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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 9 February 2021**

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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 9 February 2021, the Committee considered the following instruments under the SSI Protocol agreed between the Scottish Government and the Scottish Parliament in respect of SSIs made using the powers under the European Union (Withdrawal) Act 2018:
  - Education (Fees and Student Support) (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/28); and
  - Rural Development (Miscellaneous Amendment) (Scotland) Regulations 2021 (SSI 2021/33).
2. The Committee's recommendations in relation to these instruments are set out in the next section of the report.
3. In relation to its scrutiny of instruments under its remit, the Committee also considered the following instruments and agreed to draw them to the attention of the lead committee:
  - Low Emission Zones (Emission Standards, Exemptions and Enforcement) (Scotland) Regulations 2021 (SSI 2021/draft);
  - Low Emission Zones (Scotland) Regulations 2021 (SSI 2021/26); and
  - Education (Fees and Student Support) (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/28).
4. The Committee's recommendations in relation to these instruments are set out later in the report.
5. The Committee also determined that it did not need to draw the Parliament's attention to the instruments set out by the relevant lead committee at the end of this report.

# Instruments considered under the European Union (Withdrawal) Act 2018

## Committee consideration of the scrutiny procedure under which an instrument has been laid and the categorisation applied by the Scottish Government

### Education (Fees and Student Support) (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/28)

6. The purpose of this instrument is set out in the next section below. The deficiency-correcting aspects of the instrument, which are made under the European Union (Withdrawal) Act 2018, are a minor element of what this particular instrument does. The SSI Protocol only applies to powers exercised under the 2018 Act.
7. This instrument has been laid under the negative procedure and has been categorised by the Scottish Government as of medium significance under the SSI Protocol in relation to the European Union (Withdrawal) Act 2018.

8. **The Committee is content that the use of the negative procedure is appropriate in these circumstances.**

9. **The Committee is also content that the instrument should be categorised as medium in terms of its significance under the SSI Protocol.**

### Rural Development (Miscellaneous Amendment) (Scotland) Regulations 2021 (SSI 2021/33)

10. This instrument is made under the powers conferred on Scottish Ministers in the European Union (Withdrawal) Act 2018 to correct deficiencies in retained EU law and the power to simply or improve common agricultural policy (CAP) legislation in the Agriculture (Retained EU Law and Data) (Scotland) Act 2020. The SSI Protocol only applies to powers exercised under the 2018 Act.
11. The purpose of this instrument is to ensure the continued operability of retained EU Common Agricultural Policy legislation in the period from 2021 to 2024. The majority of the deficiencies concerned were introduced by Regulation (EU) 2020/2220. This source of EU law, most of which was brought into retained EU law, came into force on 29 December 2020, just before the end of the transition period.
12. This instrument has been laid under the negative procedure and has been categorised by the Scottish Government as of low significance under the SSI Protocol in relation to the European Union (Withdrawal) Act 2018.

13. **The Committee is content that the use of the negative procedure is appropriate in these circumstances.**

14. **The Committee is also content that the instrument should be categorised as low in terms of its significance under the SSI Protocol.**

# Scrutiny of instruments under the Committee's remit: instruments drawn to the attention of the lead committee

## Low Emission Zones (Emission Standards, Exemptions and Enforcement) (Scotland) Regulations 2021 (SSI 2021/draft)

15. The purpose of the instrument is to make provision for the operation of low emission zone schemes. Provisions include setting out (1) the emission standards with which vehicles must comply for those vehicles to be driven within a low emission zone and any applicable exemptions (2) the imposition of penalty charges as a consequence of contravening the terms of a low emission zone scheme (3) the enforcement of the scheme by the local authority, or authorities, operating it and (4) the offences associated with the interference with the operation of a low emission zone scheme.
16. A cross-referencing error has been identified in regulation 4 of the instrument. Specifically, regulation 4(9) incorrectly refers to regulation 9 and not regulation 7. It is nevertheless clear from the headings of the regulations that regulation 7 is the applicable regulation and not regulation 9.
17. The Scottish Government confirmed in correspondence with the Committee (see the **Annex**) that it will amend this error by way of a correction slip.

