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Convener of the Finance Committee

18 October 2022

## Appointment of an independent Chair of the Capital Accounting Review

Thank you for your letter of 5 October 2022.

The costs associated with the payment of an independent Chair of the Capital Accounting Review are likely covered by section 65 of the Scotland Act 1998, which provides that a sum may be paid out of the Scottish Consolidated Fund if, among other things, it is paid out for or in connection with any of the purposes mentioned in subsection (2) in accordance with rules made by or under an Act of the Scottish Parliament. The purposes mentioned in subsection (2) include meeting expenditure of the Scottish Administration, and the payment of the Chair of a review is considered to fall within that general purpose. The applicable rules made by or under an Act of the Scottish Parliament are the relevant Budget Act, and the Budget (Scotland) Act 2022 provides Parliamentary authority for expenditure of this nature in entry 2 in the table in Schedule 1: “*Through their Social Justice, Housing and Local Government portfolio, for use by the Scottish Ministers on: operational and administrative costs...*”.

If and to the extent that s.65 of the Scotland Act 1998 does not provide the necessary powers for the appointment or payment of the Chair, common law powers would fill that gap. It is a recognised principle of constitutional law that the powers of Ministers are not confined to those conferred by statute, but extend, subject to any relevant statutory or public law constraints and to the competing rights of other parties, to anything which could be done by a natural person (*R. v Secretary of State for Health Ex p. C* [2000] 2 WLUK 779; *R. (on the application of Shrewsbury and Atcham BC) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 148). The same principle applies to the actings of the Scottish Ministers, as section 53(2) of the Scotland Act 1998 transferred to the Scottish Ministers non-statutory, as well as statutory, powers.

For relatively routine matters comprising the ordinary business of government, such as entering into contracts, or issuing public guidance, statutory authority is not generally required, and nor would it be practicable for it to be. For the expenditure of money, as in the present case, Parliamentary authority is required. However, that need not take the form of an express statutory power in an Act of the Scottish Parliament. It will be sufficient if the appropriate Parliament has approved the use of resources for the particular purpose; in the annual Budget Act as set out above.

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Scottish government accounting rules, set out in the Scottish Public Finance Manual (SPFM), impose certain constraints on the use of common law powers but allow expenditure without express statutory authority in certain circumstances. The SPFM (<https://www.gov.scot/publications/scottish-public-finance-manual/expenditure-without-statutory-authority/expenditure-without-statutory-authority/>) provides that Ministers' common law powers can be used in conjunction with the spending authority in a Budget Act where:

- the expenditure is below £1 million a year; or
- the expenditure is of a "one-off" nature; or
- the use of common law powers is temporary pending the seeking of statutory powers.

In this instance, the anticipated value of the expenditure is £46,000 over the financial years 2022-23 and 2023-24. Notwithstanding that it will be spread across two financial years, it can reasonably be considered to be of a "one-off" nature, given that it relates to a particular review - the Capital Accounting Review – and is not expected to recur thereafter. For the same reason, and in light of the low value of the expenditure and other reasons given above, I do not consider it necessary or proportionate to seek detailed statutory powers for the Review.

The SPFM provides that the Parliament should be informed in all cases where the sole statutory authority for the activity giving rise to the expenditure is the Budget Act. That was in part the purpose of my letter of 1 August 2022.

Since my letter of 1 August 2022, and following pay negotiations with Local Government, the Deputy First Minister confirmed his agreement to permit the deferral of the Capital Accounting Review to September 2023 in a letter to COSLA on 5 October 2022. The value of the expenditure is therefore anticipated to be £5,000 in 2022-23 and £41,000 in 2023-24. The business case for the Capital Accounting Review was approved by both the Director of Budget and Public Spending and the Director for Local Government and Housing, following extant procedures.

I hope this information is of assistance to the Committee.

Yours sincerely,

**TOM ARTHUR**

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