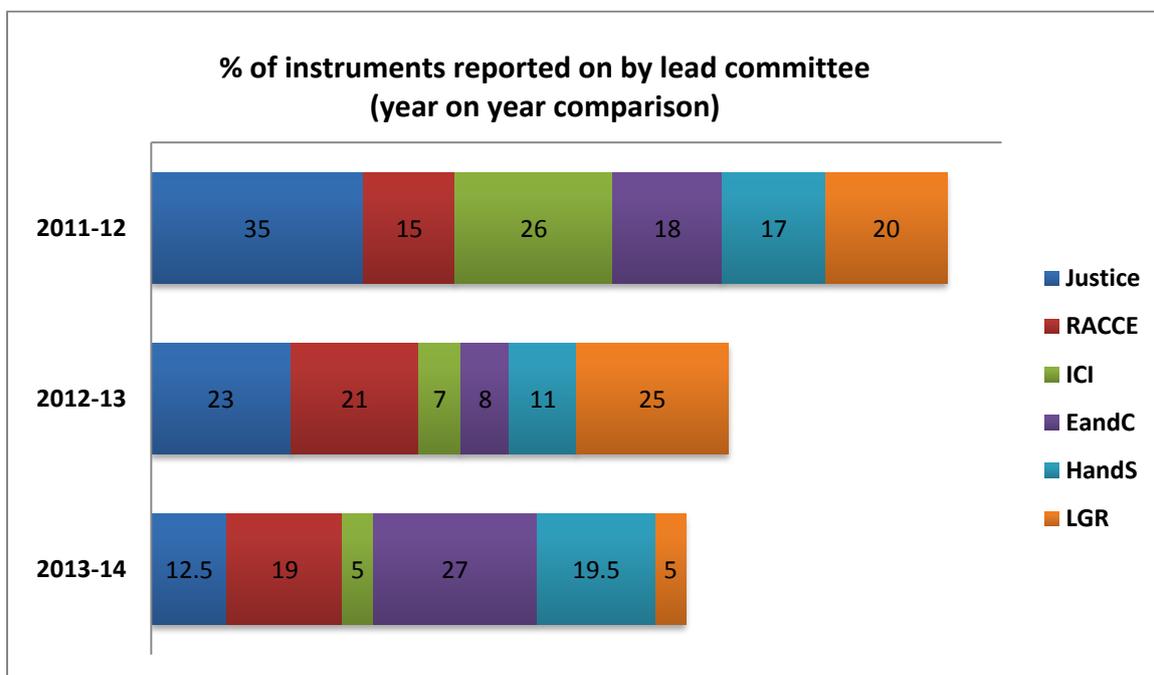
Overview

124. In 2013-14 the Rural Affairs, Climate Change and Environment (RACCE) Committee considered the largest number of instruments of any committee, having considered 48 instruments in total during the reporting period. This is a change from last year when the Justice Committee was the recipient of the most significant number of instruments.

125. As regards the highest percentage of instruments reported upon, the European and External Relations Committee considered just two instruments, of which one was drawn to the Parliament's attention – 50% of instruments referred to that Committee. This obviously represents the highest percentage of instruments drawn to the Parliament's attention of any Committee, but it is perhaps more useful to consider the figures for the Education and Culture Committee which, with 27% of the instruments referred to it drawn to the Parliament's attention, considered the next highest number of reported instruments in percentage terms and considered a sufficient number of instruments to make the percentage figure of relevance.

126. The bar charts below out the number of instruments reported on in each of the three years of this session by committee. The chart focuses on those committees who receive the majority of the instruments.

127. It is interesting and welcome to note that, of the committees who do receive a majority of the instruments, the Justice Committee, Infrastructure and Capital Investment Committee and Local Government and Regeneration Committee were all at session lows in terms of the percentage of instruments reported.



Rural Affairs and Climate Change Committee

128. The RACCE Committee was referred the highest number of instruments this year. That said, the 48 instruments it was referred this year is a reduction of four on the number received last year. Furthermore, there was a reduction in the percentage of those reported. Discounting those reports under the advisory grounds where the Committee was content with the justification offered, 19% of instruments were reported, 2% lower than last year.

129. It is also welcome to note that of the 12 instruments drawn to the attention of the Committee only two were on one of the more significant grounds.

130. That said, the share of instruments reported remains higher than the overall Parliamentary average.

Health and Sport Committee

131. The recipient of the next highest number of instruments was the Health and Sport Committee. Unlike the RACCE Committee, the Health and Sport Committee has seen an increase in the number of instruments laid, from 27 in 2012-13 to 46 in 2013-14. In addition, there has also been an increase in the number and percentage of instruments reported from 2012-13 to 2013-14; almost 20% of instruments were reported this year as compared to 11% last year.

132. While it is disappointing to note the increase in the number of instruments referred to the Committee which have been reported upon, it is pleasing to note that none of those nine instruments drawn to the Committee's attention were reported under one of the significant reporting grounds.

133. It is also worth reflecting that the 19.5% of instruments reported this year is still half of the percentage of instruments reported in 2009⁷, so, although disappointing this is not the worst performing year in terms of instruments referred to the Health and Sport Committee. It is, however, still higher than the overall parliamentary average.

Education and Culture Committee

134. The Education and Culture Committee received the next largest share of instruments. 41 instruments were referred to the Committee in 2013-14, as compared with 24 in 2012-13, representing a 42% rise in the number of instruments referred to the Committee. This increase in the number of instruments referred to the Committee was unfortunately matched by a sizeable increase in the number of instruments referred to the Committee that were reported upon. 8% of instruments referred to the Education and Culture Committee in 2012-13 were reported upon while in 2013-14 27% of instruments were reported upon.

135. This is also an increase on the number instruments reported upon in 2011-12 when 18% of instruments were drawn to the Parliament's attention. That said, the number of instruments referred to the Committee that year (2011-12) was 28, a figure comparable to that referred in 2012-13.

136. It should be noted, however, that this is still some way short of the figure for 2009 when 31% of instruments referred to the Committee were reported under one of the reporting grounds.⁸ That said, the figure is 11% higher than the overall Parliamentary average.

137. The increase in the number of instruments referred to the Education and Culture Committee can, however, be largely attributed to the implementation of the Children's Hearings (Scotland) Act 2011 and the Post-16 Education (Scotland) Act 2013. Mindful of the forthcoming implementation of the Children and Young People (Scotland) Act 2014, it could be expected that the number of instruments referred to the Education and Culture Committee will remain at high.

138. In spite of this increase in the number of reports only one instrument was reported under one of the significant reporting grounds. The Secure

⁷ <http://www.scottish.parliament.uk/parliamentarybusiness/PreviousCommittees/24226.aspx>

⁸ <http://www.scottish.parliament.uk/parliamentarybusiness/PreviousCommittees/24226.aspx>

Accommodation (Scotland) Regulations 2013 was reported under ground (e). This matched the figure for last year when again only one instrument was reported under one of the significant reporting grounds.