18. **The Committee agrees to draw this instrument to the attention of the Parliament on the general reporting ground on the basis that there is a cross-referencing error in regulation 4 of the instrument.**
19. **The Committee notes the Scottish Government's commitment to amend this error by way of a correction slip.**

## Low Emission Zones (Scotland) Regulations 2021 (SSI 2021/26)

20. The purpose of this instrument is to make provision for the creation and operation of a low emission zone scheme. Provisions include setting out consultation, publication and notification requirements for local authorities, and requirements for submitting objections to a proposed scheme. Further provisions include setting out the process for how an examination of proposals relating to a scheme may take place and a requirement that local authorities keep accounts regarding the operation of schemes.
21. A cross-referencing error has been identified in regulation 5 of the instrument. Regulation 5 refers to a local authority making a low emission zone scheme under section 6 of the Transport (Scotland) Act 2019. However, it is section 9 of the 2019 Act that gives the power to local authorities to make (or modify) a low emission zone scheme.
22. The Scottish Government confirmed in correspondence with the Committee (see the **Annex**) that it will amend this error by way of a correction slip.

23. **The Committee agrees to draw this instrument to the attention of the Parliament on the general reporting ground on the basis that there is a cross-referencing error in regulation 4 of the instrument.**
24. **The Committee notes the Scottish Government's commitment to amend this error by way of a correction slip.**

Education (Fees and Student Support) (EU Exit) (Scotland) (Amendment) Regulations 2021 (SSI 2021/28)

25. The purpose of this instrument is to amend the legislation on student support following the UK's withdrawal from the EU. The instrument removes entitlements in relation to home tuition fee status and eligibility for certain allowances and bursaries for future students coming to study in Scotland from the EU and related countries. It provides for continuing support for those whose rights are protected under the EU Withdrawal Agreement.
26. The Committee asked the Scottish Government a number of questions in relation to this instrument. These questions, along with the Scottish Government's subsequent response, are included in the **Annex**.
27. Some of the Committee's questions related to possible errors in the Regulations. Specifically:
  - regulation 3(b) of the Instrument (on page 4) inserts reference to paragraphs "10A(1)(d) and 10B(c)" of schedule 1 of SSI 2006/333, but these paragraphs do not exist;
  - the term "residence scheme immigration rules" should be defined in SSI 2007/149;
  - the reference in regulation 11(a) to paragraph (1) of regulation 2 of SSI 2007/151 should be to regulation 2 itself as there is no regulation 2(1); and the cross-references in regulation 11(b) to sub-paragraph 2(3) and in regulation 13(h) to sub-paragraph 2(3) require to be amended accordingly;
  - the references to "EU national" inserted by regulation 18(e)(iii)(bb) of the instrument should be to "EC national" given that this is a defined term in regulation 2(1) of SSI 2007/153; and
  - the reference to "regulation 2(6)" inserted by regulation 25(f) of the instrument into paragraph 10(1) of schedule 1 of SSI 2007/156 should be to "regulation 2(4)".
28. The Scottish Government confirmed in its response that it would correct these matters at the earliest opportunity.

29. **The Committee agrees to draw this instrument to the attention of the Parliament on the general reporting ground on the basis of these errors.**
30. **The Committee welcomes the Scottish Government's commitment to**

**correct these errors at the earliest opportunity.**

31. Further issues were also identified where the Scottish Government did not consider corrective action was necessary. Specifically:
- in regulation 4(h) of the instrument (on page 8), inserting a new category of person who is an “eligible student” by substituting paragraph 12 of schedule 1 of SSI 2006/333 (and in the equivalent amendments made by the instrument to other SSIs), whether for consistency with the drafting of (1) the existing paragraphs of the schedule and (2) the amendment made by the instrument to paragraph 9, a conjunction at the end of the penultimate subparagraph would be appropriate to make clear that the requirements are cumulative;
  - in regulation 22(h) of the instrument (on pages 34-35), inserting new categories of “eligible student” in new paragraphs 10A, 10B, 10C and 10D of schedule 1 of SSI 2007/154, whether for consistency with the drafting of (1) the existing paragraphs of the schedule and (2) the amendment made by the instrument to paragraphs 2, 4, 8A and 9 of the same schedule, a conjunction at the end of the penultimate subparagraph would be appropriate to make clear that the requirements are cumulative; and
  - in regulation 29(a) and (h) of the Instrument (on pages 45 and 48), respectively substituting paragraph 1 and inserting paragraph 13A of schedule 1 of SSI 2011/389, whether the wording “A post 2011/12 student is an excepted student if that post 2011/2012 student is—” (or equivalent), could be retained for consistency with the other paragraphs of schedule 1 and with the amendments made by regulation 29(c)(i), (e)(i), (f) and (i) of the instrument.
32. In relation to the first two bullet points above, the Committee notes the Scottish Government’s explanation that the absence of a conjunction is in line with modern drafting style. Nevertheless, the Committee considers that in this case the use of a conjunction would be preferable for consistency and therefore clarity because conjunctions are used both in the existing paragraphs of the schedules and in other amendments made by this instrument to those schedules.
33. In relation to the third bullet point above, the Scottish Government said in its response that it may have been clearer for consistency if the paragraphs being inserted into a schedule adopted the same introductory wording as the other paragraphs in the schedule. However, it did not consider corrective action was necessary.
34. **Given that the Scottish Government is in any event taking action to address the other issues, the Committee calls on the Scottish Government to address these three additional issues at the same time.**
35. Finally, the Scottish Government highlighted in its response that it had previously made a commitment to consolidate and update the various instruments which regulate student fees and student support in the higher education sector in Scotland with a view to ensuring greater clarity and consistency. The Scottish Government

