

DELEGATED POWERS AND LAW REFORM COMMITTEE

Instruments considered by the Committee during the third quarter of the parliamentary year 2015-16

QUARTER 3 - INTRODUCTION

1. The purpose of this report is to provide a record of the Committee's scrutiny of Scottish statutory instruments (SSIs) during the third quarter of the parliamentary year 2015-16. The report sets out details of instruments considered by the Committee which were drawn to the attention of the Parliament during the reporting period on one or more of the reporting grounds set out in Standing Orders. It also touches briefly on the commitments made by the Scottish Government and the Lord President's Private Office (LPPO) in response to the Committee's comments, and details any action that has been taken. In addition, the report briefly outlines the Committee's activity in respect of other matters within its remit.

2. This report deals with instruments considered by the Committee during the period 1 December 2015 to 22 February 2016. The report also touches on the general work of the Committee during that period.

Overview and analysis

3. During the period 1 December 2015 to 22 February 2016, a total of 115 instruments were considered by the Committee. Of these, 111 instruments were laid by the Scottish Government and 4 instruments were laid by the Lord President's Private Office.

4. The 111 SSIs laid by the Scottish Government can be broken down as follows—

- 35 affirmative instruments;
- 56 negative instruments;
- 20 laid only instruments

5. The 4 SSIs laid by the LPPO were all laid only instruments.

Table 1: Instruments considered by the DPLR Committee during the period 1 December 2015 to 22 February 2016 reported on by the Committee

	Scottish Government			LPPO		
	Total SSIs	Total drawn to the Parliament's attention	%	Total SSIs	Total drawn to the Parliament's attention	%
Total	111	13	11.5%	4	1	25%

6. Table 1 shows that of the 111 Scottish Government instruments considered by the Committee, 13 were drawn to the Parliament's attention, which is just under 12% of instruments considered.

7. 63 instruments laid by the Scottish Government were considered by the Committee during the second quarter of the current parliamentary year. The Committee drew the Parliament's attention to 5 of these instruments, which was just under 10% of those considered. Notwithstanding the fact that a far greater number of instruments were considered this quarter compared to last, there was an increase in the percentage of instruments reported on this quarter for the first time this reporting year.

8. 5 instruments laid by the LPPO were considered by the Committee during the second quarter of this parliamentary year with the Parliament's attention drawn to 2 of them. This quarter, just 1 of the 4 LPPO instruments considered by the Committee was drawn to the attention of the Parliament.

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

Withdrawal of instruments

10. The following draft SSIs were all withdrawn and re-laid during this period:

- Microchipping of Dogs (Scotland) Regulations 2016 [draft];
- Freedom of Information (Scotland) Act 2002 (Designation of Persons as Scottish Public Authorities) Order 2016 [draft];
- Public Services Reform (Social Work Complaints Procedure) (Scotland) Order 2016 [draft];
- Local Authority (Capital Finance and Accounting) (Scotland) Regulations 2016 [draft];
- Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016 [draft].

Reporting grounds

11. 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 Orders](#).

Reporting grounds: significant

12. The Committee considers some reporting grounds to be of more significance than others. The Committee has therefore determined that it has particular concerns where an instrument is drawn to the attention of the Parliament on one of the following grounds—

- ground **(e)** – doubt as to whether it is intra vires;
- ground **(f)** – raises a devolution issue; and
- ground **(i)** – drafting appears to be defective.

13. These are referred to as *the significant reporting grounds*. The Committee considers every report under one of these grounds to be a serious matter as these raise fundamental legal questions and so there is the potential for the validity of the instrument to be questioned.

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

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

Ground	Scottish Government		LPPO	
	No.	% of all SSIs laid (111)	No	% of all SSIs laid (4)
(h) form or meaning could be clearer	4	3.5%	0	N/A
(h) <u>and</u> the General ground	1	<1%	0	N/A
(i) drafting appears to be defective, (h) and (g) unusual or unexpected use of parent statute	1	<1%	0	N/A
(e) doubt as to whether it is intra vires <u>and</u> the General ground	1	<1%	0	N/A
General ground (e.g. failures to follow proper drafting practice or legislative process)	6	5.5%	1	25%

15. In terms of the significant grounds, none of the instruments laid by the Scottish Government during the first two quarters of the current parliamentary year were reported under any of these grounds.

