

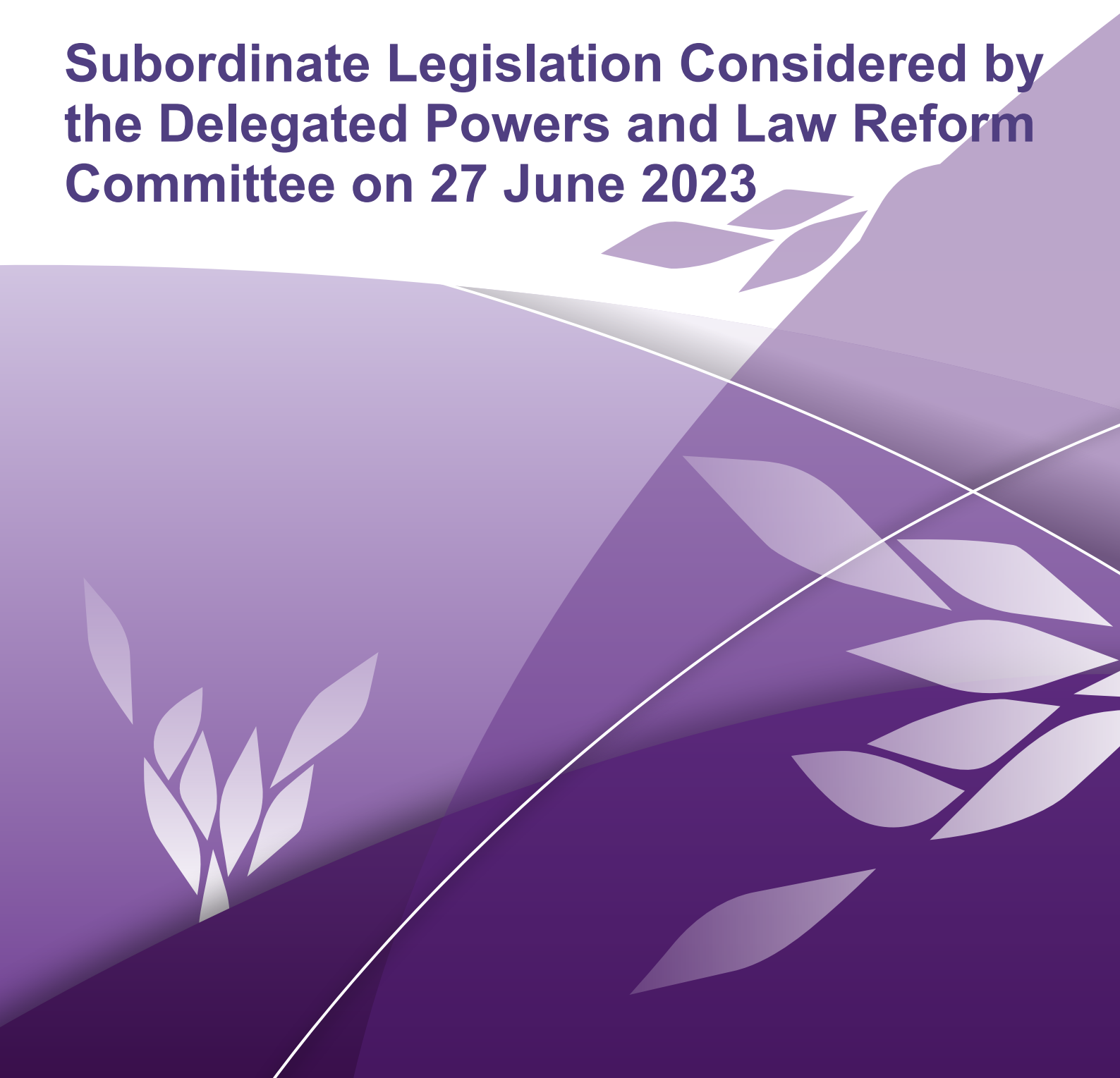


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Pàrlamaid na h-Alba

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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 27 June 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 27 Juneⁱ, the Committee considered the following instrument under its remit and agreed to draw it to the attention of the Parliament:
 - Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 3) Regulations 2023 (SSI 2023/178)
2. The Committee's recommendations in relation to this instrument 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 Jeremy Balfour MSP submitted apologies for this meeting.

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

Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 3) Regulations 2023 (SSI 2023/178)

4. This instrument makes various amendments to legal aid fees and eligibility in Scotland.
5. The Committee identified errors inserted by the instrument into schedule 2 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 in relation to Chapter 1 of Part 3 of the Table of Fees.
6. In paragraph 3 (cb) (i), the reference to paragraph 1AA (d) should be to 1AA (e).
7. In paragraph 3 (cb) (iii), the reference to paragraph 1AA (e) should be to 1AA (f).
8. The Scottish Government has confirmed these are cross-referencing errors and has undertaken to rectify them by correction slip, or at the next suitable legislative opportunity.
9. A copy of the correspondence can be found in the **Annex**.
10. The lead committee for this instrument is the Equalities, Human Rights and Civil Justice Committee.