Justice Committee

139. This year the Justice Committee saw a reduction in both the number of instruments referred to it and also in the number of those that were drawn to the Parliament's attention. Forty instruments were referred to the Justice Committee in 2013-14 as compared to 64 in 2012-13. Furthermore, 12.5% of instruments referred to the Justice Committee were reported upon, 10.5% lower than in the preceding year. The figure for 2012-13 was in itself an improvement on the previous year when 35% of the instruments referred to the Justice Committee were reported upon. It is pleasing therefore to see that this reduction in reporting has been sustained. The Committee encourages the Scottish Government in its efforts to sustain this improvement.

140. It should be noted that this level of reporting reflects a return to the levels seen in relation to instruments referred to the Justice Committee last session. For example, in 2009, 12% of instruments referred to the Justice Committee were reported under one of the reporting grounds.⁹

141. It should be noted that a significant proportion of those drawn to the Parliament's attention last year concerned the implementation of the Police and Fire Reform (Scotland) Act 2012. This implementation programme also involved a relatively significant number of instruments and not having such a significant implementation programme has contributed to a reduction in the number of instruments referred to the Justice Committee.

142. It should also be noted that only one of the instruments drawn to the attention of the Justice Committee was reported under one of the significant reporting grounds.

Local Government and Regeneration Committee

143. Although there was a relatively small reduction in the number of instruments referred to the Committee between 2012-13 and 2013-14 there was a significant decline in the number of those instruments reported. Only one instrument referred to the Local Government and Regeneration Committee in 2013-14 was reported upon as compared to seven in 2012-13, representing a reduction of 20.5% in the share of instruments reported.

144. It should also be noted that this position compares favourably with the percentage of instruments reported upon referred to its predecessor Committee last session.¹⁰

145. Disappointingly, however, although only one instrument was reported upon it was reported under ground (i), for defective drafting. That also means that, although there was a significant overall reduction in the number of instruments reported that were drawn to the attention of the Local Government and

⁹ <http://www.scottish.parliament.uk/parliamentarybusiness/PreviousCommittees/24226.aspx>

¹⁰ <http://www.scottish.parliament.uk/parliamentarybusiness/PreviousCommittees/24226.aspx>

Regeneration Committee, the number of instruments reported under the significant reporting grounds remained static.

Infrastructure and Capital Investment Committee

146. Between 2012-13 and 2013-14 there has been a significant reduction in the number of instruments referred to the Infrastructure and Capital Investment Committee. There were 43 instruments referred to the Infrastructure and Capital Investment Committee in 2012-13, however, this year only 19 instruments were referred to the Committee.

147. There has also been a small reduction (2%) in the number of those instruments which were reported upon. 5% of instruments referred to the Committee were reported although it should be noted that this represents only one instrument.

148. It is also welcome to the Committee to note that although last year two instruments drawn to the Committee's attention were reported under one of the significant reporting grounds, this year no instruments were reported under one of these grounds.

Economy, Energy and Tourism Committee

149. The Economy, Energy and Tourism Committee was referred one fewer instrument than last year and also saw a reduction in the number of instruments referred to it that were reported upon. In effect this meant that this year no instruments referred to the Committee were reported upon as compared with the previous year when two instruments were reported, one under one of the significant grounds.

Welfare Reform Committee

150. The Welfare Reform Committee was referred fewer instruments this year. Of those instruments, fewer were drawn to the Committee's attention under one of the reporting grounds both in terms of number and percentage share. Five instruments were referred to the Welfare Reform Committee this year of which only one was reported upon under one of the reporting grounds.

151. It should be noted though that this was reported under one of the significant reporting grounds (ground (i)). The instrument itself was an amendment to the Council Tax Reduction (Scotland) Regulations 2012 (SSI 2012/303), which was reported in the previous year also under ground (i).

Finance Committee

152. As in the previous two years, no instruments referred to the Finance Committee were reported. The Committee again welcomes this consistency and reflects on the overall improvement this reflects on the levels in the last session when the lowest reporting percentage was 25%.

European and External Relations Committee

153. Having not been referred any instruments previously this session, the European and External Relations Committee was referred two instruments in 2013-14. Of those one was reported. under the general reporting ground. The

errors identified in the instrument were conceded by the Scottish Government, which committed to correcting the errors.

Referendum (Scotland) Bill Committee

154. The Referendum (Scotland) Bill Committee was referred two instruments, one more than last year. As with last year, none of the instruments referred to it were reported upon.

Standards, Procedures and Public Appointments Committee

155. Like last year the Standards, Procedures and Public Appointments Committee was referred one instrument. In an improvement on last year, the instrument was not drawn to the Parliament's attention.

Parliament

156. Like last year, and indeed every year of this session, two instruments were referred directly to the Parliament. And like each of the preceding years, none of those instruments were reported upon.

Equal Opportunities Committee

157. For the second time this session no instruments were referred to the Equal Opportunities Committee. It should be noted, however, that the imminent implementation of the Marriage and Civil Partnership (Scotland) Act 2014 means that in this reporting year it is anticipated that instruments will be referred to the Committee.

Conclusion

158. As in previous years the figures show significant improvement in some areas, but it is pleasing to note that this year that improvement has been achieved across the majority of committees.

159. Indeed, of those committees who were referred a reasonable number of instruments, only two committees, the Education and Culture Committee and the Health and Sport Committee saw an increase in the percentage of instruments referred to them that were reported upon.

LORD PRESIDENT'S PRIVATE OFFICE

Overview

160. As noted earlier, Acts of Sederunt¹¹ and Acts of Adjournal¹² are laid by the Lord President's Private Office (LPPO) on behalf of the Court of Session and High Court of Justiciary as the responsible authority and are subject to the same scrutiny by the Committee as any other SSI.

161. As these instruments are laid separately from those laid by the Scottish Government, this part of the report provides a separate analysis of these figures.

Table 4: Instruments laid by the Lord President's Private Office in 2012-13 and 2013-14 reported on by the Delegated Powers and Law Reform Committee

| | 2013-14 | | | 2012-13 | | |
|-------|------------|----------------|-----|------------|----------------|-----|
| | Total SSIs | Total reported | % | Total SSIs | Total reported | % |
| Total | 22 | 4 | 18% | 22 | 8 | 36% |

162. Table 4 provides an overview of the total number of instruments brought forward by the LPPO in 2013-14 as compared with the number laid in 2012-13.

163. Last year the Committee noted its disappointment in the number and percentage of instruments laid by the LPPO which were reported upon. Significantly, half of those instruments reported upon were under one of the significant reporting grounds.

164. In noting its disappointment last year, the Committee expressed its hope that the high level of reporting was an aberration.

165. It is therefore very welcome to the Committee to note that the level of reporting is reduced from last year. Indeed the number of instruments laid by the LPPO which have been reported upon have been halved.

166. Although lower than the figure for last year, the Committee notes that the percentage of instruments reported is still marginally higher than the figure for 2011-12 when 17% of instruments were reported.

¹¹ The legal name given to the procedural rules of court regulating various civil legal procedures in Scotland. Despite the word "Act" in the title, this is a type of subordinate legislation rather than primary legislation.

¹² The legal name given to rules of court regulating criminal procedure in Scotland. Despite the word "Act" in the title, this is a type of subordinate legislation rather than primary legislation.

167. Last year the Committee noted the discrepancy between the percentage of Government instruments reported and the significantly higher percentage of LPPO instruments reported. It is therefore pleasing to the Committee to note that there is no such discrepancy in this year's figures.

