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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Subordinate Legislation Considered by the Delegated Powers and Law Reform Committee on 31 October 2023



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Delegated Powers and Law Reform Committee

The remit of the Delegated Powers and Law Reform Committee is to consider and report on the following (and any additional matter added under Rule 6.1.5A)—

(a) any—

(i) subordinate legislation laid before the Parliament or requiring the consent of the Parliament under section 9 of the Public Bodies Act 2011;

(ii) [deleted]

(iii) pension or grants motion as described in Rule 8.11A.1; and, in particular, to determine whether the attention of the Parliament should be drawn to any of the matters mentioned in Rule 10.3.1;

(b) proposed powers to make subordinate legislation in particular Bills or other proposed legislation;

(c) general questions relating to powers to make subordinate legislation;

(d) whether any proposed delegated powers in particular Bills or other legislation should be expressed as a power to make subordinate legislation;

(e) any failure to lay an instrument in accordance with section 28(2), 30(2) or 31 of the 2010 Act;

(f) proposed changes to the procedure to which subordinate legislation laid before the Parliament is subject;

(g) any Scottish Law Commission Bill as defined in Rule 9.17A.1; and

(h) any draft proposal for a Scottish Law Commission Bill as defined in that Rule.

(i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



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Introduction

1. At its meeting on 31 October, the Committeeⁱ considered the following instruments under its remit and agreed to draw them to the attention of the Parliament:
 - Budget (Scotland) Act 2023 Amendment Regulations 2023 (SSI 2023/Draft)
 - Public Procurement (Agreement on Government Procurement) (Miscellaneous Amendments) (Scotland) Regulations 2023 (SSI 2023/287)
2. The Committee's recommendations in relation to these instruments are set out in the next section of this report.
3. The Committee also determined that, in terms of its remit, it did not need to draw the Parliament's attention to the instruments at the end of the report.

ⁱ Oliver Mundell MSP submitted apologies for this meeting.

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

Budget (Scotland) Act 2023 Amendment Regulations 2023 (SSI 2023/Draft)

4. The instrument is made under powers in the Budget (Scotland) Act 2023 (“the 2023 Act”) to alter the Scottish Government’s financial allocations for the various purposes for which the Scottish Administration may use resources in the financial year 2023-24. The instrument amends the 2023 Act to make the following changes:
 - alters the overall cash authorisations for expenditure by the Scottish Administration and Audit Scotland. The amount of overall cash authorisation for the Scottish Parliamentary Corporate Body remains the same;
 - alters the descriptions of purposes against which resources are allocated in schedule 1 of the 2023 Act to reflect changes to ministerial portfolio responsibilities;
 - changes the allocation of resources, other than accruing resources against portfolio purposes as amended;
 - changes the allocation of accruing resources for the Deputy First Minister and Finance portfolio and for Food Standards Scotland;
 - creates a new purpose to which resources are allocated to meet the operation and administrative costs of Consumer Scotland;
 - amends the total amounts of resources that the Scottish Administration is authorised to use for all purposes set out in schedule 1 of the Act; and
 - Increases the amount of resources other than accruing resources available for purpose 2 (Audit Scotland) in schedule 2 of the 2023 Act (Direct-funded bodies).
5. In correspondence with the Scottish Government, the Committee queried aspects of the drafting of three provisions of the instrument.
6. First, Regulation 2(b) of the instrument amends the amount specified for the Scottish Parliamentary Corporate Body, but it replaces the existing figure in section 4(3)(a) of the 2023 Act with the same figure.
7. The Scottish Government advised that the insertion of an unchanged figure was unintentional, but that the figure remains correct.
8. Second, Regulation 3(2)(c)(iv) amends purpose 3 in schedule 1 of the Act, which sets out policy purposes against which resources are allocated. It changes:

“support for Growth Accelerator and Green Growth Accelerator programmes”
to

“support for Growth Accelerator programmes”.

9. The Scottish Government advised that failing to make “programmes” singular when removing the reference to the “Green Growth Accelerator” programme was an oversight. It has given a commitment to address this in the next amending instrument.

