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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Fair Rents (Scotland) Bill: Stage 1



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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 meetings on 9 and 23 February 2021, the Delegated Powers and Law Reform Committee considered the delegated powers contained in the Fair Rents (Scotland) Bill (“the Bill”) at Stage 1.
2. The Committee submits this report to the lead Committee for the Bill under Rule 9.6.2 of Standing Orders.

Overview of the Bill

3. This Member's Bill was introduced by Pauline McNeill MSP on 1 June 2020. The lead committee is the Local Government and Communities Committee.
4. The purpose of the Bill as stated at paragraph 10 of the Policy Memorandum is to "improve the way rents are set in Scotland in the PRS [private rented sector], to bring fairness into the private rented sector, to reduce poverty and support low income tenants and their families. It will regulate rents to protect tenants in Scotland and help create a better balance of power between the landlord and tenant in Scotland."ⁱ
5. The Bill amends the Private Housing (Tenancies) (Scotland) Act 2016 (the "2016 Act"). This introduced a new form of tenancy called the "private residential tenancy", which replaced the assured and short assured tenancy agreements for all new tenancies with effect from 1 December 2017. The amendments made by the Bill to the 2016 Act cap annual rent increases under a private residential tenancy at the Consumer Prices Index ("CPI") plus 1% (subject to provision made in regulations). The amendments also allow the tenant to apply annually to a rent officer for a reduction in rent to a fair open market rent.
6. The Bill also amends the Antisocial Behaviour etc. (Scotland) Act 2004 ("the 2004 Act") to require certain information to be made available when the landlord registers or renews their registration on the Scottish Landlord Register. That information is the monthly rent charged, the number of occupiers, and the number of bedrooms and living apartments for each property.
7. In addition, the Bill requires a statement on its impact to be published within three years of Royal Assent. The main provisions of the Bill must be brought into force by 31 May 2021.

ⁱ The Bill as introduced is available [here](#).

Delegated Powers

8. The Bill confers three powers to make subordinate legislation on Scottish Ministers. The Member has prepared a Delegated Powers Memorandum (“DPM”) which sets out the reasoning for taking the delegated powers in the Bill and the parliamentary scrutiny procedure that has been chosen.ⁱⁱ
9. When the Committee considered the Bill on 9 February 2021, it agreed to write to the Member with questions in relation to the regulation-making powers in sections 1 and 6.
10. The Committee considered the Member’s response at its meeting on 23 February 2021.
11. A copy of all correspondence is included in the **Annex**.
12. The issues considered by the Committee in relation to these powers, together with its recommendations, are set out below.

Section 1(2), inserting section 22(10) into the 2016 Act – power to make further provision about the fair rent CPI cap

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

13. Section 1(2) of the Bill inserts subsections (7) to (10) into section 22 of the 2016 Act. The effect is to provide that a rent increase notice issued by the landlord in respect of a private residential tenancy under section 22 of the 2016 Act cannot increase the rent by more than one percentage point above inflation as measured by the CPI (Consumer Prices Index) for the previous 12 months (defined as “the fair rent CPI cap”). A rent increase notice that fails to comply with the fair rent CPI cap is of no effect and is not binding on the tenant.
14. A regulation-making power is granted to the Scottish Ministers in new section 22(10) of the 2016 Act to allow them to make further provision about the fair rent CPI cap. This includes setting a different figure for the 1% currently specified, modifying or removing the application of the fair rent CPI cap, and making different provision for different circumstances.
15. Section 1(3) of the Bill amends section 77(3) of the 2016 Act to apply the affirmative procedure to regulations under section 22(10).

Committee consideration

16. In its questions to the Member, the Committee noted that there are differences between the powers in the Bill and those on Rent Pressure Zones in Chapter 3 of

ⁱⁱ The Delegated Powers Memorandum is available [here](#).