168. **The Committee welcomes the improvements in the quality of instruments laid by the LPPO. Given the Committee's concerns about the quality of the instruments laid by the LPPO expressed in its last report, it is particularly pleasing to see such a marked improvement in the instruments laid this year. In welcoming these improvements, however, the Committee encourages the LPPO to maintain these standards and endeavour to further improve the quality of the instruments it lays.**

Table 5: Instruments reported on broken down by ground: Lord President's Private Office

| Ground | 2013-14 | | 2012-13 | |
|---|---------|---------------------|---------|---------------------|
| | No. | % of SSIs laid (22) | No. | % of SSIs laid (22) |
| (a) charge on the Scottish Consolidated Fund | 0 | 0 | 0 | 0 |
| (b) made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts | 0 | 0 | 0 | 0 |
| (c) retrospective effect where the parent statute confers no express authority so to provide | 0 | 0 | 0 | 0 |
| (d) unjustifiable delay in the publication or the laying of it before parliament | 0 | 0 | 0 | 0 |
| (e) doubt as to whether the instrument is intra vires | 1 | 4.5% | 1 | 4.5% |
| (f) raises a devolution issue | 0 | 0 | 0 | 0 |
| (g) unusual or unexpected use of the powers conferred by the parent statute | 0 | 0 | 0 | 0 |
| (h) form or meaning could be clearer | 2 | 9% | 2 | 9% |
| (i) drafting appears to be defective | 1 | 4.5% | 3 | 13.5% |

| | | | | |
|--|---|----|---|-----|
| (j) failure to comply with laying requirements | 0 | 0 | 0 | 0 |
| General ground (e.g. failures to follow proper drafting practice or legislative process) | 2 | 9% | 4 | 18% |

169. Table 5 provides a breakdown of the grounds under which the instruments laid by the LPPO were reported. In considering the table it should be noted that although four instruments were reported there were six reports on four separate grounds.

170. Although the Committee welcomes the overall improvement in the instruments, it is nonetheless disappointed that there were still two reports on instruments under the significant reporting grounds. There have been fewer reports for defective drafting this year, but it is still disappointing to note that instruments laid by the LPPO continue to be reported under the significant reporting grounds.

171. It is of considerable importance to the Committee that instruments are accessible to the general public and with that in mind, the Committee would have welcomed further improvement in terms of the number of instruments reported under ground (h). At the same time, the number of instruments reported under ground (h) remain static from last year and to that extent the Committee welcomes that there has been no deterioration in that regard.

172. Finally, two instruments were reported under the general reporting ground as containing less serious drafting errors. This represents a halving of the number of instruments reported under the general reporting ground from 2012-13 and a return to the figures for 2011-12.

173. Overall therefore the number of reports under the various grounds is reflective of the reduction in the number of instruments reported. Although welcoming this reduction, the Committee encourages the LPPO to endeavour to reduce the number of reports under the significant grounds and also those under ground (h).

SCOTTISH STATUTORY INSTRUMENTS - GENERAL

Quarterly reports

174. This reporting year has seen the continuation of the quarterly reports by the Committee, which began last year. These reports provide a statistical account of the instruments considered by the Committee during the previous quarter, setting out those instruments reported upon and the grounds under which they have been reported.

175. These quarterly reports are published on the Committee's website.¹³

176. These reports have enabled the Committee as well as the Scottish Government and LPPO to identify trends in the reporting of instruments at an early juncture and respond appropriately.

177. In addition they have enabled the Committee to maintain a watching brief on the quality of instruments laid by the Scottish Government and the LPPO rather than having to wait until the production of an annual report before assessing the overall quality of instruments laid.

178. In last year's report the Committee expressed particular concern about the quality of the instruments being laid by the LPPO. The quarterly reports enabled the Committee to maintain a watching brief on the quality of the instruments being laid by the LPPO. In reflecting on these reports as the year went on the Committee was able to assure itself that there has indeed been an improvement in the quality of the instruments being laid.

179. The Committee considers that the quarterly reports have been a successful innovation and it intends to continue to produce quarterly reports with a view to them contributing to an overall improvement in the quality of instruments laid.

Annual evidence session with the Minister for Parliamentary Business

180. Following the publication of the Committee's report on instruments considered in 2012-13, the Committee agreed to invite the Minister for Parliamentary Business to give oral evidence to respond to the report. In so doing, the Committee agreed to invite the Minister to appear following the publication of all annual reports on instruments considered.

181. The Minister appeared before the Committee on 29 April 2014.¹⁴

182. At the meeting with the Minister, the Committee highlighted the concerns raised in its report and sought reassurances from the Minister.

183. Set out below are the reassurances given to the Committee.

¹³ <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/68666.aspx>

¹⁴ Delegated Powers and Law Reform Committee, Official Report 29 April

184. Firstly, the Minister recognised the challenges presented by peaks in the laying of instruments as set out in the report and undertook to endeavour to avoid such peaks.

185. In its last report the Committee highlighted concerns about breaches of the 28-day rule in relation to instruments which implement UK-wide policy. These have also persisted in this reporting period, arising, for example, in relation to the National Health Service Superannuation (Scotland) Amendment Regulations 2014 (2014/43) and the Teachers' Superannuation (Scotland) Amendment Regulations 2014 (2014/44). The Minister gave a commitment to the Committee to pursue this matter with David Mundell MP, Parliamentary Under-Secretary of State for Scotland.

186. Insofar as packages of instruments were concerned, the Committee raised concerns in its report about the general quality of drafting, the quality of the policy notes, cross-referencing between instruments yet to be laid and planning for such packages. In the evidence the Committee recognised that the Scottish Government had already effected an improvement in the quality of policy notes while endeavouring to avoid cross-referencing to instruments yet to be laid. The Committee also appreciated the commitment to planning meetings in relation to packages of instruments, so as to inform the Committee and its advisers as to what it is to expect.

187. The Committee also noted and welcomed the Minister's recognition of the role of the Committee and the importance of the relationship between this Committee and the Scottish Government in effecting an improvement in the quality and robustness of secondary legislation.

188. The Committee also raised matters in relation to primary legislation, which are discussed later in this report.

189. There has not yet been sufficient time since the Minister appeared before the Committee to assess fully the extent to which these commitments have been or will be met, but it is perhaps noteworthy that to date the peaks in the laying of instruments have been less extreme. Also, there has been a significant improvement in the information made available to the Committee as to the programming of packages of instruments.

190. At the same time, however, breaches of the 28-day rule in relation to instruments which implement UK-wide policy have persisted.

191. The Committee will return to these matters when the Minister next appears before the Committee and in its next report when there has been a more considerable period of time to reflect upon the issues.

Commitments: Scottish Government and Lord President's Private Office

192. Throughout periods of reporting, the Scottish Government and the LPPO often make commitments in response to points raised on instruments by the Committee relating to defective drafting or other errors. Such commitments

generally involve amending provisions being brought forward to address the Committee's concerns.

193. During this reporting period, the Scottish Government made a commitment to address some of the concerns raised by the Committee in respect of a number of instruments which the Committee drew to the attention of the Parliament.

194. The Scottish Government has confirmed that of the 14 instruments identified for correction/amendment, eight of these corrections/amendments have been made (either by means of a corrective instrument or, in one case, a correction slip). These are listed in *ANNEX B*.

