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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 15 January 2019



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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.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meeting on 15 January 2019, the Committee agreed to draw to the attention of the Parliament the following instrument-

Housing (Scotland) Act 2006 (Modification of the Repairing Standard)
Regulations 2019 [draft]

2. The Committee's recommendation and conclusions in relation to this instrument are set out in the following section of this report.
3. The Committee 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.

Points raised: Instruments subject to affirmative procedure

[Housing \(Scotland\) Act 2006 \(Modification of the Repairing Standard\) Regulations 2019 \[draft\] \(Local Government and Communities\)](#)

Purpose

4. The general purpose of the Regulations is to make amendments to the “repairing standard”, which is defined by sections 12 and 13 of the Housing (Scotland) Act 2006. The repairing standard is the statutory minimum standard for houses that are let under private tenancies, to improve the condition of those houses.

Comments

5. Regulation 3(2) modifies the list of criteria for a house to meet the “repairing standard”, which is currently contained in section 13(1)(a) to (g) of the Housing (Scotland) Act 2006. Section 13(1)(f) currently includes the word “and” at the end of that paragraph, so that the list of criteria is clearly cumulative. Regulation 3(2)(d) does not include an “and” after the new penultimate paragraph inserted by the regulation. The Committee considers that such an inclusion could make it clearer that the required criteria are cumulative, rather than alternative.
6. The Committee raised this issue with the Scottish Government and that correspondence is reproduced in the Annex to this report. While the issue concerns a word omitted from the instrument, the changes made by regulation 3(2) are central to the Regulations, and the provision amends primary legislation.
7. The Scottish Government has acknowledged in the correspondence that, to ensure a consistent approach to section 13(1), it may have been preferable to include an “and” after the new penultimate paragraph of the subsection, inserted by the Regulations. The Scottish Government proposes to correct the drafting by using a correction slip.
8. The Committee considers however that it is more appropriate in these circumstances for the draft instrument to be withdrawn and re-laid before the Parliament. It appears that the instrument could be re-laid timeously, given that the first provisions in it to come into force do so on 1 March 2019, and regulation 3(2)(d) in question comes into force on 1 March 2024.

Recommendations

9. **The Committee draws the Regulations to the attention of the Parliament on reporting ground (h), as the meaning of regulation 3(2)(d) could be clearer as outlined in paragraph 5 above.**
10. **The Committee recommends that the Scottish Government should withdraw and re-lay the draft instrument, to correct regulation 3(2)(d).**

No points raised

Environment, Climate Change, and Land Reform

Spring Traps Approval (Scotland) Amendment Order 2018 (SSI 2018/389)

Health and Sport

Cremation (Scotland) Regulations 2019 [draft]

Burial and Cremation (Pregnancy Loss Prescribed Information and Forms) (Scotland) Regulations 2018 (SSI 2018/384)

Burial and Cremation (Scotland) Act 2016 (Commencement No. 3, Transitional, Saving and Transitory Provisions) Regulations 2018 (SSI 2018/380 (C.24))

Justice

First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Amendment Regulations 2018 (SSI 2018/378)

Domestic Abuse (Scotland) Act 2018 (Commencement and Transitional Provision) Regulations 2018 (SSI 2018/387 (C.25))

Local Government and Communities

Housing (Scotland) Act 2006 (Supplemental Provision) Order 2019 [draft]

Social Security

Social Security (Scotland) Act 2018 (Commencement No. 4 and Saving Provision) Regulations 2018 (SSI 2018/393 (C.26))

Annex

CORRESPONDENCE WITH THE SCOTTISH GOVERNMENT

Housing (Scotland) Act 2006 (Modification of the Repairing Standard) Regulations 2019 [draft]

On 17 December 2018, the Scottish Government was asked:

Section 22(b) of the Housing (Scotland) Act 2014 inserted paragraph (g) of subsection (1) of section 13 of the Housing (Scotland) Act 2006, including “, and” at the end of paragraph (f), which specifies that the list of requirements for a house to meet the repairing standard in paragraphs (a) to (g) is a cumulative list.

Regulation 3(2)(c), (b) and (d) of this instrument (listed in that order because the paragraphs would come into force in that order) will insert paragraph (h), omit paragraphs (f) and (g), and insert paragraphs (i) to (k). However those provisions do not re-insert “, and”, or move its position within the list of paragraphs.

1. Is this an omission? Otherwise please explain why the drafting of regulation 3(2)(b) to (d) is considered to be suitable to implement the proposed staged commencement of the requirements?
2. Is any corrective action proposed?

The Scottish Government responded as follows:

The Scottish Government notes that the original drafting of section 13(1) included a list of criteria with an “and” at the end of the penultimate paragraph and that when that list was amended by the Housing (Scotland) Act 2014 the “and” was moved to the new penultimate paragraph. Although, we agree that including the “and” at the end of the penultimate paragraph would have been consistent, we think that it is clear from the context of section 13(1) that the list of criteria is cumulative in nature. The “and” which currently appears in the list between paragraphs (f) and (g) will no longer appear once those paragraphs are repealed.

We note that primary legislation sometimes uses conjunctions in lists but often there are lists which contain no conjunction which are clearly cumulative. One recent example can be found in section 9(3) of the Child Poverty (Scotland) Act 2017 which sets out the criteria which must be addressed in a delivery plan. Another recent example is in section 1 of the Social Security (Scotland) Act 2018. However, the Scottish Government accepts that to ensure a consistent approach to section 13(1), it may have been preferable to include an “and” after the new penultimate paragraph inserted by the Regulations. Therefore, we propose to use a correction slip to insert an “and” after paragraph (j) in regulation 3(2)(d). The SI Registrar has confirmed that he is content to issue such a correction slip and has also confirmed that the “and” after paragraph (f) will be omitted when that paragraph is repealed.

