## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>1</td>
</tr>
<tr>
<td>Points raised: instruments subject to affirmative procedure</td>
<td>2</td>
</tr>
<tr>
<td>Local Authority (Capital Finance and Accounting) (Scotland) Regulations 2016 [draft] (Local Government and Regeneration)</td>
<td>2</td>
</tr>
<tr>
<td>Scotland’s Adoption Register Regulations 2016 [draft] (Education and Culture)</td>
<td>4</td>
</tr>
<tr>
<td>Procurement (Scotland) Regulations 2016 [draft] (Infrastructure and Capital Investment)</td>
<td>7</td>
</tr>
<tr>
<td>No points raised</td>
<td>10</td>
</tr>
<tr>
<td>Annexe A</td>
<td>11</td>
</tr>
<tr>
<td>Annexe B</td>
<td>16</td>
</tr>
<tr>
<td>Annexe C</td>
<td>18</td>
</tr>
</tbody>
</table>
Delegated Powers and Law Reform Committee

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; and
i. any Consolidation Bill as defined in Rule 9.18.1 referred to it by the Parliamentary Bureau in accordance with Rule 9.18.3.

www.scottish.parliament.uk/delegated-powers
DPLR.Committee@scottish.parliament.uk
0131 348 5175

Follow the Scottish Parliament @ScotParl
Committee Membership

Convener
Nigel Don
Scottish National Party

Deputy Convener
John Mason
Scottish National Party

Lesley Brennan
Scottish Labour

John Scott
Scottish Conservative and Unionist Party

Stewart Stevenson
Scottish National Party
Introduction

1. At its meeting on 2 February 2016, the Committee agreed to draw the attention of the Parliament to the following instruments—

   Local Authority (Capital Finance and Accounting) (Scotland) Regulations 2016 [draft];

   Scotland’s Adoption Register Regulations 2016 [draft];

   Procurement (Scotland) Regulations 2016 [draft].

2. The Committee’s recommendations in relation to the above instruments are set out below.

3. The Committee determined that it did not need to draw the Parliament’s attention to the instruments which are set out at the end of this report.
Points raised: instruments subject to affirmative procedure

Local Authority (Capital Finance and Accounting) (Scotland) Regulations 2016 [draft] (Local Government and Regeneration)

4. The purpose of the draft instrument is to make provision with respect to the powers of local authorities to borrow money, to incur debt through borrowing by way of credit arrangements and to maintain loan funds.

5. The instrument is subject to the affirmative procedure. If approved by the Parliament it will come into force on 1 April 2016.

6. In considering the instrument, the Committee asked for explanation of a number of different issues. The first issue was in relation to the use of the enabling power which defines an authority as including the Strathclyde Passenger Transport Authority, whereas the Regulations define an authority as including the Strathclyde Partnership for Transport; the Committee queried the relationship and transfer of functions between the Transport Authority and the Partnership.

7. Another issue concerned the instrument making provision to repeal certain obsolete definitions in the Local Government (Scotland) 1975 ("the 1975 Act"), given that it was not clear whether the repeals were consequential on provision made in the Regulations, or alternatively consequential on the commencement of the repeal of certain provisions in the 1975 Act by the Local Government etc. (Scotland) Act 1994 (Commencement No. 9) Order 2016). The Committee sought to understand what enabling power was being used to make the repeals.

8. A similar issue was that the Regulations revoke four instruments made using enabling powers in the 1975 Act. Once again the Committee asked for an explanation of why the revocations were considered to be consequential on provision made in the regulations.

9. As a result of this correspondence the instrument was subsequently withdrawn and re-laid. The re-laid instrument addresses the issue in paragraph 7 by removing the relevant provision from the instrument. The issue in paragraph 8 was addressed by citing an additional enabling power (paragraph 5(1) of Schedule 3 to the 1975 Act) in the preamble to the instrument. The correspondence is reproduced at Annexe A.