195. Six commitments given during this reporting period remain outstanding. Details of these – as well as a list of commitments from previous years that have yet to be met – can also be found in *ANNEX B*.

196. The Lord President's Private Office met all commitments timeously and has none outstanding.

197. The Committee welcomes the continued effort made by the Scottish Government, and the Lord President's Private Office in particular, when it comes to meeting the commitments it made to correcting or amending instruments on which the Committee had reported. The Committee welcomes the fact that the LPPO has no outstanding commitments and urges the Scottish Government to complete this process in early course.

Withdrawal of instruments

198. The Committee notes that the following instruments/documents were withdrawn and subsequently re-laid during the reporting period—

- Registration of Social Workers and Social Service Workers in Care Services (Scotland) Regulations 2013 [draft];
- Protected Trust Deeds (Scotland) Regulations 2013 [draft];
- Model Code of Conduct for Members of Devolved Public Bodies [draft];
- Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014 [draft];
- Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014 - Proposed Explanatory Document [draft].

199. All five of these documents were initially withdrawn by the Scottish Government to address points which had been raised either in light of comments made by the Committee or following initial queries raised by the legal advisers prior to the instruments being considered by the Committee.

200. The Committee considers that this demonstrates the effectiveness of robust scrutiny and partnership working which ensures that concerns raised are addressed before the instruments became law.

Minor Points

201. During its scrutiny of instruments in 2013-14, the Committee identified a total of 72 instruments on which minor points were raised (generally typographical or referencing errors). This can be broken down into 60 instruments laid by the Scottish Government and 12 instruments laid by the LPPO.

202. This overall figure is slightly down on last year when almost a third of instruments laid contained minor points.

203. Over half of the instruments laid by the LPPO over the course of this reporting year contained minor points.

204. While not affecting the validity of the instrument, these points are areas that the Committee considers the Scottish Government, and the LPPO in particular, should correct at the earliest opportunity.

205. While the Committee accepts that minor points such as these do not affect the validity of instruments, it urges both the Scottish Government and the LPPO to take steps to ensure that the number of these types of errors decreases.

Motions to Annul

206. Motions to annul the following two instruments were lodged by members during the reporting period—

- Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2013 (SSI 2013/320);
- Teachers' Superannuation (Scotland) Amendment Regulations 2014 (SSI 2014/44).

207. The motion to annul the Criminal Legal Aid (Scotland) (Fees) Amendment Regulations 2013 (SSI 2013/320) was disagreed to by the Justice Committee (by division) at its meeting on 17 December 2013.

208. The motion to annul the Teachers' Superannuation (Scotland) Amendment Regulations 2014 (SSI 2014/44) was disagreed to by the Education and Culture Committee (by division) at its meeting on 18 March 2014.

209. The Committee recognises that the number of motions to annul does not necessarily have any bearing on the quality of instruments laid, but includes this information for interest.

Consolidation

210. The Committee's overarching objective is to ensure the accessibility of legislation to the general public. As part of this objective, the Committee continued to pursue the issue of consolidation of instruments which have been amended a number of times or to the extent that it was difficult to discern what was the current law.

211. While in principle the Committee would like to see as many instruments as possible be consolidated, it recognises that consolidation can be a very resource intensive exercise both from the perspective of the Parliament as well as the Scottish Government. Therefore the Committee has agreed to target its efforts. In particular, the Committee has only sought an explanation from the Government where there appears to be merit in consolidation being brought forward for the purposes of accessibility.

212. Only two instruments were identified by the Committee as meriting consolidation and these are listed in *ANNEX C*.

213. The Committee very much welcomes the ten consolidating instruments brought forward by the Scottish Government of its own accord which, along with the one consolidating instrument laid by the LPPO, are listed in *ANNEX D*.

214. The Committee will continue to liaise with the Scottish Government in respect of these points and will continue to pursue the issue of consolidation more generally.

Transitional Provisions

215. The Committee has reflected again this year on its scrutiny of commencement orders where they contain complex transitional provisions.

216. Mindful of past concerns expressed by the Committee about such commencement orders, the Scottish Government committed to providing policy notes to accompany such orders. It also committed to enable greater time for scrutiny by endeavouring to provide for a full 40 days between the made date and the appointed day.

217. This reporting year, in its submission to the SPPA Committee's legislation inquiry, the Committee raised this matter.

218. In particular, the Committee invited the SPPA Committee to reflect upon whether there would be merit in making provision in Standing Orders for the commitments made by the Scottish Government as regards the laying of commencement orders containing complex transitional provisions.

219. The SPPA Committee is yet to conclude its inquiry and report to the Parliament. The Committee will return to this issue again following the SPPA Committee's report.

220. In the meantime, however, the Committee will maintain close scrutiny of commencement orders containing complex transitional provisions.

221. For example, in considering the Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26) at its meeting of 18 February 2014 the Committee noted that the instrument made no saving provision for the visiting committees for HMP Aberdeen and HMP Peterhead beyond the date of closure of the prisons. Without such a period those committees would be unable to complete any ongoing investigations or to report on their activities under rule 153 of the Prisons and Young Offenders Institutions (Scotland) Rules 2011 for the

period from 1 April 2013 to their abolition. The Committee also noted that, in relation to previous prison closures, such a period has been allowed for such purposes by way of transitional and saving provision. The Committee drew this matter to the attention of both the Scottish Government and the lead committee.

222. Given the implications of failings in transitional provisions it is critical that the Committee maintains close scrutiny of such provisions. It is also critical that the Committee is afforded sufficient time and provided with sufficient information to enable it to undertake such scrutiny.

223. Moreover the Committee eagerly awaits the conclusions of the SPPA Committee. The Committee will reflect on this matter further following the conclusion of the SPPA Committee's considerations.

Packages of instruments

224. In its report last year the Committee raised concerns about the laying of packages of instruments. In particular, the Committee raised concerns about the programming of packages of instruments, the level of reporting on instruments within those packages, the laying of instruments referring to instruments yet to be laid and the quality of the policy notes.

225. As noted above, the Minister for Parliamentary Business has committed to effect an improvement in how packages of instruments are planned for and laid as well as an improvement in the quality of the instruments themselves.

226. Last year's concerns were raised in the context of the instruments implementing the Police and Fire Reform (Scotland) Act 2012. Since that time there has not been a package of instruments of a comparable size and, as such, it is difficult to measure whether improvements have been achieved.

227. There are, however, a number of significant implementation packages forthcoming. In relation to them, there has been a marked improvement in the level of discussion with the Scottish Government as regards its plans.

228. The Committee therefore welcomes this improvement in planning and discussion and hopes that a similar improvement can be affected in those other areas of concern to the Committee. It is anticipated that the Committee will consider a number of such packages of instruments over the coming year and as such, will be in a position to assess whether improvements have been made in the areas that were of such concern to the Committee last year.

Agricultural Holdings (Scotland) Act 2003 Remedial Order

229. In the course of the reporting year, the Committee considered the above order. The purpose of the order was to correct a legal defect identified by the Supreme Court in the case of *Salvesen v Riddell*. The Court determined that section 72(10) of the Agricultural Holdings (Scotland) Act 2003 ("the 2003 Act") was incompatible with the rights of landlords to peaceful enjoyment of their property under Article 1 of the First Protocol to the European Convention on

Human Rights. It was therefore outwith the legislative competence of the Scottish Parliament and “not law” in terms of section 29(1) of the Scotland Act 1998.