Part 4 of the 2016 Act. These differences appear to stem from the fact that the existing provisions in the 2016 Act take a localised approach, whereas the Bill takes a wider approach. Nevertheless, the Committee asked the Member whether:

- there should be a requirement to consult interested landlord and tenant groups before the regulations are laid, as there is in section 40(2) of the 2016 Act;
 - there should be a requirement to lay a document with the draft regulations summarising the consultation responses, as there is in section 40(3) of the 2016 Act; and
 - the power should include specific provision to permit the regulations to replace references in the Bill as enacted to the consumer prices index with references to another prices index, as there is in section 41 of the 2016 Act?
17. In her response, the Member accepted that it would be good and consistent legislative practice to require the Scottish Ministers to consult interested landlord and tenant groups before regulations were laid under section 1(2) of the Bill in line with section 40(2) and (3) of the 2016 Act. She also considered that this would be a proportionate requirement in light of the scope of the power in section 1(2).
18. The Member therefore proposed to bring forward the appropriate amendments at Stage 2 of the Bill.
19. In her response, the Member also stated that it did not appear to be necessary to include a provision in the Bill similar to section 41 of the 2016 Act. This is on the basis that section 1(2) of the Bill enables Ministers to add or subtract a percentage figure to the CPI, which in effect gives considerable flexibility other than relying upon a particular index as a fixed percentage.

20. The Committee welcomes the Member's commitment to bring forward an amendment at Stage 2 to insert a requirement to consult interested landlord and tenant groups, and to lay a document with the draft regulations summarising the consultation responses, in line with section 40(2) and (3) of the 2016 Act.

Section 2(2), inserting section 22A into the 2016 Act – power to prescribe the form of application to a rent officer for a tenant to apply for a fair rent to be determined

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid but not subject to parliamentary procedure

Provision

21. Section 2 (“Tenant’s right to apply for a fair rent to be determined”) of the Bill inserts new sections 22A (“Tenant’s right to apply for a fair open market rent to be determined”) and 22B (“Determination of a fair open market rent”) into the 2016 Act.
22. Section 22A provides a right for a tenant under a private residential tenancy to apply to a rent officer for a fair rent to be determined under section 22B. No more

than one application can be made within any 12-month period.

23. The delegated power is contained in new section 22A(5) and (6). An application to a rent officer is to be in the form, and intimated by the tenant to the landlord in the manner, prescribed by regulations made by Scottish Ministers.
24. Regulations under the power are currently to be laid but not subject to any parliamentary procedure in terms of section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

Committee consideration

25. The Committee noted that paragraph 11 of the DPM states that, if the Bill was successful at Stage 1, the Member would bring forward a minor technical amendment to insert a reference to new section 22A into section 77(3) of the 2016 Act. This would have the effect of applying the negative procedure to such regulations. Applying the negative procedure would be consistent with other similar powers in the 2016 Act.

26. **The Committee is content with the power in section 2(2), inserting section 22A(5) and (6) into the 2016 Act, in principle.**
27. **The Committee welcomes the Member's commitment made at paragraph 11 of the DPM to bring forward an amendment at Stage 2 to apply the negative procedure to this power.**

Section 6(2) – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid but not subject to parliamentary procedure

Provision

28. Section 6 of the Bill provides that Part 5, containing sections 5 (interpretation), 6 (commencement) and 7 (short title) come into force on the day after Royal Assent.
29. The delegated power is contained in section 6(2), which provides that the other provisions of the Bill as enacted come into force on such day as the Scottish Ministers may by regulations appoint, but no later than 31 May 2021.
30. Regulations under the power are to be laid but not subject to any parliamentary procedure in terms of section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.

Committee consideration

31. The Committee noted that paragraph 14 of the DPM states that the requirement to commence the other provisions of the Bill as enacted by 31 May 2021 would enable tenants who are adversely affected by the economic impact of the current pandemic to benefit from the provisions of the Bill as soon as possible, why still retaining

some flexibility.

32. The Committee asked the Member whether this deadline would allow sufficient time for the Bill to complete its passage through Parliament, to pass the four-week period before which a Bill can be submitted for Royal Assent, obtain Royal Assent, and come into force in the context of the upcoming election. In the event that it would not, the Committee asked whether the Member would propose to seek to amend the Bill at Stage 2 to extend the commencement deadline.
33. In her response, the Member accepted that the commencement date of 31 May 2021 must be amended to provide sufficient time for the Bill, if passed, to be submitted for Royal Assent. She confirmed she be happy to bring forward an appropriate amendment to do so if the Bill proceeds to Stage 2.