10. In relation to the issue in paragraph 6, the Scottish Government’s response explains that the functions of the Strathclyde Passenger Transport Authority were transferred to the Strathclyde Partnership for Transport by SSI, namely the Transfer of Functions from the Strathclyde Passenger Transport Authority and the Strathclyde Passenger Transport Executive to the West of Scotland Transport...
Partnership Order 2006 (SSI 2006/106). The Committee notes that it would be in accordance with usual drafting practice for such a transfer of functions to be narrated in a footnote to the instrument particularly where, as here, the designation of the body is relevant to the scope of the enabling power being exercised.

11. The Committee accordingly draws the draft instrument to the Parliament’s attention under the general reporting ground, as there has been a failure to follow proper drafting practice. The instrument does not narrate the statutory transfer of functions from the Strathclyde Passenger Transport Authority to the West of Scotland Transport Partnership.
Scotland’s Adoption Register Regulations 2016 [draft] (Education and Culture)

12. The Regulations make provision for the operation of Scotland’s Adoption Register (“the Register”). The Register is currently operated by a charity on the Scottish Ministers’ behalf. The Regulations will put the register on a statutory footing.

13. In particular, the Regulations:

- require Scottish adoption agencies to submit information to the Register about:
  - each child who is to be adopted, and
  - each approved prospective adopter;

- specify what information is to be submitted;

- require this information to be submitted within 3 months from the date on which (in relation to a child) the decision is taken that the child ought to be adopted, and (in relation to a prospective adopter) the decision is taken that the person is suitable to adopt;

- provide for the information on the Register to be disclosed to certain adoption agencies, for the purpose of helping those agencies to match children with prospective adopters;

- allow information contained in the Register to be disclosed, so that it can appear also on the adoption registers for England, Wales and Northern Ireland.

14. The Regulations are subject to the affirmative procedure. If approved, they will come into force on 1 April 2016.

15. In considering the instrument, the Committee explored with the Scottish Government in correspondence whether regulation 5(6) could be clearer. The correspondence is reproduced at Annexe B.

16. By virtue of regulation 5(1), the regulation applies where “an adoption agency” mentioned in paragraph (a) of the definition of “adoption agency” in section 119(1) of the Adoption and Children (Scotland) Act 2007 (“the 2007 Act”) decides under the Adoption Agencies (Scotland) Regulations 2009 that a person is suitable to be an adoptive parent, and “the agency” has obtained the written consent of the person to information being provided for inclusion in the Adoption Register. The definition in section 119(1)(a) of the 2007 Act covers a local authority or a registered adoption service.

17. Regulation 5(6) makes further provision for the circumstance where, after information is provided under the remainder of the regulation, it is decided that the person is no longer suitable to be an adoptive parent. It is provided that “an adoption agency” must as soon as reasonably practicable notify the Scottish Ministers of that, and inform the Ministers of the reason for this decision. There
appears to be significance in that requirement, as the provision of the further information will enable the Adoption Register to be brought up to date, in relation to persons who are no longer suitable to be adoptive parents.

18. The Scottish Government has confirmed in the correspondence the intentions which underlie the provisions. In one circumstance, the requirement in regulation 5(6) may be implemented by the agency which has decided that the person is suitable to be an adoptive parent, and has obtained the written consent of the person in accordance with regulation 5(1). After information is provided to the Register under regulation 5(2), it is possible that the adoption agency which provided that information will decide that the person is no longer suitable to be an adoptive parent.

19. In that circumstance, it is intended that the adoption agency would require to implement the requirement in regulation 5(6). However, it is also possible that a prospective adopter may, after information is provided to the Register, move to another agency. In that circumstance, the Scottish Government confirms that the new adoption agency will usually wish to assess the person’s suitability for adoption again, which could result in a decision that the person is no longer suitable to be an adoptive parent. Where such a decision is taken, it is intended that the new agency would be the one that is required to implement the requirements of regulation 5(6). The Scottish Government’s intention is accordingly to impose the notification requirement upon the agency which made the decision that the person is no longer suitable. The Scottish Government considers that the meaning of the provision is sufficiently clear.

20. The Committee considers however that regulation 5(6) does not clearly identify which adoption agency must carry out the notification requirements, when it is decided that a person is no longer suitable to adopt. It may be the case that, in practice, it will be the agency that determines non-suitability which decides to implement the requirements of regulation 5(6). However, the paragraph states “an adoption agency”. The drafting of the provision determines which agency or agencies must implement the requirements.