10. Third, amendments by regulation 3(2)(i)(ii) and (iv) to purpose 9 in schedule 1 introduces two references to “the organisation”:

“funding of a strategy function which supports effective policy across the organisation”; and

“expenditure on corporate and central services, funding to support the central performance, delivery and resilience functions of the organisation”.

The Committee queried what “the organisation” refers to.

11. The Scottish Government advised it refers to the Scottish Administration, and that it considers this is clear from the context of schedule 1, which sets out the various purposes for which the Scottish Administration may use resources.

12. The term “organisation” is not defined in the instrument or the 2023 Act. The Committee also noted that various other bodies are mentioned in purpose 9 which could be described as organisations in their own right, funded by the Scottish Administration.

13. A copy of the correspondence can be found in the **Annex**.

14. The lead committee for this instrument is the Finance and Public Administration Committee.

15. The Committee draws the instrument to the attention of the Parliament under the general reporting ground in that:

- 1. regulation 2(b) makes an unnecessary substitution, by replacing the existing figure in section 4(3)(a) of the Act 2023 with the same figure;**
- 2. the amendment made by regulation 3(2)(c)(iv) to purpose 3 in schedule 1 of the Act leaves a reference to “programmes” which should be singular; and**
- 3. in the amendments made by regulation 3(2)(i)(ii) and (iv) to purpose 9 in schedule 1, it would be more helpful to the reader if the references to “the organisation” (which are introduced into a provision which refers to various different bodies) were instead expressly to the Scottish Administration.**

16. In relation to regulation 3(2)(c)(iv), the Committee welcomed the Scottish Government’s commitment to address this in the next amending

instrument,

17. **In relation to regulation 3(2)(i)(ii) and (iv), the Committee invited the Scottish Government to consider addressing this in the next amending instrument.**

Public Procurement (Agreement on Government Procurement) (Miscellaneous Amendments) (Scotland) Regulations 2023 (SSI 2023/287)

18. This instrument was made under powers in the Trade Act 2021. The UK is a party to the international Agreement on Government Procurement ("the GPA"), which is negotiated by members of the World Trade Organization ("WTO").
19. The GPA requires equal treatment of suppliers across WTO member states when bidding for government contracts. North Macedonia will shortly accede to the GPA and its suppliers will then be entitled to the same treatment as UK suppliers bidding for public contracts in the UK which are subject to the GPA. The instrument amends Scottish procurement legislation to enable this.
20. Under section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, instruments subject to the negative procedure must be laid at least 28 days before they come into force, not counting recess periods of more than 4 days. The instrument breaches this requirement as it was laid on 18 October and came into force on 30 October.
21. The Scottish Government wrote to the Presiding Officer stating that it was not possible to meet the laying requirements because officials were only informed on 2 October that North Macedonia deposited its instrument of accession to join the GPA on 30 September. The GPA enters into force for a new member 30 days after the instrument of accession is deposited, which for North Macedonia is 30 October.
22. The Scottish Government also highlighted that taking account of recess, there was insufficient time to prepare and lay the instrument to meet the laying requirements and comply with the international obligation to have the instrument in force by 30 October. The correspondence also indicates the UK Government is in a similar position.
23. A copy of the correspondence can be found in the **Annex**.
24. The lead committee for this instrument is the Economy and Fair Work Committee.

25. **The Committee draws this instrument to the attention of the Parliament under reporting ground (j) for failure to comply with laying requirements, as it was not laid 28 days before it comes into force.**

26. **The Committee is content with the Scottish Government's explanation provided for this breach of the laying requirements.**

No points raised

Local Government, Housing and Planning Committee

Non-Domestic Rating Contributions (Scotland) Amendment Regulations 2023 (SSI 2023/288)

Net Zero, Energy and Transport Committee

Vehicle Emissions Trading Schemes Order 2023 (SI 2023/Draft)

Rural Affairs and Islands Committee

Plant Health (Fees) (Forestry) (Scotland) (Amendment) Regulations 2023 (SSI 2023/Draft)