230. The Supreme Court suspended the effect of its judgement for a period of one year in order to allow Ministers to identify those parties who would be affected by the defect in the legislation and to bring forward a solution which deals with them “in a fair and constructive manner”.

231. The Committee had two opportunities to reflect on the order. Firstly, when it was presented for consultation and secondly when it was laid for approval.

232. The Committee used the opportunity afforded by the consultation to take oral evidence from officials and then to highlight concerns about the proposed transitional provisions within the order, the role of the land court in determining on-going cases and bilateral agreements.

233. These concerns were considered by the Scottish Government and responded to in the order laid for approval. The Committee expressed contentment with the approach taken.

234. To that end, the Committee believes that it was able to contribute effectively to the resolution of this legal defect that the order sought to resolve.

OTHER BUSINESS

Introduction

235. Although the focus of this report is on the Committee's activities in relation to its scrutiny of instruments, in order to give a full picture of the Committee's activities throughout the reporting period, the following section sets out the Committee's activity in respect of other matters within its remit.

Bills

236. A primary function of the Committee is to consider the delegated powers provisions in any public or private Bills introduced in the Parliament. Over the reporting period, the Committee has considered and reported on the following 18 Bills at Stage 1:

- Scottish Independence Referendum Bill;
- Landfill Tax (Scotland) Bill;
- Regulatory Reform (Scotland) Bill;
- Tribunals (Scotland) Bill;
- Bankruptcy and Debt Advice (Scotland) Bill;
- Criminal Justice (Scotland) Bill;
- Public Bodies (Joint Working) (Scotland) Bill;
- Marriage and Civil Partnership (Scotland) Bill;
- Children and Young People (Scotland) Bill;
- Procurement Reform (Scotland) Bill;
- Buildings (Recovery of Expenses) (Scotland) Bill;
- Budget (Scotland) (No.3) Bill;
- Housing (Scotland) Bill;
- Disabled Persons' Parking Badges (Scotland) Bill;
- Food (Scotland) Bill;
- Revenue Scotland and Tax Powers Bill;
- Courts Reform (Scotland) Bill;
- Historic Environment Scotland Bill.

237. The Committee also considered and reported on the following 12 Bills as amended at Stage 2:

- Post-16 Education (Scotland) Bill;
- Land and Buildings Transaction Tax (Scotland) Bill;
- Scottish Independence Referendum Bill;
- Victims and Witnesses (Scotland) Bill;
- Landfill Tax (Scotland) Bill;
- Regulatory Reform (Scotland) Bill;
- Marriage and Civil Partnership (Scotland) Bill;
- Children and Young People (Scotland) Bill;
- Public Bodies (Joint Working) (Scotland) Bill;
- Tribunals (Scotland) Bill;
- Bankruptcy and Debt Advice (Scotland) Bill;

- Procurement Reform (Scotland) Bill.

238. All of the Bills (with the exception of the Buildings (Recovery of Expenses) (Scotland) Bill and the Disabled Persons' Parking Badges (Scotland) Bill) were Scottish Government Bills and the Committee's recommendations led to a number of changes being made by the Scottish Government to the delegated powers provisions in Bills. Through its scrutiny process, the Committee also aims to ensure that the correct balance between primary and secondary legislation is maintained.

239. The Committee's consideration of Bills is usually carried out through written correspondence with Scottish Government officials. However, sometimes the extent of the delegated powers in Bills means that the scrutiny is better conducted through oral evidence.

240. This was the case in relation to the delegated powers provisions in the Regulatory Reform (Scotland) Bill, in particular the extensive scope of the powers proposed in Parts 1 and 2 of the Bill. The Committee therefore took oral evidence from Scottish Government officials, enabling it to explore the issues in detail and give thorough scrutiny to the extent of the provisions.

241. Similarly, the breadth of powers given to Ministers in the Food (Scotland) Bill as introduced was an issue that the Committee felt worthy of exploring in greater detail. With this in mind, the Committee took oral evidence from Scottish Government officials in order to give thorough consideration to these provisions.

242. The Committee also took oral evidence on the Marriage and Civil Partnership (Scotland) Bill with a view to obtaining further information, specifically on:

- the power at section 8(1) and the scope of the proposed power to define the effect of changing a civil partnership to a marriage;
- the power at section 28(1) as regards the nature of the proposed renewed marriage or renewed civil partnership;
- the power at schedule 2, paragraph 6, new section 5D of the Gender Recognition Act 2004 to understand the nature of the proposed power to define additional circumstances in which a Gender Recognition Certificate (GRC) may be issued.

243. These three sessions allowed the Committee to scrutinise the delegated powers in detail which enabled it to provide a comprehensive report of its views to the Parliament.

Stages 2 and 3

244. In the course of this reporting year, the Committee encountered significant challenges in its consideration of Bills after Stage 2 in two regards.

245. Firstly, the Committee experienced challenges in terms of the gap between Stages 2 and 3 of the legislative process and the extent to which this allows for the Committee to effectively scrutinise Bills. This is of particular relevance where the

minimum time period between Stages 2 and 3 (ten days) is observed. In such circumstances there is very little time for the Committee to scrutinise changes made to the Bill at Stage 2.

246. To inform the Committee's scrutiny of amendments to the delegated powers within a Bill at Stage 2, the Scottish Government is obliged to produce a Supplementary Delegated Powers Memorandum. This is required to be produced by not later than the end of the second week before the week on which Stage 3 is due to start. Irrespective of whether the minimum time period is being observed or not, this timescale allows very little time for the Committee to scrutinise what can be complex and extensive changes to the delegated powers within a Bill.

247. The challenges of limited time and extensive changes to a Bill were highlighted this year in the context of the Marriage and Civil Partnership (Scotland) Bill and the Children and Young People (Scotland) Bill. Timescales were ultimately extended and the Committee was able to effectively scrutinise the Bills, but had they not been the Committee would have found it very difficult.

248. The second issue that arose this session was the number of amendments to delegated powers being lodged at Stage 3. The Committee has no specific obligation to consider such amendments, however, the Committee considers that as the experts in matters of delegated powers it would be remiss of it not to consider such powers and inform the Parliament in relation to them. The timescales between Stages 2 and 3 and moreover the timescales between the deadline for Stage 3 amendments and the Stage 3 proceedings gives the Committee very little time to scrutinise such amendments, particularly where they relate to new issues, such as they did in relation to the Public Bodies (Joint Working) (Scotland) Bill.

249. Given the Committee's concerns in relation to these matters and the extent to which concerns have increased this session, the Committee decided to draw them to the attention of the SPPA Committee to inform its legislation inquiry.

250. In addition, the Committee raised the matter with the Minister for Parliamentary Business when he gave evidence to the Committee.