21. The Committee considers that it would have been clearer if the Regulations had made provision (in accordance with the policy intention) that, where an adoption agency decides that a person is no longer suitable, it is that agency which must comply with the notification requirements.

22. The Committee accordingly draws the Regulations to the attention of the Parliament on the reporting ground (h) as the meaning of regulation 5(6) could be clearer, in a particular respect.

23. Regulation 5(6) provides that where, after information is provided under the regulation for inclusion in the Adoption Register, it is decided that the person in respect of whom the information was provided is no longer suitable to be an adoptive parent, “an” adoption agency must as soon as is reasonably practicable- (a) notify the Scottish Ministers of that, and (b)
inform the Scottish Ministers of the reason for this decision. Those requirements enable the Adoption Register to be brought up to date.

24. The Scottish Government’s intention is that the adoption agency which decides that the person is no longer suitable to be an adoptive parent must implement the requirements of regulation 5(6) (and which agency might not be the same as the one which approves suitability). The provision could more clearly implement that intention.
Procurement (Scotland) Regulations 2016 [draft] (Infrastructure and Capital Investment)

26. These Regulations make further provision to implement the Procurement Reform (Scotland) Act 2014 (“the Act”), and will be complemented by the publication of statutory guidance. In broad terms, the Act introduces a degree of regulation for procurements for public contracts for goods and services valued at £50,000 and above, and for works contracts valued at £2M and above. The procurements covered by the Act are “regulated procurements”.

27. The Act enables the Scottish Ministers to make provision by regulations in respect of-

- how the estimated value of a contract is to be determined;
- applying provisions of the Act to the establishment and operation of a dynamic purchasing system, as it applies to the carrying out of a “regulated procurement”;
- specifying what a health or social care service is for the purposes of the Act;
- specifying the circumstances in which a contracting authority may award a contract under the Act without competition in relation to the proposed contract;
- details regarding the publication of contract opportunity notices, prior information notices and contract award notices on the Public Contracts website;
- the circumstances under which a contracting authority must exclude a business from a competition under the Act;
- the circumstances in which a business may or may not be excluded from bidding for a contract under the Act, as well as the selection criteria which contracting authorities may apply; and
- the use of technical specifications in “regulated procurements”.

28. The Regulations therefore make further provision as to those matters. Part 2 sets out the methods by which the estimated value of regulated contracts shall be calculated, and the provisions of the Act which will not apply to dynamic purchasing systems.

29. Part 3 relates to the general duties under the Act, and covers the definition of “health and social care services”, and the circumstances in which a contract may be awarded without a competition. Part 4 relates to specific duties under the Act. It covers providing details regarding advertising contract opportunities, using prior information notices and publishing contract award notices; setting out the criteria on which businesses must be excluded from bidding for public contracts, the basis on which businesses may be selected to participate in a competition, and rules
relating to the use of technical specifications and labels in “regulated procurements”.

30. The Regulations are subject to the affirmative procedure. If approved by the Parliament, they will come into force on 18 April 2016.

31. In considering the instrument, the Committee asked the Scottish Government questions on various matters. These questions included asking whether the instrument could be clearer in relation to when provisions relate to different types of “regulated procurement” and “regulated contract”, given that the various provisions of the Regulations would be made under different enabling provisions in the Act. The correspondence is reproduced at Annexe C.

32. Some provisions of the Regulations are made under provisions containing delegated powers in the Act which apply to “regulated procurements”, or “regulated contracts” made after a regulated procurement process. Others apply in terms of the Act expressly to “regulated procurements” and “EU-regulated procurements”. Others apply expressly to “regulated procurements”, but not “EU-regulated procurements”. An “EU-regulated procurement” is further defined by section 41(1)(c) of the Act.