16. This quarter, 2 Scottish Government instruments were reported under the significant grounds; one for defective drafting (i) and one because there was doubt as to whether it was intra vires (e).

17. None of the instruments laid by the LPPO this quarter were reported on under any of the aforementioned significant grounds. The one instrument laid by the LPPO during this quarter that was reported on was done so under the general reporting ground.

Lead committees

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

Table 3: Instruments reported on by lead committee

Lead Committee	Scottish Government			LPPO		
	Total SSIs	Total reported	% of SSIs considered that were reported on	Total SSIs	Total reported	% of SSIs considered that were reported on
RACCE	29	3	10%			
Health and Sport	21	1	5%			
Justice	14	1	7%	4	1	25%
Local Government and Regeneration	10	2	20%			
Education and Culture	16	3	19%			
Infrastructure and Capital Investment	11	3	27%			
Economy, Energy and Tourism	3	0	N/A			
Equal Opportunities	1	0	N/A			
Devolution (Further Powers)	2	0	N/A			
Finance	1	0	N/A			
Welfare Reform	2	0	N/A			
Parliament	1	0	N/A			
TOTAL	111	13	11.5%	4	1	25%

Summary

19. During this reporting period, the Rural Affairs, Climate Change and Environment Committee had referred to them the largest number of Scottish Government instruments, looking at twenty-nine in total. Three of these were drawn to the attention of the Parliament by the Committee. The Education and Culture Committee and the Infrastructure and Capital Investment Committee were also referred three instruments which the Committee drew to the Parliament's attention.

Rural Affairs, Climate Change and Environment Committee (RACCE)

20. Three instruments referred to the RACCE Committee were drawn to the Parliament's attention, including one which was reported for defective drafting. Commitments were given by the Scottish Government to correct the errors identified in two of the instruments. One commitment remains outstanding.

Infrastructure and Capital Investment Committee

21. Three of the eleven instruments referred to the Infrastructure and Capital Investment Committee were drawn to the Parliament's attention – all under the general reporting ground. A commitment was given by the Scottish Government to correct the error(s) identified in one of the instruments and that commitment was met.

Education and Culture Committee

22. Two of the three instruments referred to the Education and Culture Committee drawn to the Parliament's attention by the Committee were related to the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015 which the Committee considered last quarter.

Local Government and Regeneration Committee

23. Two instruments referred to the Local Government and Regeneration Committee were drawn to the Parliament's attention - both under the general reporting ground. The Scottish Government gave a commitment to correct the error(s) in one of the instruments and that commitment was duly met.

Justice Committee

24. Only one of the fourteen instruments laid by the Scottish Government and referred to the Justice Committee this quarter was drawn to the attention of Parliament – albeit under the significant reporting ground of being considered *intra vires*. The question of *vires* was subsequently resolved by the laying of amending instruments.

Health and Sport Committee

25. Just one of the twenty-one instruments referred to the Health and Sport Committee was drawn to the Parliament's attention – under the general reporting ground. The Scottish Government commitment to correct the drafting errors in the instrument remains outstanding.

Other Committees

26. No other subject committees were referred instruments that were drawn to the attention of the Parliament by the Committee.