Social Justice and Social Security Committee

Social Security (Iceland) (Liechtenstein) (Norway) (Further provision in respect of Scotland) Order 2023 (SSI 2023/282)

Annex

Budget (Scotland) Act 2023 Amendment Regulations 2023 (SSI 2023/Draft)

On 19 October 2023, the Committee asked the Scottish Government

1. Regulation 2(b) amends the amount specified in section 4 of the Budget (Scotland) Act 2023 for the Scottish Parliamentary Corporate Body (SPCB). The 'amended' amount of £117,598,000 is the same amount currently specified in the Act. Is this intentional?
2. Regulation 3 amends the policy purposes in Schedule 1 of the Act against which resources are allocated. Regulation 3(2)(c)(iv) in relation to purpose 3 deletes reference to the Green Growth Accelerator programme leaving reference only to the Growth Accelerator programme. Following the deletion of one of the two named programmes, should the word 'programmes' now be in the singular rather than plural, or is there more than one Growth Accelerator programme in existence?
3. Regulation 3(2)(i) also amends purpose 9 which relates to the Deputy First Minister and Finance portfolio. At the end of the text of the amendments in the entries listed at (ii) and (iv) there is reference to 'the organisation'. These are the first references in purpose 9 to 'the organisation' which is not defined. There are various entities referred to in the amended purpose 9. Does 'the organisation' refer to the office of the Deputy First Minister, or the Scottish Administration or another organisation? Is it sufficiently clear what this term refers to?

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

On 24 October 2023, the Scottish Government responded:

1. As noted, the amended figure is the same as the original figure. The insertion of an unchanged figure was unintentional, but it is considered that no corrective action is necessary, as the figure remains correct.
2. The word 'programmes' should be in the singular. The oversight in failing to amend this, when omitting the reference to 'Green Growth Accelerator', is regretted, but it is considered that the meaning is clear in context. This will be addressed in the next amending instrument.
3. The word 'organisation' refers to the Scottish Administration. Schedule 1 sets out the various purposes for which the Scottish Administration may use resources. It is considered that in this context, it is clear that a reference to 'the organisation' without further qualification is to the Scottish Administration, and no corrective action is proposed.

Public Procurement (Agreement on Government Procurement) (Miscellaneous Amendments) (Scotland) Regulations 2023 (SSI 2023/287)

On 18 October 2023, the Scottish Government wrote to the Presiding Officer

The Public Procurement (Agreement on Government Procurement) (Miscellaneous

Amendments) (Scotland) Regulations 2023, SSI 2023/287 was made by the Scottish Ministers under section 1(1)(b)(i) of the Trade Act 2021 on 18 October 2023. It was laid before the Scottish Parliament on 18 October and will come into force on 30 October 2023.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out that a negative SSI must be laid before the Scottish Parliament at least 28 days before the instrument comes into force. On this occasion, this has not been complied with and to meet the requirements of section 31(3) of that Act, this letter explains why.

The UK is a party to the World Trade Organisation's Agreement on Government Procurement ("the GPA"). North Macedonia deposited its instrument of accession to join the GPA on 30 September, meaning that the GPA will enter into force for it 30 days later; on 30 October 2023.

As a consequence of North Macedonia joining the GPA, its suppliers will be entitled to the same treatment as UK suppliers bidding for regulated public contracts in the UK. This SSI makes a small technical amendment to Scottish Procurement regulations in order to meet this international obligation.

It has not been possible to meet the requirements of section 31(3) of the Act due to Scottish Government officials having only been informed on Monday 2 October that North Macedonia had already deposited its instrument of accession. This means that the SSI would have had to be laid on that same day in order to meet the requirements of section 31(3). Work was already in hand to make and lay this SSI, but the timing (and lack of advance warning) of the tabling of North Macedonia's instrument of accession has taken us – and the UK Government – by surprise. It is therefore necessary, as a matter of international obligation, that we lay this instrument during October recess in breach of the 28 day rule.

The UK is still to lay its equivalent SI, leaving the UK Parliament and the Scottish Parliament in a similar position with regards to breaching timelines.