11. The Committee draws the instrument to the attention of the Parliament under the general reporting ground for these cross-referencing errors.

12. The Committee noted that the Scottish Government has undertaken to correct the errors by correction slip, or at the next suitable legislative opportunity.

13. The Committee also identified an apparent error introduced by the instrument into the same schedule of the 1989 Regulations by substituting “accused” for “expert” in paragraph 16A (1) (b). This results in heads (b) and (d) of this paragraph being identical.
14. The Scottish Government has undertaken to rectify the duplication at the next suitable legislative opportunity.

15. The Committee draws the instrument to the attention of the Parliament under the reporting ground (h) (meaning could be clearer) in relation to this duplication, as this could raise doubt in the mind of the reader as to what

the provision is intended to say.

- 16. The Committee noted that the Scottish Government has undertaken to rectify this duplication at the next suitable legislative opportunity.**

No points raised

Criminal Justice Committee

Management of Offenders (Scotland) Act 2019 (Commencement No. 7) Regulations 2023 (SSI 2023/182 (C.18))

Finance and Constitution Committee

Land and Buildings Transaction Tax (Green Freeports Relief) (Scotland) Order 2023 (SSI 2023/Draft)

Health, Social Care and Sport Committee

National Health Service (Free Prescriptions and Charges for Drugs and Appliances) (Scotland) Amendment Regulations 2023 (SSI 2023/181)

Rural Affairs and Islands Committee

Agriculture and Horticulture Development Board (Amendment) Order 2023 (SI 2023/Draft)

Deer (Firearms etc.) (Scotland) Amendment Order 2023 (SSI 2023/Draft)

Deer (Close Seasons) (Scotland) Amendment Order 2023 (SSI 2023/184)

Good Food Nation (Scotland) Act 2022 (Commencement No. 1) Regulations 2023 (SSI 2023/183 (C.19))

Annex

Agriculture and Horticulture Development Board (Amendment) Order 2023 (SI 2023/Draft)

On 15 June 2023, the Committee asked the Scottish Government:

The preamble states that the instrument is laid before the Scottish Parliament as required by section 96(4) of the Act, before Scottish Ministers may give their approval to the Secretary of State to make this Order. Section 96(4) states that the Scottish Ministers may not give their approval to the making of an order establishing a board whose cross-border functions include functions relating to Scotland, or an order dissolving an existing levy body or a board whose cross-border functions include functions relating to Scotland. This instrument appears to expand the scope of an existing board and make amendments in relation to levies.

Please explain why you consider that this instrument is subject to the requirement in s96(4) that the Scottish Ministers may not give their approval unless a draft of the order has been laid before, and approved by a resolution of, the Scottish Parliament?

Please could you confirm whether the Scottish Ministers are committing to giving their approval to the Secretary of State, should this draft Order be approved by the Parliament?

On 20 June 2023, the Scottish Government responded:

(1)

The Agriculture and Horticulture Development Board (the “Board”) is a levy body with cross-border functions, including relating to Scotland, established under powers in the Natural Environment and Rural Communities Act 2006 (the “2006 Act”) by the Agriculture and Horticulture Development Board Order 2008 (the “2008 Order”).

The 2006 Act confers various powers in relation to bodies established under its provisions on “the appropriate authority” which (per section 96(1)(e) and 91(1) of the 2006 Act) is the Secretary of State with the approval of the Scottish Ministers for matters relating to Scotland. Section 96(4) of the 2006 Act requires that the Scottish Ministers may only approve certain types of Orders made by the appropriate authority where these orders have first been laid before and approved by resolution of the Scottish Parliament.

Those types of orders are (section 96(4)):

“(a) an order establishing a board whose cross-border functions include functions relating to Scotland, or

(b) an order dissolving an existing levy body or a board whose cross-border functions include functions relating to Scotland,”

We note The Agriculture and Horticulture Development Board (Amendment) Order 2023 (the “2023 Order”) is made under section 87 of the 2006 Act (in addition to other provisions which are not relevant for present purposes).

That section enables the appropriate authority to “establish a body for a purpose or purposes falling within section 88” and “assign to it a function or functions falling within

section 89”.

Article 3 of the 2023 Order amends Article 2 of the 2008 Order to expand the scope of the Board to include any agricultural industry in the United Kingdom not already covered in the Board’s scope.