27. Information detailing specific SSIs and the grounds that they were reported on is provided in **ANNEX A**.

SCOTTISH STATUTORY INSTRUMENTS - GENERAL

Commitments

28. In terms of the Scottish Government committing to the laying of amending instruments to correct errors identified and reported on by the Committee, a number of amending instruments were laid during this period:

- Community Right to Buy (Scotland) Regulations 2015 (SSI 2015/400) **errors corrected by the laying of the Community Right to Buy (Scotland) Amendment Regulations 2016 (SSI 2016/4)**
- Public Contracts (Scotland) Regulations 2015 (SSI 2015/446) **errors corrected by the laying of the Public Contracts (Scotland) Amendment Regulations 2016 (SSI 2016/47)**
- Local Government Pension Scheme (Scotland) Amendment (No. 2) Regulations 2015 (SSI 2015/448) **errors corrected by the laying of the Local Government Pension Scheme (Scotland) Amendment Regulations 2016 (SSI 2016/32)**

29. The following instruments were laid to meet commitments given by the Scottish Government to correct errors identified by the Committee in previous reporting periods:

- Food Information (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/410) **corrected errors identified in the Food Information (Scotland) Regulations 2014 (SSI 2014/312)**
- Products Containing Meat etc. (Scotland) Amendment Regulations 2016 (SSI 2016/24) **corrected errors identified in the Products Containing Meat etc. (Scotland) Regulations 2014 (SSI 2014/289)**
- Teachers' Superannuation and Pension Scheme (Scotland) Amendment Regulations 2016 (SSI 2016/62) **corrected errors identified in both the Teachers' Pension Scheme (Scotland) Amendment Regulations 2015 (SSI 2015/97) and Teachers' Superannuation (Scotland) Amendment Regulations 2015 (SSI 2015/98)**

30. There are two outstanding Scottish Government commitments in terms of the instruments that were laid this quarter:

- Seed Potatoes (Scotland) Regulations 2015 (SSI 2015/395) **to be corrected at the next available opportunity**
- National Health Service (General Dental Services) (Scotland) Amendment Regulations 2016 (SSI 2016/53) **to be corrected at the first opportunity**

31. A full list of all outstanding Scottish Government commitments can be found at **ANNEX B**.

32. The Scottish Government also agreed to replace the provisions of the Management of Offenders etc. (Scotland) Act 2005 (Commencement No. 8 and Consequential Provisions) Order 2015 (SSI 2015/397 (C.49)) which was reported by the Committee as ultra vires. The corrective instruments laid were:

- Management of Offenders etc. (Scotland) Act 2005 (Commencement No. 8) Order 2015 (SSI 2015/429 (C.57)); and the
- Management of Offenders etc. (Scotland) Act 2005 (Specification of Persons) Amendment Order 2015 (SSI 2015/431).

33. During the reporting period, the Committee worked with the Minister for Parliamentary Business to construct a form of words to reflect the fact that the aforementioned SSI 2015/397 (C.49) was of no legal consequence, with a view to issuing a notice to this effect in Section H of the Parliament's Business Bulletin.

LPPO instruments

34. One commitment given by the Lord President's Private Office to correct errors in an instrument laid during this quarter was outstanding at the end of the reporting period:

- Act of Sederunt (Rules of the Court of Session, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Sheriff Appeal Court) 2015 (SSI 2015/419) ***to be corrected in due course***

Consolidation

35. No consolidating instruments were laid during this period:

Minor Points

36. The Committee identified a total of 21 instruments on which minor points were raised (generally relating to typographical or referencing errors). 20 of these instruments were laid by the Scottish Government and 1 was laid by the LPPO.

OTHER BUSINESS

Introduction

37. Although the focus of this report is primarily on the Committee's activities in relation to its scrutiny of instruments, the following section briefly outlines the Committee's activity in respect of other matters within its remit.

Bills

38. During the period 1 December 2015 to 22 February 2016, the Committee considered and reported on the following Bills at Stage 1:

- Lobbying (Scotland) Bill;
- Private Housing (Tenancies) (Scotland) Bill;
- Bankruptcy (Scotland) Bill (*delegated powers*);
- Transplantation (Authorisation of Removal of Organs etc.) (Scotland) Bill;
- Burial and Cremation (Scotland) Bill;
- Budget (Scotland) (No.5) Bill;
- Land and Buildings Transaction Tax (Amendment) (Scotland) Bill.

39. The Committee also considered the following Bills after Stage 2:

- Criminal Justice (Scotland) Bill;
- Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Bill;
- Smoking Prohibition (Children in Motor Vehicles) (Scotland) Bill;
- Apologies (Scotland) Bill;
- Education (Scotland) Bill;
- Carers (Scotland) Bill.