251. At that meeting the Minister gave a commitment to review the gap between Stages 2 and 3 in the legislative process and recognised that the minimum timescales should be a minimum and not become what is commonly observed.¹⁵

252. Furthermore he asserted that unless particular circumstances make it unavoidable, new powers should not be introduced at Stage 3.¹⁶

253. The Committee welcomes these commitments and hopes that the challenges it encountered in relation to the Marriage and Civil Partnership (Scotland) Bill, Children and Young People (Scotland) Bill and Public Bodies (Joint Working) (Scotland) Bill are not repeated this year. At the same time, the Committee awaits the conclusions of the SPPA Committee and would

¹⁵ Delegated Powers and Law Reform Committee, Official Report 29 April Col.1435

¹⁶ Delegated Powers and Law Reform Committee, Official Report 29 April Col.1435

welcome changes in procedure that ensure such pressures as occurred in relation to the above Bills cannot be repeated.

Delegated Powers Memorandums

254. In its last report, the Committee expressed its concern about the quality of Delegated Powers Memorandums (DPM), noting the frequency with which the Committee had to resort to seeking further information from the Scottish Government in the absence of sufficient information within the Memorandum.

255. Since these concerns were raised in last year's report there has been no appreciable improvement in the quality of the DPMs. It is difficult to determine whether there has in fact been a further deterioration in their quality, but the Committee can say with some certainty that there has been no improvement.

256. With this in mind, the Committee explored with the Minister for Parliamentary Business its concerns about the quality of DPMs.

257. The Minister committed to improving the quality of Delegated Powers Memorandums.¹⁷ To that end the Committee clerks are now working with Scottish Government officials to make such an improvement.

258. Mindful of this commitment, and the work ongoing to deliver it, the Committee will be disappointed if, for a second successive year still no improvement has been made to the quality of the DPMs.

Scottish Law Commission Bills

259. At the beginning of this reporting period the Committee changed its name and remit in order to enable it to consider Scottish Law Commission bills.

260. The Parliament agreed to this change on the basis of a recommendation of the Standards, Procedures and Public Appointments Committee.

261. This process began with a Law Reform Working Group consisting of officials from the Scottish Parliament, the Scottish Government and the Scottish Law Commission set up in November 2011 to consider the rate of implementation of reports of the Scottish Law Commission.

262. The Group was established to take forward the work of the Law Reform Working Group established in the previous session to consider the same matter.

263. Implicit in the decision to form this original working group was a recognition that there is a concern about the implementation rate of Commission reports and the working group sought to understand what factors were impeding implementation of Commission reports.

264. The original working group concluded that the principal obstacle to the implementation of Commission reports was the perception that there was not sufficient Committee time available to scrutinise Bills arising from Commission reports. In particular, the working group recognised that the majority of Bills arising

¹⁷ Delegated Powers and Law Reform Committee, Official Report 29 April Col.1434

from Commission reports would be referred to the Justice Committee which already has a substantial legislative workload.

265. Reflecting on these issues, the original working group sought to develop a means by which these bills could be scrutinised.

266. The original working group concluded that using existing parliamentary resources would be the most effective means to provide for scrutiny and that the Subordinate Legislation Committee would be best placed to undertake this role.

267. In doing so, the original working group recognised that the then Subordinate Legislation Committee had responsibility for considering the whole breadth of Scots law and it had the capacity within its workload to undertake this role. Referring the Bills to the Subordinate Legislation Committee was therefore considered to be the best means by which these Bills could be brought forward without there being a detrimental impact on the Parliament's consideration of other matters.

268. The working group convened this session endorsed the original working group's view that the Subordinate Legislation Committee would be best placed to consider these Bills.

269. In coming to this view, the working group recognised the Committee's wide experience across the whole breadth of Scots Law and its familiarity with dealing with complex legislation, both primary and secondary through its existing scrutiny role.

270. At the end of this reporting period the first such Scottish Law Commission bill, the Legal Writings (Counterparts and Delivery) (Scotland) Bill, was introduced. Subsequently the Bill was referred to the Committee.

271. In addition, in oral evidence to the Committee, the Minister for Parliamentary Business advised the Committee that it was anticipated that one Scottish Law Commission Bill will be introduced each year¹⁸ meaning that the Committee should expect to be referred another bill in 2015.

272. The Committee will return to this issue next year and reflect on its experience in considering its first Scottish Law Commission Bill. Moreover the Standards, Procedures and Public Appointments Committee will review the process after two years or two bills, whichever comes first.

Legislative Consent Memorandums

273. The Committee has also considered four Legislative Consent Memorandums (LCMs). LCMs are prepared in relation to Westminster Bills which seek to change the law or alter Scottish Ministers' or the Scottish Parliament's powers in relation to devolved matters. The four LCMs considered by the Committee were on:

- Anti-social Behaviour, Crime and Policing Bill (UK Parliament legislation);
- Water Bill (UK Parliament legislation);

¹⁸ Delegated Powers and Law Reform Committee, Official Report 29 April Col.1437

- Deep Sea Mining Bill (UK Parliament legislation);
- High Speed Rail (London-West Midlands) Bill (UK Parliament legislation).

Public Body Consent Memorandums (PBCMs)

274. PBCMs relate to draft orders made under sections 1 to 5 of the Public Bodies Act 2011 which would fall within the Scottish Parliament's legislative competence. This mechanism was created to make provision for orders being brought forward under the Act which related to cross-border matters and so would require the consent of the Scottish Parliament before proceeding further.

275. One PBCM was considered by the Committee in 2013-14. The Committee considers the orders under the same grounds as instruments laid before the Parliament. In doing so, it determined that it did not need to draw the attention of the Parliament to the following order on any of those grounds:

- Public Bodies (Abolition of the National Consumer Council and Transfer of the Office of Fair Trading's Functions in relation to Estate Agents etc.) Order 2014.

CONCLUSION

276. Having considered different aspects of the Committee's year in isolation, it is worth reflecting on the year in its entirety.

277. In general terms the Committee welcomes the improvements it has seen in the quality of instruments laid by the Scottish Government. The overall reduction in the proportion of instruments reported upon is very welcome, particularly as it follows on from an improvement in the figures from last year.

278. This improvement was very welcome and, mindful of the commitments given to the Committee by the Minister for Parliamentary Business in oral evidence, the Committee hopes that improvements can also be effected in terms of policy notes, DPMs, breaches of laying requirements and the opportunity for committees to scrutinise bills after Stage 2.

279. The Committee also welcomes the improvements made in the quality of the instruments laid by the LPPO. Given the disappointment the Committee expressed in the quality of the instruments laid by the LPPO last year it is particularly pleasing to see such a significant improvement.

280. In addition, the Committee eagerly awaits the conclusions of the SPPA Committee and hopes that its report can effect changes which will enable the Committee to undertake ever more effective scrutiny. The Committee will return to this issue following the conclusion of the SPPA Committee's inquiry.