33. To explain that further, the relevant provisions of the Regulations which are made under particular powers provisions in the Act can be broadly outlined as follows:

- ** Provision on regulated procurements – section 7 of the Act and regulation 4 (dynamic purchasing systems);**

- ** Provision on regulated contracts – section 14 of the Act and regulation 6 (circumstances in which a contract can be awarded without competition);**

- ** Provision on both regulated and EU-regulated procurements – section 23 of the Act and regulation 7 (publication of contract notices and award notices);**

- ** Provision on regulated procurements other than EU-regulated – sections 27, 28 and 30 of the Act and regulations 8, 9, 10, 11 and 12 (selection of tenderers exclusion and selection criteria, technical specifications and labels).**

34. The expression “regulated contract” is not used at all in the provisions, although used in the contents list, the headings to Part 2 and regulation 3, and in the explanatory note. “Regulated procurement” appears only to be used in regulation 11(1) (and in the explanatory note).

35. The Scottish Government has confirmed in correspondence that the Regulations need to be read in conjunction with the Act, as the application of the provisions to different types of contracts is governed by the Act itself. The Regulations will be accompanied by statutory guidance, which is intended to make clear how the regime will operate in practice. The explanatory notes also distinguish between the application of provisions to ‘regulated contracts’, ‘regulated procurements’ and ‘EU-regulated procurements’.
36. The Committee considers that in this instance the failure to make any reference in the provisions of the instrument (with one exception) to their application to a “regulated contract” or a “regulated procurement”, as the case may be, amounts to a failure to follow proper drafting practice.

37. (Regulation 11(1) contains the exception, which prescribes requirements in connection with the technical specifications in “regulated procurements”.)

38. Making such express provisions through the instrument would have helped the reader. As the Regulations are drawn, the reader requires also to read either the explanatory note, or the statutory guidance to follow, or the Act (or all of these), to find an explanation of which types of contract or procurement the regulations which are identified in the broad outline above apply to.

39. The Committee accordingly draws the Regulations to the attention of the Parliament on the general reporting ground, as the Committee considers that there has been a failure to follow proper drafting practice.

40. Some provisions of the Regulations are made by virtue of provision in the Procurement Reform (Scotland) Act 2014 (“the Act”) which applies to “regulated procurements”. Others are made by virtue of provision in the Act which applies to “regulated contracts”.

41. Yet others are made by virtue of provision in the Act which applies to “regulated procurements” and “EU-regulated procurements”. Yet others are made by virtue of provision which applies to “regulated procurements”, but not those which are “EU-regulated”.

42. In that way, regulations 4, and 6 to 12, apply to differing types of contract or procurement. However the provisions make no reference to a “regulated procurement” or “regulated contract”, apart from one reference in regulation 11(1).

43. The Committee considers that it would have been proper drafting practice in these circumstances to have specified in the relevant regulations (as well as in the explanatory note) which types of contract or procurement the regulations apply to. Alternatively where it might be more suitable drafting, a regulation could have made reference back to the section of the Act specifying which type of contract or procurement the provision applies to.

44. This would also have helped the reader to understand the extent of the provisions.
No points raised

45. At its meeting on 2 February 2016, the Committee considered the following instruments. The Committee determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit:

*Finance*

Budget (Scotland) Act 2015 Amendment Regulations 2016 [draft].

*Infrastructure and Capital Investment*

Water Act 2014 (Commencement No. 2) (Scotland) Order 2016 (SSI 2016/48 (C.8)).

*Local Government and Regeneration*

Assessment of Energy Performance of Non-domestic Buildings (Scotland) Regulations 2016 [draft];

Local Government Pension Scheme (Scotland) Amendment Regulations 2016 (SSI 2016/32).

Local Government etc. (Scotland) Act 1994 (Commencement No. 9) Order 2016 (SSI 2016/31 (C.6)).

*Rural Affairs, Climate Change and Environment*

Less Favoured Area Support Scheme (Scotland) Amendment Regulations 2016 (SSI 2016/33);

Nature Conservation (Scotland) Act 2004 (Authorised Operations) Order 2016 (SSI 2016/38);

Pollution Prevention and Control (Scotland) Amendment Regulations 2016 (SSI 2016/39).