Succession (Scotland) Bill

40. Stage 2 proceedings took place on 8 December 2015 and the Bill was passed by Parliament after the Stage 3 debate on Thursday 28 January 2016.

Bankruptcy (Scotland) Bill

41. On 20 January 2016 the Committee published its Stage 1 report on the Bankruptcy (Scotland) Bill.

Legislative Consent Memorandums (LCMs) and Public Bodies Act Consent Memorandums (PBCMs)

42. The Committee considered the following LCM:

- Enterprise Bill (UK Parliament legislation).

ANNEX A - REPORTING GROUNDS: 1 DECEMBER 2015 TO 22 FEBRUARY 2016

(e) doubt whether it is intra vires

- Management of Offenders etc. (Scotland) Act 2005 (Commencement No. 8 and Consequential Provisions) Order 2015 (SSI 2015/397 (C.49)) **Justice**

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

- Community Right to Buy (Scotland) Regulations 2015 (SSI 2015/400) **RACCE**

(h) meaning could be clearer

- Community Empowerment (Scotland) Act 2015 (Commencement No. 3 and Savings) Order 2015 (SSI 2015/399 (C.50)) **RACCE**
- Community Right to Buy (Scotland) Regulations 2015 (SSI 2015/400) **RACCE**
- Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 (SSI 2015/423) **Education and Culture**
- Public Contracts (Scotland) Regulations 2015 (SSI 2015/446) **Infrastructure and Capital Investment**
- Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2016 [draft] **Education and Culture**
- Scotland's Adoption Register Regulations 2016 [draft] **Education and Culture**

(i) drafting appears to be defective

- Community Right to Buy (Scotland) Regulations 2015 (SSI 2015/400) **RACCE**

General reporting ground

- Seed Potatoes (Scotland) Regulations 2015 (SSI 2015/395) **RACCE**
- Management of Offenders etc. (Scotland) Act 2005 (Commencement No. 8 and Consequential Provisions) Order 2015 (SSI 2015/397 (C.49)) **Justice**
- Public Contracts (Scotland) Regulations 2015 (SSI 2015/446) **Infrastructure and Capital Investment**
- Local Government Pension Scheme (Scotland) Amendment (No. 2) Regulations 2015 (SSI 2015/448) **Local Government and Regeneration**
- Procurement Reform (Scotland) Act 2014 (Commencement No. 3 and Transitional Provisions) Order 2016 (SSI 2016/30 (C.5)) **Infrastructure and Capital Investment**
- National Health Service (General Dental Services) (Scotland) Amendment Regulations 2016 (SSI 2016/53) **Health and Sport**
- Procurement (Scotland) Regulations 2016 [draft] **Infrastructure and Capital Investment**
- Local Authority (Capital Finance and Accounting) (Scotland) Regulations 2016 [draft] **Local Government and Regeneration**

LPPO instrument

- Act of Sederunt (Rules of the Court of Session, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Sheriff Appeal Court) 2015 (SSI 2015/419) **Justice**