added that this has been delayed for reasons connected with the Covid-19 pandemic, but that it remains committed to doing so at the earliest opportunity.

36. **The Committee notes this commitment but, given that it was made previously, calls on the Scottish Government to prioritise this matter.**

# No points raised

## COVID-19 Committee

Health Protection (Coronavirus) (Restrictions and Requirements) (Miscellaneous Amendment) (Scotland) Regulations 2021 (SSI 2021/49)

Health Protection (Coronavirus) (Restrictions and Requirements) (Local Levels) (Scotland) Amendment (No. 15) Regulations 2021 (SSI 2021/54)

## Economy, Energy and Fair Work Committee

Bankruptcy (Miscellaneous Amendments) (Scotland) Regulations 2021 (SSI 2021/draft)

## Health and Sport Committee

Health Protection (Coronavirus) (International Travel, Prohibition on Travel from the United Arab Emirates) (Scotland) Amendment Regulations 2021 (SSI 2021/52)

## Justice Committee

Legal Aid and Advice and Assistance (Miscellaneous Amendment) (Scotland) Regulations 2021 (SSI 2021/56)

## Rural Economy and Connectivity Committee

Companies Act 2006 (Scottish public sector companies to be audited by the Auditor General for Scotland) Order 2021 (SSI 2021/draft)

Rural Development (Miscellaneous Amendment) (Scotland) Regulations 2021 (SSI 2021/33)

M8 and M9 Trunk Roads (Newbridge to Hermiston Gait) (Actively Managed Hard Shoulder and Speed Limit Amendment) Regulations 2021 (SSI 2021/43)

Forestry and Land Management (Scotland) Act 2018 (Consequential, Saving and Transitional Provisions) Regulations 2021 (SSI 2021/44)

- To note: the instrument fulfils the Scottish Government's undertakings to correct drafting errors in regulations 19 and 20 of the Forestry and Land Management (Scotland) Act 2018 (Commencement and Transitional and Saving Provisions) Regulations 2019, and in regulation 4 of the Felling (Scotland) Regulations 2019. These were identified by the Committee in its report on subordinate legislation dated 5 March 2019.

Scottish Road Works Register (Prescribed Fees) Regulations 2021 (SSI 2021/48)

## Social Security Committee

Council Tax Reduction (Scotland) Amendment (No. 2) Regulations 2021 (SSI 2021/51)

# Annex

## Low Emission Zones (Emission Standards, Exemptions and Enforcement) (Scotland) Regulations 2021 (SSI 2021/draft)

### **On 29 January 2021, the Scottish Government was asked:**

“The Delegated Powers and Law Reform Committee intends to consider the Draft Low Emission Zones (Emission Standards, Exemptions and Enforcement) (Scotland) Regulations 2021 at its meeting on 9<sup>th</sup> February 2021. The Committee has delegated authority to its legal advisers to ask questions directly of the Scottish Government Legal Directorate.

Regulation 4 of this instrument makes provision in respect of penalty charges. Regulation 4(9) provides that “Where a charge certificate is served under regulation 9 the penalty charge is increased by 50 per cent”. Regulation 9 of the instrument makes provision in respect of responses to representations (made under regulation 8 with regards to penalty charge notices). Regulation 7 of this instrument makes provision in respect of the service of charge certificates. Should the reference in Regulation 4(9) be to Regulation 7? If so, is any corrective action proposed, what action and when?”