ANNEX A – REPORTING GROUNDS: 11 MAY 2013 TO 10 MAY 2014

(a) Charge on the Scottish Consolidated Fund

- None

(b) Made in pursuance of any enactment containing specific provisions excluding it from challenge in the courts

- None

(c) retrospective effect where the parent statute confers no express authority so to provide

- None

(d) unjustifiable delay in the publication or the laying of it before Parliament

- National Health Service (Superannuation Scheme) (Scotland) Amendment Regulations 2014 (SSI 2014/43) **Health and Sport**
- Teachers' Superannuation (Scotland) Amendment Regulations 2014 (SSI 2014/44) **Education and Culture**

(e) doubt as to whether it is intra vires

- Secure Accommodation (Scotland) Regulations 2013 [draft] **Education and Culture**
- Brucellosis (Scotland) Amendment Order 2014 (SSI 2014/63) **RACCE**

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| <i>LPPO instrument</i> |
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- Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Miscellaneous) 2013 (SSI 2013/238) **Justice**

(f) raises a devolution issue

(g) unusual or unexpected use of the powers conferred by the parent statute

- Personal Licence (Training) (Scotland) Regulations 2013 (SSI 2013/261) **Justice**

(h) meaning could be clearer

- Children's Hearings (Scotland) Act 2011 (Movement Restrictions Conditions) Regulations 2013 [draft] **Education and Culture**
- Mobile Homes Act 1983 (Amendment of Schedule 1) (Scotland) Order 2013 [draft] **Infrastructure and Capital Investment**
- Children's Hearings (Scotland) Act 2011 (Transitional, Savings and Supplementary Provisions) Order 2013 (SSI 2013/150) **Education and Culture**
- Registration of Social Workers and Social Service Workers in Care Services (Scotland) Regulations 2013 [draft] **Health and Sport**

- James Watt College (Transfer and Closure) (Scotland) Order 2013 (SSI 2013/181) **Education and Culture**
- Sea Fishing (Illegal, Unreported and Unregulated Fishing) (Scotland) Order 2013 (SSI 2013/189) **RACCE**
- Personal Licence (Training) (Scotland) Regulations 2013 (SSI 2013/261) **Justice**
- Food Additives, Flavourings, Enzymes and Extraction Solvents (Scotland) Regulations 2013 (SSI 2013/266) **Health and Sport**
- Adoption (Recognition of Overseas Adoptions) (Scotland) Regulations 2013 (SSI 2013/310) **Education and Culture**
- Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014 [draft] **Justice**
- Water Environment (Shellfish Water Protected Areas: Environmental Objectives etc.) (Scotland) Regulations 2013 (SSI 2013/325) **RACCE**
- Bovine Viral Diarrhoea (Scotland) Amendment (No. 2) Order 2013 (SSI 2013/337) **RACCE**
- National Health Service (General Ophthalmic Services) (Scotland) Amendment Regulations 2013 (SSI 2013/355) **Health and Sport**
- Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68) **Justice**
- Assigned Colleges (Scotland) Order 2014 (SSI 2014/80) **Education and Culture**
- National Health Service (Functions of the Common Services Agency) (Scotland) Amendment Order 2014 (SSI 2014/100) **Health and Sport**

LPPO instrument

- Act of Sederunt (Rules of the Court of Session Amendment No.4) (Miscellaneous) 2013 (SSI 2013/162) **Justice**
- Act of Sederunt (Fitness for Judicial Office Tribunal Rules) 2014 (SSI 2014/99) **Justice**

(i) drafting appears to be defective

- Council Tax Reduction (Scotland) Amendment (No. 2) Regulations 2013 (SSI 2013/218) **Welfare Reform**
- Single Use Carrier Bag Charge (Scotland) Regulations 2014 [draft] **RACCE**
- Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (Commencement No. 2) Order 2013 (SSI 2013/262) **Justice**
- Ethical Standards in Public Life etc. (Scotland) Act 2000 (Register of Interests) Amendment Regulations 2014 (SSI 2014/50) **Local Government and Regeneration**

LPPO instrument

- Act of Sederunt (Fitness for Judicial Office Tribunal Rules) 2014 (SSI 2014/99) **Justice**

(j) failure to comply with laying requirements

- Specified Products from China (Restriction on First Placing on the Market) (Scotland) Amendment Regulations 2013 (SSI 2013/221) **RACCE**
- Landfill (Scotland) Amendment Regulations 2013 (SSI 2013/222) **RACCE**

- Football Banning Orders (Regulated Football Matches) (Scotland) Order 2013 (SSI 2013/228) **Justice**
- Sports Grounds and Sporting Events (Designation) (Scotland) Amendment (No. 2) Order 2013 (SSI 2013/229) **Justice**
- Fruit Juices and Fruit Nectars (Scotland) Regulations 2013 (SSI 2013/305) **Health and Sport**
- Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26) **Justice**
- National Health Service (Superannuation Scheme) (Scotland) Amendment Regulations 2014 (SSI 2014/43) **Health and Sport**
- Teachers' Superannuation (Scotland) Amendment Regulations 2014 (SSI 2014/44) **Education and Culture**
- CRC Energy Efficiency Scheme (Amendment) Order 2014 (SI 2014/502) **RACCE**
- Brucellosis (Scotland) Amendment (No.2) Order 2014 (SSI 2014/72) **RACCE**
- Health Professions Council (Registration and Fees) (Amendment) Rules 2013 Order of Council 2014 (SI 2014/532) **Health and Sport**

General reporting ground

- Children's Legal Assistance (Scotland) Regulations 2013 [draft] **Justice**
- Children's Hearings (Scotland) Act 2011 (Rehabilitation of Offenders) (Transitory Provisions) Order 2013 (SSI 2013/146) **Education and Culture**
- Animal Health (Miscellaneous Fees and Amendments) (Scotland) Regulations 2013 (SSI 2013/151) **RACCE**
- National Library of Scotland Act 2012 (Consequential Modifications) Order 2013 (SSI 2013/169) **Education and Culture**
- Water Environment (Controlled Activities) (Scotland) Amendment Regulations 2013 (SSI 2013/176) **RACCE**
- European Union (Amendments in respect of the Accession of Croatia) (Scotland) Regulations 2013 (SSI 2013/177) **European and External Relations**
- Single Use Carrier Bag Charge (Scotland) Regulations 2014 [draft] **RACCE**
- Food Additives, Flavourings, Enzymes and Extraction Solvents (Scotland) Regulations 2013 (SSI 2013/266) **Health and Sport**
- Post-16 Education (Scotland) Act 2013 (Commencement No. 1) Order 2013 (SSI 2013/281) **Education and Culture**
- Public Services Reform (Prison Visiting Committees) (Scotland) Order 2014 [draft] **Justice**
- Long Leases (Scotland) Act 2012 (Commencement No. 1) Order 2013 (SSI 2013/322 (C.25)) **RACCE**
- Health Boards (Membership) (Scotland) Regulations 2013 (SSI 2013/334) **Health and Sport**
- Bovine Viral Diarrhoea (Scotland) Amendment (No. 2) Order 2013 (SSI 2013/337) **RACCE**
- Teachers' Superannuation (Scotland) (Miscellaneous Amendments) Regulations 2014 (SSI 2014/69) **Education and Culture**
- National Health Service (Charges to Overseas Visitors) (Scotland) (Amendment) Regulations 2014 (SSI 2014/70) **Health and Sport**

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| <i>LPPO instruments</i> |
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- Act of Sederunt (Rules of the Court of Session Amendment No. 5) (Miscellaneous) 2013 (SSI 2013/238) **Justice**
- Act of Sederunt (Rules of the Court of Session Amendment No. 6) (Miscellaneous) 2013 (SSI 2013/294) **Justice**