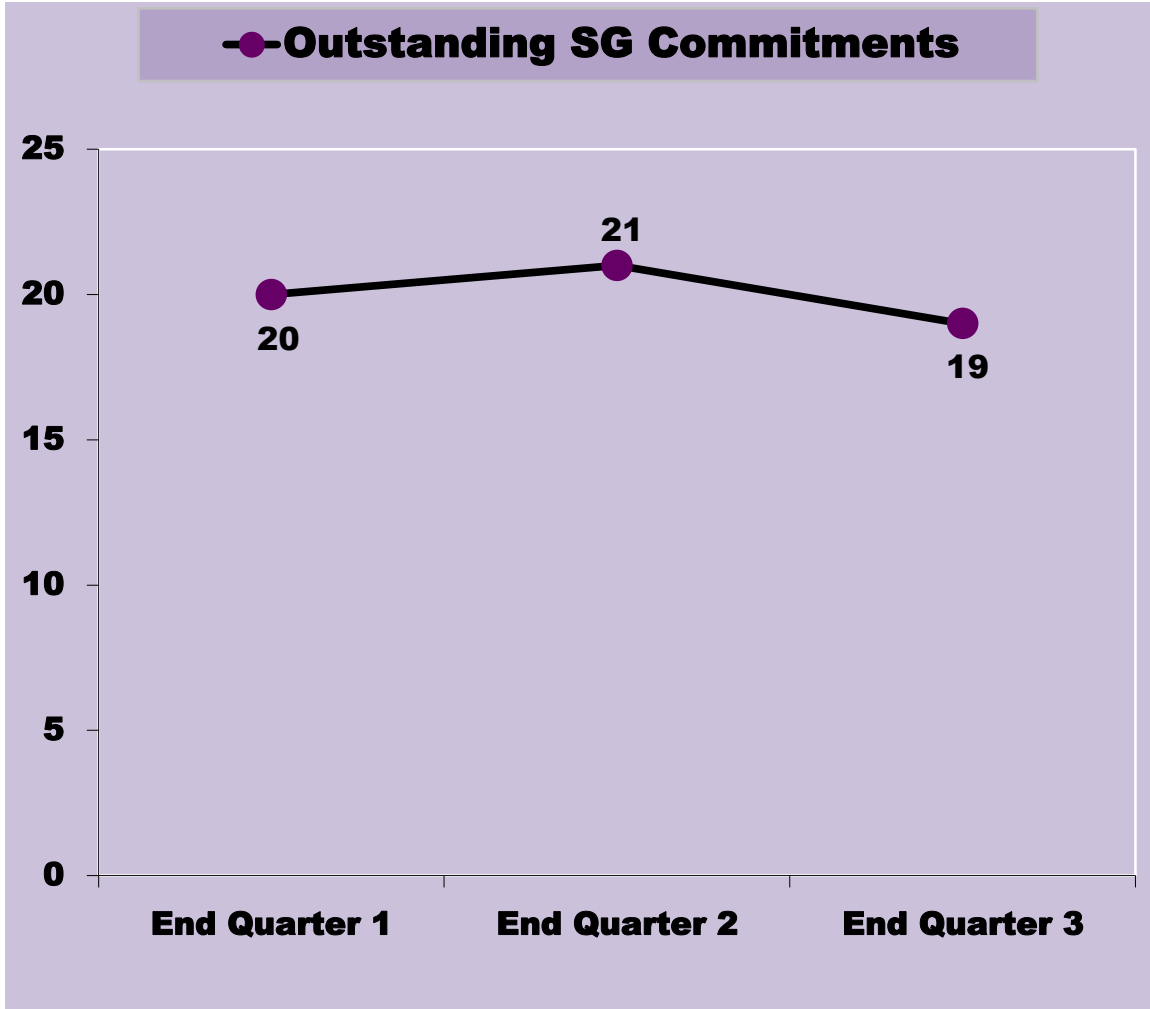
ANNEX B - OUTSTANDING SCOTTISH GOVERNMENT COMMITMENTS

- Additional Support for Learning (Sources of Information) (Scotland) Amendment Order 2011 (SSI 2011/102) **to be amended at the next available opportunity**
- Marketing of Horticultural Produce (Scotland) Amendment Regulations 2011 (SSI 2011/324) **to be amended at the earliest available opportunity**
- Conservation (Natural Habitats, &c.) Amendment (Scotland) Regulations 2012 (SSI 2012/228) **to be amended at the next available opportunity**
- Animal Health (Miscellaneous Fees and Amendments) (Scotland) Regulations 2013 (SSI 2013/151) **to be amended at the next available opportunity**
- National Health Service Superannuation Scheme (Scotland) (Miscellaneous Amendments) Regulations 2014 (SSI 2014/154) **to be corrected in due course**
- Sulphur Content of Liquid Fuels (Scotland) Regulations 2014 (SSI 2014/258) **to be amended at the next available opportunity**
- Marriage Between Persons of Different Sexes (Prescribed Bodies) (Scotland) Regulations 2014 (SSI 2014/304) **to be corrected when the Regulations are next amended**
- Local Government Pension Scheme (Scotland) Amendment Regulations 2015 (SSI 2015/87) **to be corrected after 1 April 2015 but having retrospective effect from that date**
- National Health Service Pension Scheme (Scotland) Regulations 2015 (SSI 2015/94) **to be corrected after 1 April 2015 but having retrospective effect from that date**
- National Health Service Pension Scheme (Transitional and Consequential Provisions) (Scotland) Regulations 2015 (SSI 2015/95) **to be corrected when the Regulations are next amended**
- National Health Service Superannuation Scheme (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/96) **to be corrected after 1 April 2015 but having retrospective effect from that date**
- Crofting Counties Agricultural Grants (Scotland) Variation Scheme 2015 (SSI 2015/105) **to be corrected when the principal scheme is next amended**