### **On 2 February 2021, the Scottish Government responds as follows:**

The Scottish Government acknowledges the typographical error in regulation 4 of the above regulations. It is agreed that the reference to regulation 9 should in fact be to regulation 7. It is considered that the appropriate cross-reference is obvious and capable of being read only one way, and so the Scottish Government intends to correct that error at the earliest available opportunity by correction slip.

## Low Emission Zones (Scotland) Regulations 2021 (SSI 2021/26)

### **On 29 January 2021, the Scottish Government was asked:**

Regulation 5 of the instrument makes provision in respect of giving notice of the making of a low emission scheme. This regulation refers to a local authority making a scheme under section 6 of the Transport (Scotland) Act 2019. Section 6 of the 2019 Act restricts the driving of vehicles within low emission zones. Section 9 of the 2019 Act gives the power to local authorities to make or modify a low emission zone scheme. Should regulation 5 of the instrument refer to section 9 of the 2019 Act? If so, is any corrective action proposed, what action and when?”

### **On 2 February 2021, the Scottish Government responds as follows:**

The Scottish Government acknowledges the typographical error in regulation 5 of the above regulations. It is considered that the appropriate cross-reference is obvious and capable of being read only one way, and so the Scottish Government intends to correct that error at the earliest available opportunity by correction slip.

## Education (Fees and Student Support) (EU Exit) (Scotland) (Amendment) Regulations 2021(SSI 2021/28)

### **On 29 January 2021 the Scottish Government was asked:**

1. In relation to the definition of “right of permanent residence”, which first appears on page 3 of the Instrument, in regulation 3(a)(xv), amending regulation 2(1) of SSI 2006/333, is the wording: ““right of permanent residence” means a person who”” sufficiently clear (in that a “right” is being defined as a “person”)? The same point arises in the amendments being made to each of the other SSIs, with the exception of SSI 2011/389.
2. Regulation 3(b) of the Instrument (on page 4) inserts reference to paragraphs “10A(1)(d) and 10B(c)” of schedule 1 of SSI 2006/333, but these paragraphs do not appear elsewhere in that SSI. Is this perhaps a cross-referencing error?
3. In regulation 4(h) of the Instrument (on page 8), inserting a new category of person who is an “eligible student” by substituting paragraph 12 of schedule 1 of SSI 2006/333, are the requirements in new paragraph 12 intended to be cumulative, and if so is this sufficiently clear? All the equivalent paragraphs in schedule 1 specify “and” or “or” before the final sub-paragraph. The same point arises in the equivalent amendments made by the Instrument to each of the other SSIs.
4. In regulation 6(a)(xi) and (xii) and 6(b) of the Instrument (on pages 9, 10 and 11), the new definitions of “person with protected rights”, “relevant person of Northern Ireland” and “right of permanent residence”, and new paragraph 2(3) (which are inserted into paragraph 2 of SSI 2007/149) refer to “residence scheme immigration rules”, but that term does not appear to be defined in SSI 2007/149. Is a definition required? A definition is inserted by the Instrument into each of the other six SSIs.
5. In regulation 11 of the Instrument (on page 15), has the cross-referencing/paragraph numbering gone awry? It appears that the reference in regulation 11(a) to paragraph (1) of regulation 2 of SSI 2007/151 should be to regulation 2 itself (there is no regulation 2(1)). This appears to knock on to regulation 11(b) of the Instrument which inserts new sub-paragraph 2(3) “after paragraph (2)” (on page 18), and sub-paragraph 2(3) is in turn referred to in regulation 13(h) of the Instrument (on page 21).
6. In regulation 18(e)(iii)(bb) of the Instrument (on page 27), inserting new paragraph 9(3)(c) of schedule 1 of SSI 2007/153, should the references to “EU national” be to “EC national”, to reflect the terms of paragraph 9(1)(a) and given the definition in paragraph 2(1) of SSI 2007/153?
7. Similar to question 4, in regulation 22(h) of the Instrument (on pages 34-35), inserting new categories of “eligible student” in new paragraphs 10A, 10B, 10C and 10D of schedule 1 of SSI 2007/154, is it sufficiently clear that, for each of these new paragraphs, the requirements within the paragraph are cumulative? As above, all the equivalent paragraphs of eligible persons in schedule 1 specify “and” or “or”. (Paragraph 10D relating to Irish nationals is already covered by question 4.)
8. Regulation 25(f) of the Instrument (on page 42), is the insertion of “regulation 2(6)” into paragraph 10(1) of schedule 1 of SSI 2007/156 a cross-referencing error?
9. Regulation 28(b) of the Instrument (on page 45) inserts new paragraph (7) into regulation 2 of SSI 2011/389, specifying circumstances in which an excepted student within the meaning of schedule 1 of SSI 2011/389 ceases to be an excepted student. New paragraph (7) refers in four places to “application for support” or “applying for support”. A similar amendment is made by the instrument to SSIs SSI 2007/153, 2007/154 and 2007/156. In those SSIs the amendment operates in the context that schedule 1 of those SSIs lists the categories of person who are eligible to apply for a form of support such as a