Specified Diseases (Notification) Amendment (Scotland) Order 2016 (SSI 2016/41).
Annexe A

Local Authority (Capital Finance and Accounting) (Scotland) Regulations 2016 [draft]

On 21 January 2016 the Committee’s legal advisers asked for an explanation of the following matters in relation to a previous draft of the instrument, laid on 19 January, which has now been withdrawn. The answers to questions 1-3 and 5 remain relevant to the Committee’s consideration of the re-laid instrument:

1. The enabling power in section 165 of the Local Government etc. (Scotland) Act 1994 confers power to make provision about the powers of authorities to borrow and lend money. “Authority” is defined at section 165(6) and means a local authority, a joint board or the Strathclyde Passenger Transport Authority.

The regulations make provision for borrowing and lending by local authorities. “Local authority” is defined for the purposes of the regulations as “a council…. a joint board… and the Strathclyde Partnership for Transport…”.

Please explain if the Strathclyde Partnership for Transport is a statutory successor to the Strathclyde Passenger Transport Authority, and if so how its functions were transferred.

2. The following terms are used in the regulations without definition:

(a) “service concession arrangement” (regulation 1(2));

(b) “treasury management activities” (regulation 2(1)(d)); and

(c) “prudent financial management” (regulation 12(2)).

Please explain whether you consider the meaning of these terms, as they are intended to be applied in the regulations, to be sufficiently clear.

3. Regulation 15(1) amends section 37(1) of the Local Government (Scotland) Act 1975 to omit the words “, except in paragraph 6 of Schedule 3”, from the definition of “prescribed” in that section. Paragraph 6 of Schedule 3 to the 1975 Act was repealed by Schedule 14 to the 1994 Act. That repeal has not yet been commenced, but is to be commenced on 1st April 2016 by the Local Government etc. (Scotland) Act 1994 (Commencement No. 9) Order 2016.

Is the amendment, properly construed, consequential on provision made in these regulations, or is it consequential on the repeal of paragraph 6 of Schedule 3 to the 1975 Act? Depending on your answer, what enabling power is relied on to make the amendment?
4. Regulation 15(2)(c) repeals a number of the definitions in paragraph 31 of Schedule 3 to the 1975 Act. The definitions repealed are definitions of terms used in various paragraphs of Schedule 3 to the 1975 Act which are repealed by Schedule 14 to the 1994 Act. Once again, the repeals are to be commenced on 1st April 2016 by the Local Government etc. (Scotland) Act 1994 (Commencement No. 9) Order 2016.

Are the repeals of the definitions in paragraph 31, properly construed, consequential on provision made in these regulations, or are they consequential on the repeal of the relevant paragraphs of Schedule 3 to the 1975 Act? Depending on your answer, what enabling power is relied on to make the provision in regulation 15(2)(c)?

5. Regulation 15(3) amends section 33(1) of the Order in the Schedule to the Tay Road Bridge Order Confirmation Act 1991 to omit the reference to the powers of councils under Schedule 3 to the 1975 Act to lend money. Those powers are repealed by Schedule 14 to the 1994 Act. That repeal is once again to be commenced on 1st April 2016 by the Local Government etc. (Scotland) Act 1994 (Commencement No. 9) Order 2016.

Is the repeal of the relevant words in section 33(1) of the Order in the Schedule to the Tay Road Bridge Order Confirmation Act 1991, properly construed, consequential on provision made in these regulations, or is it consequential on the repeal of the relevant paragraphs of Schedule 3 to the 1975 Act? Depending on your answer, what enabling power is relied on to make the provision in regulation 15(3)?

6. Regulation 16 revokes four instruments made in reliance on enabling powers in paragraph 5(1) of Schedule 3 to the 1975 Act. That paragraph was repealed by Schedule 14 to the 1994 Act but the repeal has not yet been commenced, and is not intended to be commenced in the forthcoming Commencement No. 9 Order. Please explain why the revocations are consequential on provision made in these regulations, and what enabling power is relied on to make the revocations.