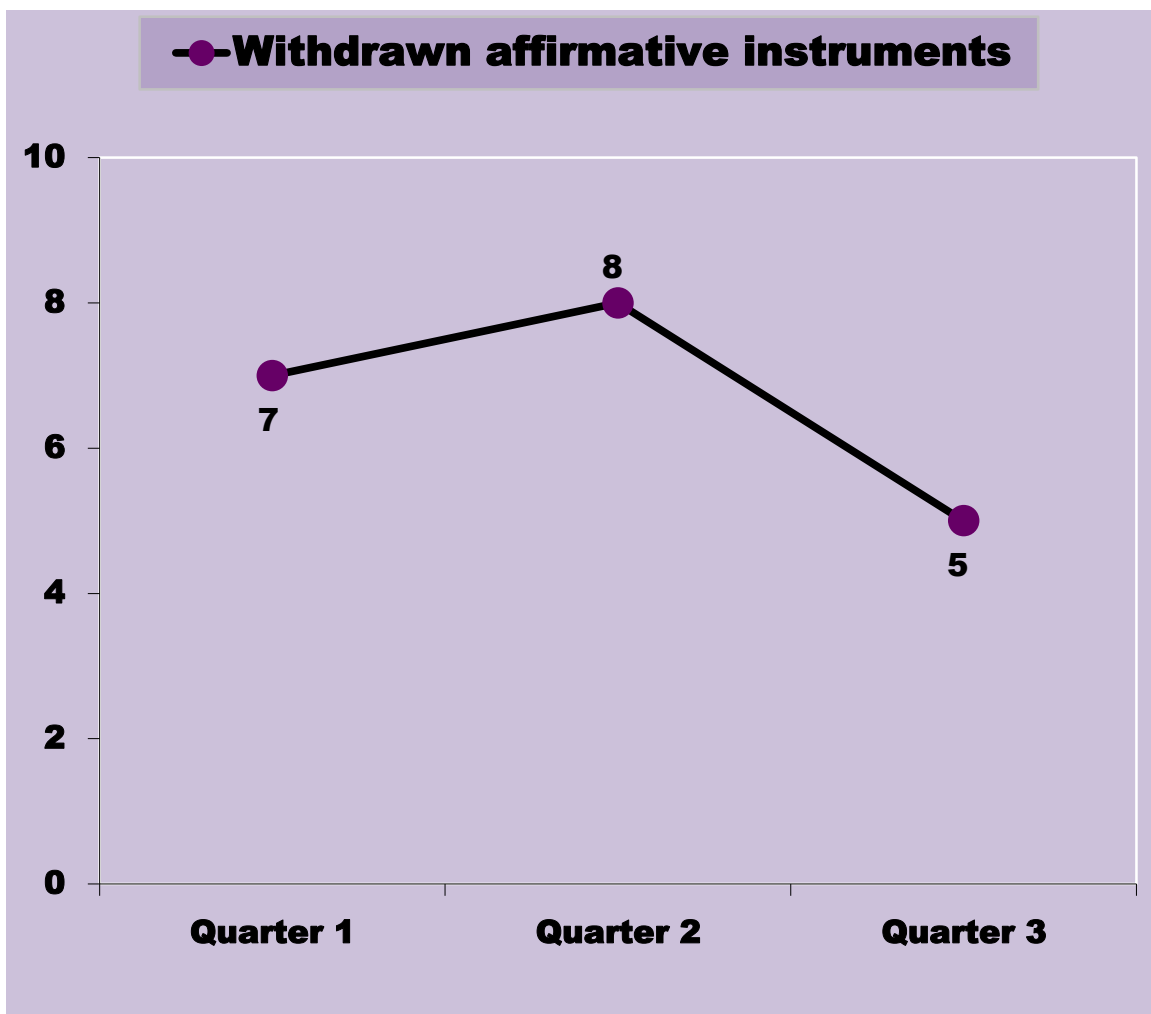
- Firefighters' Pension Schemes (Amendment) (Scotland) Regulations 2015 (SSI 2015/141) ***to be corrected after 1 April 2015 but having retrospective effect from that date***
- Firefighters' Compensation Scheme and Pension Scheme (Amendment) (Scotland) Order 2015 (SSI 2015/143) ***to be corrected by an amending instrument with appropriate retrospective effect***
- Registration of Births, Deaths and Marriages (Scotland) Act 1965 (Prohibition on Disposal of a Body without Authorisation) Regulations 2015 (SSI 2015/166) ***to be corrected at the next appropriate opportunity***
- Tuberculosis in Specified Animals (Scotland) Order 2015 (SSI 2015/327) ***to be corrected at the next available legislative opportunity***
- Private and Public Water Supplies (Miscellaneous Amendments) (Scotland) Regulations 2015 (SSI 2015/346) ***to be corrected at the next suitable opportunity***
- Seed Potatoes (Scotland) Regulations 2015 (SSI 2015/395) ***to be corrected at the next available opportunity***
- National Health Service (General Dental Services) (Scotland) Amendment Regulations 2016 (SSI 2016/53) ***to be corrected at the first opportunity***