bursary. However, SSI 2011/389 (before amendment) does not mention applications for support and its schedule 1 performs the different function of listing those categories of student who cannot lawfully be charged higher fees. Should the references in new regulation 2(7) of SSI 2011/389 to “application for support” or “applying for support” refer instead to exemption from being charged higher fees? Alternatively, is more clarity required as to what is meant by “application for support” and “applying for support” in new regulation 2(7) of SSI 2011/389?

10. In Regulation 29(a) and (h) of the Instrument (on pages 45 and 48), respectively substituting paragraph 1 and inserting paragraph 13A of schedule 1 of SSI 2011/389, would it have been clearer to retain the wording “A post 2011/12 student is an excepted student if that post 2011/2012 student is—” (or equivalent), for consistency with the other paragraphs of schedule 1 and with the amendments made by regulation 29(c)(i), (e)(i), (f) and (i) of the Instrument?

11. Is any corrective action proposed, and if so, what action and when?

**On 2 February 2020, the Scottish Government responds as follows:**

1. The definition of “right of permanent residence” has been introduced to the various SSIs amended by the Instrument to describe the permanent right to reside in the United Kingdom resulting from the Withdrawal Agreements. It is a right held by a person in specific circumstances. In order to possess this right, the person must meet one of a number of conditions, set out in the definition.

The Scottish Government considers that the provision operates effectively. By defining the right in relation to a person who meets one of the necessary conditions, it is clear to the reader how the right of permanent residence arises. In drafting terms, it may have been preferable to define a “right of permanent residence” as a right *held* by a person, rather than simply with reference to a person meeting certain conditions, or alternatively to define a “person with a right of permanent residence” (similar to the approach for a “person with protected rights”).

However, the context in which the defined term is used throughout the Instrument, each time referring to “a person with a right of permanent residence”, does not seem to allow scope for confusion; a person with a right of residence is a person who meets one of the conditions set out in the definition. Therefore, no corrective action is proposed.

2. The reference to paragraphs 10A(1)(d) and 10B(c) in regulation 3(b) of the Instrument is a cross-referencing error. The Scottish Government is grateful to the Committee for drawing its attention to this point and undertakes to correct it at the earliest opportunity. The Scottish Government will correct the misplaced reference to those paragraphs at the earliest opportunity. In the meantime, the Scottish Government considers that the references have no legal effect, in the absence of paragraphs 10A and 10B in schedule 1 of SSI 2011/389.

3. Regulation 4(h) of the Instrument inserts a new category of person who is an “eligible student” by substituting paragraph 12 of schedule 1 of SSI 2006/333. The requirements in this new paragraph 12 are intended to be cumulative. The Scottish Government considers that it is sufficiently clear from the context that this list operates cumulatively without the need for a conjunction at the end of the penultimate paragraph. This is because each of the criteria in sub-paragraphs (a) to (d) clearly relate to different characteristics (nationality, immigration status, current place of ordinary residence and history of ordinary residence)

which, taken together, confer eligibility for student loan support. The provision has therefore been drafted in the modern drafting style, which is only to use conjunctions where there would otherwise be uncertainty as to whether requirements are cumulative or not.

4. The term “residence scheme immigration rules” should have been defined in SSI 2007/149 and the Scottish Government is grateful to the Committee for noting this oversight. It is considered that the definitions will still nevertheless operate effectively, given that these definitions are intended to give effect to the Withdrawal Agreements and the residence scheme immigration rules associated with them. However, a correction will be made at the earliest opportunity to assist the reader.