The Scottish Government responded as follows:

1. The glossing reference that links various statutory references to the “Strathclyde Partnership for Transport” to the “Regional Transport Partnership for the West of Scotland” is to be found at article 3(3) of the Transfer of Functions from the Strathclyde Passenger Transport Authority and the Strathclyde Passenger Transport Executive to the West of Scotland Transport Partnership Order (S.S.I. 2006/106). As that latter body designs itself as the “Strathclyde Partnership for Transport”, the draft Regulations use that name, to assist users in identifying it, but the definition at regulation 1(2) makes the further link that is then needed to the statutory name.
2. The three terms in the question are familiar to the main audience of the Regulations. All take their natural meanings. If it assists the Committee:

(a) a "service concession arrangement" is an arrangement whereby a public sector body contracts with a private operator to develop (i.e. to build or upgrade), operate and maintain the public body’s infrastructure assets (for example, schools). In lay language, these are often called Private Finance Initiatives (PFI) or Public Private Partnerships (PPP). They are a type of credit arrangement. The term is more fully described in an international financial reporting standard, IFRIC 12, which is generally recognised as providing proper accounting practices for local authorities.

(b) “treasury management activities” are all activities that, in accordance with accepted good practice, relate to the operational management of an organisation’s corporate treasury.

There is relevant guidance, ‘Treasury Management in the Public Services: Code of Practice and Cross-sectoral Guidance Notes’, published by the Chartered Institute of Public Finance and Accountancy, which the main audience will be aware of from its (separate) use in relation to local authority investments, as provided for by regulation 3 of the Local Government Investments (Scotland) Regulations 2010 (S.S.I. 2010/122) and, less overtly, by regulation 4 of the draft Regulations. The Code is mentioned in paragraph 4 of the Explanatory Note to the draft Regulations.

(c) “prudent financial management” has the meaning of “financial management”, with “prudent” added to ensure that a local authority acts prudently, when making the determination under regulation 14 of the draft Regulations as to the period and amount of repayments. Guidance to be issued if the draft Regulations are approved will set out what the Scottish Ministers consider to be prudent repayment. A draft of the proposed guidance formed part of the consultation that preceded the laying of the draft Regulations.

More generally, local authorities are familiar with the concept of “prudence” as they are already required to have regard to ‘The Prudential Code for Capital Finance in Local Authorities’ published by the Chartered Institute of Public Finance and Accountancy. The main audience will be aware of this Code from its (separate) use in relation to local authority capital expenditure limits, as provided for by regulation 2(2) of the Local Government Capital Expenditure Limits (Scotland) Regulations 2004 (S.S.I. 2004/29), by regulation 3 of the Local Government Investments (Scotland) Regulations 2010 (S.S.I. 2010/122) and, less overtly, by regulation 4 of the draft Regulations. The Code is mentioned in paragraph 4 of the Explanatory Note to the draft Regulations.

3. Regulation 15(1) of the draft Regulations amends section 37(1) of the 1975 Act (the exception for paragraph 6, borrowing by issue of bills), because that provision will be otiose, as a result of the approach of the draft Regulations. The Scottish Ministers will no longer be prescribing specific type of borrowing, with associated
controls. Instead, what happens will be controlled through recognised codes of practice and guidance. Therefore the amendment, and the commencement of the repeal of the specific paragraph by the separate commencement order, are both consequential on provision that will be made by the draft Regulations. The power used is that at section 165(4) of the 1994 Act.

4. As with the answer to question 3, the Scottish Ministers were removing definitions that will become unnecessary due to the approach taken by the draft Regulations. The power envisaged was section 165(2) of the 1994 Act, as although the definitions also become otiose because of the revocations that are being commenced from the 1994 Act, those revocations are themselves consequential on the making of the draft Regulations (as explained in the answer to question 3).

However, in looking at this the Scottish Ministers are concerned that the specific power to amend legislation in section 165(4) might be viewed as limiting the generality of the power at section 165(2). As there is no necessity to remove the definitions, the Scottish Ministers think the safer course is to remove this provision from the draft Regulations and are withdrawing and re-laying them without it.

5. In relation to the Tay Road Bridge, what is being revoked is a reference to Schedule 3 of the 1975 Act that will cease to be relevant if the draft Regulations are made. The relevant councils would make the advances it relates to, once the draft Regulations are in force, under their regulation 10(b). This amendment therefore follows on the draft Regulations and is made under the power at section 165(4) of the 1994 Act.