ANNEX C - GRAPHICS AND CHARTS

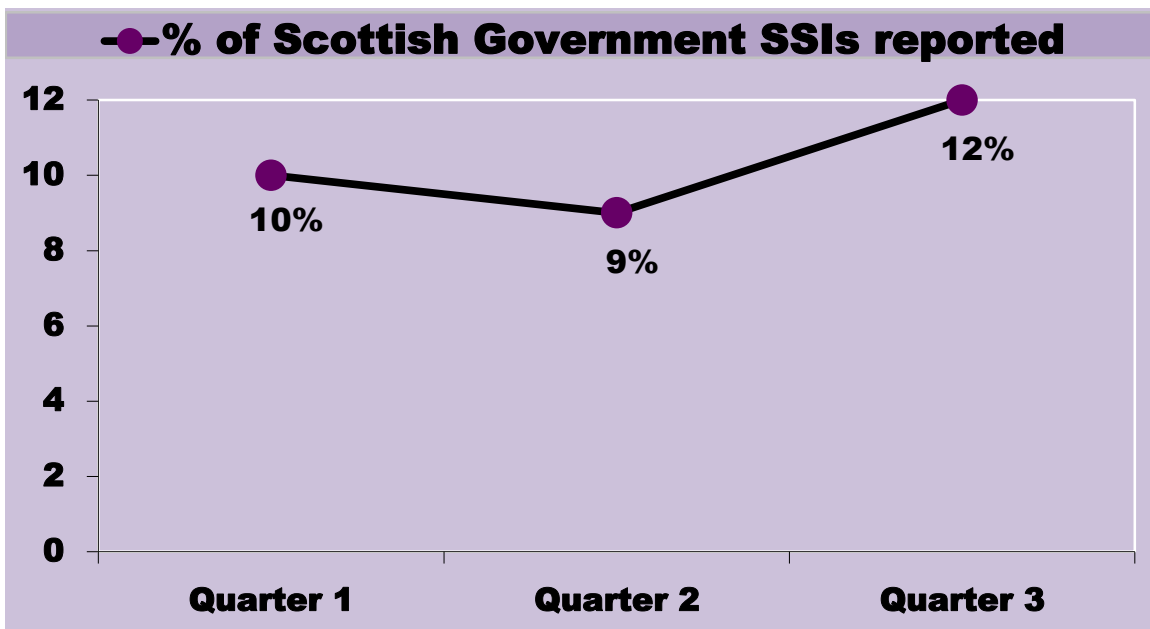
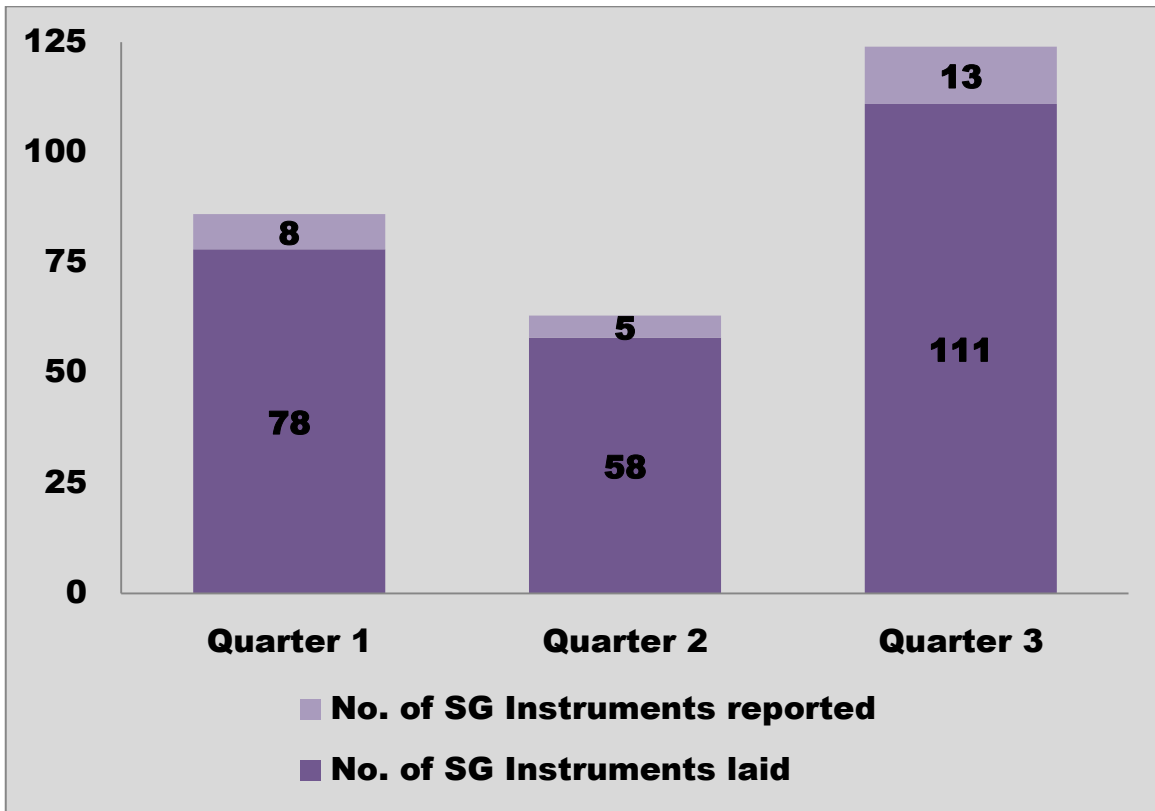
Line graph showing the number of outstanding Scottish Government commitments as at the end of each quarter of the current parliamentary year



Line graph showing the number of affirmative Scottish Government instruments withdrawn during each quarter of the current parliamentary year



Graphs showing the number and percentage of Scottish Government instruments laid that were drawn to the Parliament's attention during each quarter of the current parliamentary year



Graphs showing the number and percentage of LPPO instruments laid that were drawn to the Parliament's attention during each quarter of the current parliamentary year