34. **The Committee welcomes the commitment from the Member to bring forward an amendment at Stage 2 to change the commencement deadline currently set as 31 May 2021 in section 6(2) of the Bill.**

Annex

Correspondence from the Delegated Powers and Law Reform Committee to Pauline McNeill MSP

The Delegated Powers and Law Reform Committee considered the above Bill at its meeting today and seeks further information on the following proposed delegated powers:

Section 1(2), inserting section 22(10) into the 2016 Act – power to make further provision about the fair rent CPI cap

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Section 1(2) of the Bill inserts subsections (7) to (10) into section 22 of the Private Housing (Tenancies) (Scotland) Act 2016. The effect is to provide that a rent increase notice issued by the landlord in respect of a private residential tenancy under section 22 of the 2016 Act cannot increase the rent by more than one percentage point above inflation as measured by the CPI for the previous 12 months (defined as “the fair rent CPI cap”). A rent increase notice that fails to comply with the fair rent CPI cap is of no effect and is not binding on the tenant.

A regulation-making power is granted to the Scottish Ministers in new section 22(10) to allow them to make further provision about the fair rent CPI cap, including setting a different figure for the 1% currently specified, modifying or removing the application of the fair rent CPI cap, and making different provision for different circumstances.

In considering this power, the Committee notes that there are differences between the powers in the Bill and those on Rent Pressure Zones in Chapter 3 of Part 4 of the Private Housing (Tenancies) (Scotland) Act 2016. These differences appear to stem from the fact that the existing provisions in the 2016 Act take a localised approach, whereas the Bill takes a wider approach. Nevertheless, the Committee would be grateful if further information could be provided on whether: a) there should be a requirement to consult interested landlord and tenant groups before the regulations are laid, as there is in section 40(2) of the 2016 Act; b) there should be a requirement to lay a document with the draft regulations summarising the consultation responses, as there is in section 40(3) of the 2016 Act; and c) the power should include specific provision to permit the regulations to replace references in the Bill as enacted to the consumer prices index with references to another prices index, as there is in section 41 of the 2016 Act?

Section 6(2) – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: laid but not subject to parliamentary procedure

Section 6 of the Bill provides that Part 3, containing sections 5 (interpretation), 6 (commencement) and 7 (short title) come into force on the day after Royal Assent.

Section 6(2) provides that the other provisions of the Bill as enacted come into force on such day as the Scottish Ministers may by regulations appoint, but no later than 31 May 2021.

Paragraph 14 of the DPM states that the requirement to commence the other provisions of the Bill as enacted by 31 May 2021 would enable tenants who are adversely affected by the economic impact of the current pandemic to benefit from the provisions of the Bill as soon as possible, why still retaining some flexibility.

Could you please confirm whether it is considered that this deadline would allow sufficient time for the Bill to complete its passage through Parliament, to pass the four-week period before which a Bill can be submitted for Royal Assent, obtain Royal Assent and come into force in the context of the upcoming election? If not, would you propose to seek to amend the Bill at Stage 2 to extend the commencement deadline? Timescale for response I'd be grateful if you could please send your response to the Delegated Powers and Law Reform Committee e-mail address above by 5pm on Friday 12 February 2021. I appreciate that this is a very short timeframe but it will enable the Committee to consider your response and publish its report ahead of your evidence session with the Local Government and Communities Committee.

Response from Pauline McNeill MSP to the Delegated Powers and Law Reform Committee

I write in response to your letter following the Delegated Powers and Law Reform Committee's meeting on 9 February 2021.

In relation to the Committee's comments on section 1(2) of the Bill, I accept that it would be good and consistent legislative practice to require the Scottish Ministers to consult interested landlord and tenant groups before regulations were laid under section 1(2) of the Bill in line with section 40(2) and (3) of the 2016 Act.

Given that the Scottish Ministers would be empowered to modify or remove the application of the fair rent CPI cap under section 1(2) of the Bill and make different provision for different circumstances this would be a proportionate requirement. I would propose to bring forward the appropriate amendments to implement same if the Bill proceeded to Stage 2.

With respect, it does not appear necessary to include a provision in the Bill similar to section 41 of the 2016 Act as section 1(2) of the Bill enables Ministers to add or subtract a percentage figure to the CPI which in effect gives considerable flexibility other than relying upon a particular index as a fixed percentage.

In relation to section 6(2) of the Bill, I accept that the commencement date of 31 May 2021 must be amended to provide sufficient time for the Bill, if passed, to be submitted for Royal Assent. I would be happy to bring forward an appropriate amendment to do so if the Bill proceeds to Stage 2.