5. The reference in regulation 11(a) should indeed be to regulation 2 of SSI 2007/151 as there is no regulation 2(1). This has affected the cross-referencing / paragraph numbering of regulation 11(b) of the Instrument which inserts new sub-paragraph 2(3). The Scottish Government considers the provisions to operate effectively but undertakes to correct these paragraph numbering errors at the earliest opportunity.

6. We’re grateful for the Committee’s comments. The reference to “EU national” inserted by regulation 18(e)(iii)(bb) of the Instrument should be to “EC national” given that this is a defined term in regulation 2(1) of SSI 2007/153. The Scottish Government considers that the provision continues to operate effectively given that it should be apparent to the reader that it is intended to refer to the definition of “EC national” (since it refers back to sub-paragraph (1)(a)), but undertakes to remedy this at the earliest opportunity.

7. The requirements within paragraphs 10A, 10B, 10C and 10D of schedule 1 of SSI 2007/154 inserted by regulation 22(h) of the Instrument are intended to operate cumulatively. The Scottish Government considers this to be clear from the context and, as noted above in response to question 3, considers the provisions to operate effectively without the need for a conjunction at the end of each penultimate paragraph.

8. This is a cross-referencing error; the reference should be to regulation 2(4). The new regulation 2(4), inserted by regulation 24(b) of this Instrument, ensures that a person who has previously been eligible for education maintenance allowances and is then no longer eligible due to one of the reasons listed in new regulation 2(4)(b), will cease to be entitled to education maintenance allowances.

As the drafting in regulation 2(4) is sufficiently clear to describe when a person ceases to be eligible for education maintenance allowances, the Scottish Government does not consider the incorrect cross-reference in regulation 25(f) to cause significant difficulties as it should be apparent from the context that this is intended to refer to regulation 2(4). In any event, the drafting in regulation 2(4) is unambiguous as to when a person ceases to be eligible. The Scottish Government is grateful to the Committee for identifying this error and undertakes to remedy it at the earliest opportunity.

9. The Scottish Government agrees that SSI 2011/389 differs from the other SSIs being amended by this Instrument, in that its schedule 1 lists the categories of student who cannot lawfully be charged higher fees, rather than qualifying for student support.

However, the practical effect of SSI 2011/389 is that the categories of student listed in schedule 1 can apply for support from the Student Awards Agency Scotland for funding for their annual course fees (currently £1,820 per year). The new paragraph (7) inserted into regulation 2 makes it clear that those students who are excepted students within the

meaning of schedule 1 and therefore able to apply for support to cover their course fees will cease to be eligible to apply for this support if they fall within either of the categories in paragraph (7)(b). Therefore, no corrective action is proposed.

10. The categories in schedule 1 of SSI 2011/389 all commence with the phrase “A post 2011/12 student is an excepted student if that post 2011/12 student...”. The Scottish Government recognises that while it may have been clearer for consistency to retain this wording when substituting paragraph 1 and inserting paragraph 13A (by way of Regulation 29(a) and (h)), the omission of this phrase has no legal effect on the operation of these new provisions. This is because regulation 4(2) of SSI 2011/389 provides that it is not lawful to charge higher relevant fees in the case of a post 2011/12 student who is an excepted student within the meaning of schedule 1. Schedule 1 then contains the categories of students that are excepted. It is therefore clear to the reader that each paragraph in schedule 1 contains different categories of “excepted students”, rendering the words “A post 2011/12 student is an excepted student if that post 2011/12 student...” at the start of each paragraph superfluous. Therefore, no corrective action is proposed.

11. The Scottish Government undertakes to take corrective action as set out above in relation to responses 2, 4, 5, 6 and 8 at the earliest opportunity. This will be the next time it makes regulations in the area of student fees and support.

The Committee will wish to note that the Scottish Government has previously made a commitment to consolidate and update the various instruments of secondary legislation which regulate student fees and student support in the higher education sector in Scotland with a view to ensuring greater clarity and consistency. The Scottish Government remains committed to doing so at the earliest opportunity. At one point, it was hoped that the consolidation work could be progressed in tandem with the EU Exit amendments. However, diversion of resources to the Covid-19 response has made that impossible, and further progress is likely to be delayed until ongoing issues in the further and higher education sectors arising from the pandemic have been addressed.