We note in addition to the scope of the Board in Article 2, separate provision is made in schedule 1 of the 2008 order in relation to its functions. This distinction is relevant to the question of whether the 2023 Order concerns matters falling within section 96(4) of the 2006 Act since the Scottish Ministers may consent to orders relating to the functions of boards without first seeking the prior approval of the Scottish Parliament (section 96(2)(c)).

It is the Scottish Government Legal Directorate’s view that the expansion of the scope of the Board in Article 3 of the 2023 Order could equally have been achieved through the establishment of a new and separate board and therefore in substance, and in terms of the relevant enabling powers, the 2023 Order falls to be considered as an order “establishing a board”, thus requiring the approval of the Scottish Parliament before it is made.

The Scottish Government Legal Directorate considers that the references to the making of a section 87 Order establishing a board with cross-border functions in section 96(2) and (4) of the 2006 Act fall to be read in particular as including instances where the section 87(1)(a) and section 88 power to establish bodies for particular purposes are used on subsequent occasions to amend the 2008 Order, in line with section 14 of the Interpretation Act 1978. Given that interpretation, the Scottish Government Legal Directorate considers it necessary to follow the procedure required when establishing a board with cross border functions as set out in section 96(4) of the 2006 Act, and parliamentary approval of the 2023 Order is therefore required.

(2)

I confirm the Scottish Ministers have agreed to give their approval to the Secretary of State should this draft Order be approved by the Parliament. The Cabinet Secretary of Rural Affairs, Land Reform and Islands wrote to Lord Benyon, Minister for Biosecurity, Marine and Rural Affairs indicating her intent to provide consent to this instrument, subject to its approval by the Scottish Parliament.

Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) (No. 3) Regulations 2023 (SSI 2023/178)

On 15 June 2023, the Committee asked the Scottish Government:

Regulation 4 of the instrument makes amendments to the Criminal Legal Aid (Scotland) (Fees) Regulations 1989.

Regulation 4(3)(b)(ii) of the instrument inserts a new sub-paragraph (cb) into paragraph 3 of schedule 2 of the 1989 Regulations.

The newly inserted sub-paragraph 3(cb)(i) refers to fees payable for managed meetings under either paragraph 1B(d) of Chapter 1 of Part 1 or paragraph 1AA(d) of Chapter 1 of Part 3 of the Table of Fees. The Table of Fees is also relevantly amended by regulation 4(6)(b) of this instrument by inserting paragraph 1AA into the Table of Fees. Should the reference to paragraph 1AA(d) in this regulation be to paragraph 1AA(e)?

The newly inserted sub-paragraph 3(cb)(iii) refers to fees payable relating to the conduct

of a first diet under paragraph 1AA(e) of chapter 1 of part 3 of the Table of Fees, the Table of Fees which is also amended by regulation 4(6)(b) of this instrument by inserting paragraph 1AA into the Table of Fees. Should the reference to paragraph 1AA(e) in this regulation be to paragraph 1AA(f)? Regulation 4(3)(j) of the instrument makes amendments to paragraph 16A of schedule 2 of the 1989 Regulations relating to consultation fees payable.

Regulation 4(3)(j)(i)(dd) substitutes “accused” for “expert” in regulation 16A(1)(b) so it now refers to “the same counsel and expert”.

Regulation 16A(1)(d) of the 1989 regulations already refers to “the same counsel and expert” so the amendment results in heads (b) and (d) of this regulation being identical. Is this intentional?

On 20 June 2023, the Scottish Government responded:

We thank the Committee for bringing these points to our attention. The references inserted in paragraph 3 of the notes on the operation of schedule 2 of the Criminal Legal Aid (Scotland) (Fees) Regulations 1989 are incorrect:–

the reference in paragraph 3(cb)(i) to paragraph 1AA(d) of Chapter 1 of Part 3 of the Table of Fees should be to paragraph 1AA(e);

the reference in paragraph 3(cb)(iii) to paragraph 1AA(e) of Chapter 1 of Part 3 of the Table of Fees should be to paragraph 1AA(f).

The Scottish Government considers that in the context of the amended regulations, having regard to the wider wording of inserted sub-paragraph (cb) and the entries in paragraph 1AA of Chapter 1 of Part 3 of the Table of Fees, the provisions are capable of being operated effectively despite the incorrect references. The primary users of the legislation will be counsel, agents and the Scottish Legal Aid Board. However, in the interests of clarity the Government will amend the legislation by correction slip, as the intention is obvious from the context, or at the next suitable legislative opportunity.

The intention was to make the amendments included in the instrument, including the change at regulation 4(3)(j)(i)(dd) to regulation 16A(1)(b), but the drafting has inadvertently left a duplicate provision.

The Scottish Government considers that paragraph 16A can be operated effectively, however proposes to rectify the duplication at the next suitable legislative opportunity.