6. The two instruments being revoked, along with two instruments that amend those instruments, make detailed provision about local authority mortgages, stocks and bonds. The draft Regulations leave the manner of such borrowing at the discretion of local authorities and the other bodies the draft Regulations apply to, subject to the controls set out in the draft Regulations. The controls in the instruments being revoked are therefore no longer appropriate. As the revocation is a consequence of the draft Regulations, the power at section 165(2) had originally been envisaged as the one being used. However, the issue referred to in answer 4 above concerning the terms of section 165(4) arises here too.

The revocation can be empowered by paragraph 5 of Schedule 3 to the 1975 Act. The Commencement No. 9 Order does not commence the repeal of that paragraph by the 1994 Act. This is because section 165 of the 1994 Act does not give a power fully to make equivalent provision. Retention of paragraph 5 will allow Scottish Ministers to use the powers it gives to regulate mortgages, stocks and bonds should that prove appropriate.

As the Scottish Ministers have decided to withdraw and re-lay the draft Regulations, as set out in the answer to question 4, the re-laid version will include reference to the power under the 1975 Act in the preamble. That power is subject to the negative procedure in the Scottish Parliament, but as the Committee will be aware, section 33 of the Interpretation and Legislative Reform Act allows
regulations to which that procedure applies to be combined with the remainder of the draft Regulations (with the affirmative procedure applying to the whole instrument).
Annexe B

Scotland’s Adoption Register Regulations 2016 [draft]

On 21 January 2016, the Scottish Government was asked:

Regulation 5 applies where, in accordance with paragraph (1) of the regulation, “an adoption agency” mentioned in paragraph (a) of the definition of “adoption agency” in section 119(1) of the Adoption and Children (Scotland) Act 2007 (that is, a local authority or a registered adoption service) decides under the Adoption Agencies (Scotland) Regulations 2009 that a person is suitable to be an adoptive parent, and “the agency” has obtained the written consent of the person to information being provided for inclusion in the Adoption Register.

Regulation 5(6) (“paragraph 6”) makes further provision for the circumstance where, after information is provided under the remainder of the regulation, it is decided that the person is no longer suitable to be an adoptive parent. “An adoption agency” must as soon as reasonably practicable notify the Scottish Ministers of that, and inform the Ministers of the reason for this decision.

(1) Please clarify whether the intention is that the requirement in paragraph (6) will be implemented only by the agency which has decided that the person is suitable to be an adoptive parent, and has obtained the written consent of the person in accordance with regulation 5(1); or whether any adoption agency mentioned in paragraph (a) of the definition of “adoption agency” in section 119(1) of the Adoption and Children (Scotland) Act 2007 could implement this requirement?

(2) Could the meaning of the provision be clearer, given that “an adoption agency” as referred to in regulation 5(1) means any agency as mentioned in section 119(1)(a) of the 2007 Act, whereas the remainder of the regulation refers in various places to “the agency”; and paragraph 6 does not otherwise make reference back to the agency which decides the suitability of the person in accordance with regulation 5(1)?

The Scottish Government responded as follows:

In response to question 1, it is not intended that the requirement in paragraph (6) will be implemented only by the agency which has decided that the person is suitable to be an adoptive parent and has obtained the written consent of the person in accordance with regulation 5(1). After information is provided to the Register under regulation 5(2), it is possible that the adoption agency which provided that information will decide that the person is no longer suitable to be an adoptive parent. In these circumstances, regulation 5(6) would apply and that adoption agency would require to implement the requirement in that paragraph. However, it is possible that a prospective adopter may, after information was provided to the Register under regulation 5(2), move to another adoption agency. This could happen, for example, where a prospective adopter moves
home. In these circumstances, the new adoption agency will usually wish to assess the person’s suitability for adoption again which could result in a decision that the person is no longer suitable to be an adoptive parent. Where such a decision is taken, regulation 5(6) would apply and the new adoption agency would be the agency which is required to implement the requirement at that paragraph.