ANNEX B – COMMITMENTS: 11 MAY 2013 TO 10 MAY 2014

Scottish Government instruments

Commitments met by the laying of amending instruments

- **European Union (Amendments in respect of the Accession of Croatia) (Scotland) Regulations 2013 (SSI 2013/177)**
Commitment met by St Mary's Music School (Aided Places) (Scotland) Amendment Regulations 2014 (SSI 2014/143) [laid on 29 June 2014]
- **Council Tax Reduction (Scotland) Amendment (No.2) Regulations 2013 (SSI 2013/218)**
Commitment met by Council Tax Reduction (Scotland) Amendment (No.2) Regulations 2013 (SSI 2013/239)
- **Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (Commencement No. 2) Order 2013 (SSI 2013/262)**
Commitment met by Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (Commencement No. 2) Amendment Order 2013 (SSI 2013/271)
- **Post-16 Education (Scotland) Act 2013 (Commencement No. 1) Order 2013 (SSI 2013/281)**
Commitment met by Post-16 Education (Scotland) Act 2013 (Commencement No. 2) Order 2013 (SSI 2013/348)
- **Adoption (Recognition of Overseas Adoptions) (Scotland) Regulations 2013 (SSI 2013/310)**
Commitment met by Adoption (Recognition of Overseas Adoptions) (Scotland) Regulations 2013 (SSI 2013/335)
- **Bovine Viral Diarrhoea (Scotland) Amendment (No. 2) Order 2013 (SSI 2013/337)**
Commitment met by Bovine Viral Diarrhoea (Scotland) Amendment (No. 3) Order 2013 (SSI 2013/363)
- **Brucellosis (Scotland) Amendment Order 2014 (SSI 2014/63)**
Commitment met by Brucellosis (Scotland) Amendment (No.2) Order 2014 (SSI 2014/72)

Commitments met by correction slip

- National Library of Scotland Act 2012 (Consequential Modifications) Order 2013 (SSI 2013/169)

Commitments outstanding (from 2013-14)

- Animal Health (Miscellaneous Fees and Amendments) (Scotland) Regulations 2013 (SSI 2013/151) **to be amended at next opportunity**
- Water Environment (Controlled Activities) (Scotland) Amendment Regulations 2013 (SSI 2013/176) **to be amended at next opportunity**
- Sea Fishing (Illegal, Unreported and Unregulated Fishing) (Scotland) Order 2013 (SSI 2013/189) **to be amended at next opportunity**
- National Health Service (General Ophthalmic Services) (Scotland) Amendment Regulations 2013 (SSI 2013/355) **to be amended at next opportunity**
- Teachers' Superannuation (Scotland) (Miscellaneous Amendments) Regulations 2014 (SSI 2014/69) **to be amended at next opportunity**
- National Health Service (Charges to Overseas Visitors) (Scotland) (Amendment) Regulations 2014 (SSI 2014/70) **to be amended at next opportunity**

Commitments outstanding (from previous years)

- Smoke Control Areas (Authorised Fuels) (Scotland) Regulations 2010 (SSI 2010/271)
- Additional Support for Learning (Sources of Information) (Scotland) Amendment Order 2011 (SSI 2011/102)*
- Marketing of Horticultural Produce (Scotland) Amendment Regulations 2011 (SSI 2011/324)
- Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2012 (SSI 2012/228)
- National Health Service Superannuation Scheme etc. (Miscellaneous Amendments) (Scotland) Regulations 2013 (SSI 2013/109)
- Animal Health (Miscellaneous Fees and Amendments) (Scotland) Regulations 2013 (SSI 2013/151)
- Water Environment (Controlled Activities) (Scotland) Amendment Regulations 2013 (SSI 2013/176)

* Commitment was overlooked by the Scottish Government when it laid the *Additional Support for Learning (Sources of Information) (Scotland) Amendment Order 2014 (SSI 2014/103)* during this reporting period.

**ANNEX C – INSTRUMENTS WHICH THE COMMITTEE IDENTIFIED AS BEING
SUITABLE FOR CONSOLIDATION: 11 MAY 2013 TO 10 MAY 2014**

- Police Pensions Regulations 1987
- National Assistance (Assessment of Resources) Regulations 1992

ANNEX D – CONSOLIDATING INSTRUMENTS LAID IN THE REPORTING PERIOD: 11 MAY 2013 TO 10 MAY 2014

- Home Energy Assistance Scheme (Scotland) Regulations 2013 (SSI 2013/148) **consolidates the 2009 Regulations**
- Animal Health (Miscellaneous Fees and Amendments) (Scotland) Regulations 2013 (SSI 2013/151) **consolidates all previous versions**
- Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2013 (SSI 2013/155) **consolidates the 2008 Regulations**
- Town and Country Planning (Appeals) (Scotland) Regulations 2013 (SSI 2013/156) **consolidates the 2008 Regulations**
- Town and Country Planning (Schemes of Delegation and Local Review Procedure) (Scotland) Regulations 2013 (SSI 2013/157) **consolidates the 2008 Regulations**
- Registration of Social Workers and Social Service Workers in Care Services (Scotland) Regulations 2013 [draft] **consolidates the 2009 Regulations**
- National Health Service Superannuation Scheme (2008 Section) (Scotland) Regulations 2013 (SSI 2013/174) **consolidates the 2008 Regulations**
- Contaminants in Food (Scotland) Regulations 2013 (SSI 2013/217) **consolidates the 2010 Regulations**
- Fruit Juices and Fruit Nectars (Scotland) Regulations 2013 (SSI 2013/305) **consolidates the 2003 Regulations**
- Sports Grounds and Sporting Events (Designation) (Scotland) Order 2014 (SSI 2014/5) **consolidates all previous designation Orders**

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| <i>LPPO instrument</i> |
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- Act of Sederunt (Commisary Business) 2013 (SSI 2013/291) **consolidates the 1975 Act of Sederunt**

ANNEX E – NON-COMPLIANCE WITH LAYING REQUIREMENTS: 11 MAY 2013 TO 10 MAY 2014

Committee content with reason for non-compliance

- Specified Products from China (Restriction on First Placing on the Market) (Scotland) Amendment Regulations 2013 (SSI 2013/221) **RACCE**
- Football Banning Orders (Regulated Football Matches) (Scotland) Order 2013 (SSI 2013/228) **Justice**
- Sports Grounds and Sporting Events (Designation) (Scotland) Amendment (No. 2) Order 2013 (SSI 2013/229) **Justice**
- Brucellosis (Scotland) Amendment (No.2) Order 2014 (SSI 2014/72) **RACCE**
- CRC Energy Efficiency Scheme (Amendment) Order 2014 (SI 2014/502) **RACCE**

Committee not content with reason for non-compliance

- Landfill (Scotland) Amendment Regulations 2013 (SSI 2013/222) **RACCE**
- Fruit Juices and Fruit Nectars (Scotland) Regulations 2013 (SSI 2013/305) **Health and Sport**
- Prisons and Young Offenders Institutions (Scotland) Amendment Rules 2014 (SSI 2014/26) **Justice**
- Health Professions Council (Registration and Fees) (Amendment) Rules 2013 Order of Council 2014 (SI 2014/532) **Health and Sport**
- National Health Service (Superannuation Scheme) (Scotland) Amendment Regulations 2014 (SSI 2014/43) **Health and Sport**
- Teachers' Superannuation (Scotland) Amendment Regulations 2014 (SSI 2014/44) **Education and Culture**

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