In response to question 2, we consider that the meaning of the provision is clear. This is because it encompasses both of these possible situations and it will be the adoption agency which decides that the person is no longer suitable to be an adoptive parent and is in possession of the facts set out in sub-paragraphs (a) and (b) of regulation 5(6) which will implement the requirement at regulation 5(6).
Annexe C

Procurement (Scotland) Regulations 2016 [draft]

On 22 January 2016, the Scottish Government was asked:

1. The Regulations refer in various places to a “public contract”.

   (a) Is it considered that, in the absence of that term being defined in regulation 2, section 24 of the Interpretation and Legislative Reform (Scotland) Act 2010 (“ILRA”) has effect to imply the definition contained in section 42(1) of the Procurement Reform (Scotland) Act 2014 (the same meaning as in the Directive 2004/18/EC), which appears to be:

   “contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive”?

   (b) Regulation 2 of the Public Contracts (Scotland) Regulations 2015 contains an express definition of “public contract”, which excludes the words in italics above. Regulation 2 of these Regulations defines “the Directive” as the Directive 2014/24/EU on public procurement, which has replaced Directive 2004/18/EC.

   Assuming that it is agreed that section 24 of ILRA implies the definition quoted above, please explain why this definition has been considered appropriate for these Regulations; or alternatively whether there is an error or it was intended to include an express definition?

   If there is an error, would corrective action be proposed?

2. Some provisions of the Regulations are made under powers which apply to “regulated procurements” or “regulated contracts” in terms of the Procurement Reform (Scotland) Act 2014 (“the Act”). Others apply to regulated procurements and EU-regulated procurements. Others apply to “regulated procurements” but not EU-regulated procurements.

   This application may be broadly outlined as follows:

   Regulated procurements- section 7 of the Act and regulation 4; Section 14 of the Act and regulation 6.

   Regulated and EU-regulated procurements- section 23 of the Act and regulation 7.

   Regulated procurement other than EU-regulated- sections 27, 28 and 30 of the Act and regulations 8, 9, 10, 11 and 12.
It appears though that “regulated contract” is not used at all in the provisions (while used in the contents list, the headings to Part 2 and regulation 3, and in the explanatory note). “Regulated procurement” appears only to be used in regulation 11(1) (and the explanatory note).

Could the provisions therefore be made clearer, to specify when provisions relate to regulated procurements or regulated contracts; regulated and EU-regulated procurements; or regulated procurements other than EU-regulated, as the case may be?

Otherwise please explain why the provisions are considered to be sufficiently clear.

3. Regulation 9(14) refers to a definition of “concession contract” which has the meaning given in the Concession Contracts (Scotland) Regulations 2016. That instrument appears not yet to have been laid before Parliament.

(a) Can you confirm when this instrument is planned to be made and laid?

(b) Can you confirm what this definition is, or is it yet to be determined?

(c) Why could the definition not have been specified in regulation 9(14)?

**The Scottish Government responded as follows:**

1. (a) Yes, the Interpretation and Legislative Reform (Scotland) Act 2010 implies the definition in the Procurement Reform (Scotland) Act 2014 (‘the Act’) of ‘public contract’ into the Regulations.

(b) We are making regulations under the Act in relation to ‘public contracts’ which are defined in the Act and so we can’t deviate from that meaning.

The Act has been amended by the Public Contracts (Scotland) Regulations 2015 to the effect that reference to Directive 2004/18/EC has been replaced with reference to Directive 2014/24/EU.

We do not consider there to be an error which needs corrective action.

2. The Regulations need to be read in conjunction with the Act as the application to the different contracts is governed by the Act itself.

The Regulations will be accompanied by guidance which will make it clear how the regime operates in practice.

We have made reference in the explanatory notes to assist readers in distinguishing between the application of provisions to ‘regulated procurements’ and ‘EU-regulated procurements’.
3. (a) The Concessions Contracts (Scotland) Regulations 2016 (‘the Concessions Regulations’) are scheduled to be made on Thursday 28th January and so therefore they should be laid early next week.

(b) and (c) The Procurement (Scotland) Regulations 2016 are part of a package of legislation and we consider it more appropriate to cross refer to the Concessions Regulations for the definition of ‘concession contract’.