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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 6 September 2022

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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 6 September, the Committee considered the following instruments under its remit and agreed to draw them to the attention of the relevant lead committee:
 - Act of Sederunt (Rules of the Court of Session 1994 Amendment (Court Sittings) 2022 (SSI 2022/250)
 - Coronavirus (Scotland) Acts (Saving Provision) Regulations 2022 (SSI 2022/261)
2. The Committee's recommendations in relation to both instruments are set out in the next section of this report.
3. The Committee also determined that in terms of its remit, it did not need to draw the Parliament's attention to the instruments at the end of the report. Some broader points highlighted by the Committee are noted below the relevant instrument.

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

Act of Sederunt (Rules of the Court of Session 1994 Amendment (Court Sittings) 2022 (SSI 2022/250))

4. The Act of Sederunt, which is made under section 103 of the Courts Reform (Scotland) Act 2014, amends the Rules of the Court of Session 1994 to set out the public holidays, vacation periods and vacation sitting days of the Court of Session from the beginning of 2024 up to the end of the 2026 winter vacation. Schedule 3 of the instrument provides an updated definition of vacation sitting days of the Court of Session across this period.
5. In correspondence with the Committee, which can be read in the **Annex**, the Lord President's Private Office confirmed there was an error in the selection of two of the vacation sitting days. It noted that the days selected should have inserted Monday instead of Wednesday in both instances. The Lord President's Private Office apologised for the oversight and confirmed that it intends to take corrective action at the next available opportunity.

6. **The Committee draws the instrument to the attention of the Parliament under the general reporting ground.**
7. **The Committee nevertheless welcomes the Lord President's Private Office's intention to take corrective action, by way of an amendment, at the next available opportunity.**

Coronavirus (Scotland) Acts (Saving Provision) Regulations 2022 (SSI 2022/261)

8. The instrument makes saving provisions in consequence of the expiry of Part 1 of the Coronavirus (Scotland) Act 2020 and Part 1 of the Coronavirus (Scotland) (No.2) Act 2020.
9. Under section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010, instruments subject to the negative procedure must be laid at least 28 days before they come into force, not counting recess periods of more than 4 days. This instrument was laid on 30 August 2022 and will come into force on 1 October 2022. As the Parliament was in recess until 4 September 2022, the 28 day calculation starts on 5 September 2022 and as such the calculated period is 27 days.
10. In its letter to the Presiding Officer, which can also be read in the **Annex**, the Scottish Government explained that it was unable to lay the instrument in late June to allow the full 28 laying days before coming into force. This was due to the fact that the final stages of the Coronavirus (Recovery and Reform) (Scotland) Act 2022 were also taking place at that time and may have necessitated further provision in the instrument.

11. **The Committee draws the instrument to the attention of the Parliament under reporting ground (j) for failure to comply with the laying requirements in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.**
12. **The Committee is nevertheless content with the explanations provided by the Scottish Government for failure to comply with the laying requirements.**

No points raised

Criminal Justice Committee

Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (Overseas Production Orders) 2022 (SSI 2022/231)

Economy and Fair Work Committee

Consumer Scotland (Transfer of Functions) Regulations 2022 (SSI 2022/ Draft)

Equalities, Human Rights and Civil Justice Committee

Civil Protection Measures, European Protection Order and Victims' Rights (EU Exit) (Scotland) (Amendment Etc.) Regulations 2022 (SSI 2022/249)

Finance and Public Administration Committee

Scottish Landfill Tax (Prescribed Landfill Site Activities) Amendment Order 2022 (SSI 2022/233)

The Committee noted that as the instrument was laid the day before the summer recess on 1 July and came into force immediately, it meant that there has been a period of time when the Order has been law but the Parliament has not been able to consider the changes.

While the Committee was content with the reasons provided by the Scottish Government in its correspondence, which can be read in full in the **Annex**, the Committee agree to highlight in its report that:

Firstly, as far as possible, the Scottish Government should avoid a situation such as this in the future; and

Secondly, where this is not possible, it would be helpful for the Scottish Government to provide a fuller explanation of the reasons for the timing of the instrument.

Health, Social Care and Sport Committee

General Pharmaceutical Council (Amendment) Rules Order of Council 2022 (SI 2022/697)

Local Government, Housing and Planning Committee

Scottish Social Housing Charter: November 2022 (SG/2022/149)

The Charter was previously laid in February 2022 and subsequently withdrawn following questions asked on behalf of the Committee about whether the statutory consultation requirements had been met.

In correspondence with the Scottish Government on the revised Charter, the Committee asked whether there had been direct communication with all eight statutory consultees listed in section 33(2) of the 2010 Act and whether any changes were made to the revised Charter in light of direct communication from the statutory

consultees.

The Scottish Government's response, which can be read in full in the **Annex** , lists the statutory consultees who responded to the consultation and the changes made to the Charter in light of the consultation responses received.

While the Committee was content with the revised Charter, given the lead committee's likely interest in this work, it draws this correspondence to the attention of the Local Government, Housing and Planning Committee.

Annex

Scottish Landfill Tax (Prescribed Landfill Site Activities) Amendment Order 2022 (SSI 2022/233)

On 8 July 2022, the Committee asked the Scottish Government:

The above instrument was made, laid and came into force on 1 July 2022. The accompanying policy note indicates that a consultation, which sought views on a draft of the instrument, was published in November 2021 and closed in December 2021.

The Parliament went in to recess on 2nd July 2022, the day after this instrument was made, laid and came into force. The instrument ceases to have effect on the expiry of the period of 28 days (not counting recess periods of more than 4 days) beginning with the date on which it is made unless, before the expiry of that period, it is approved by resolution of the Parliament. The instrument will therefore be in force for a number of months without Parliament having had the opportunity to consider the instrument.

Please explain why:

1. it was necessary to make and lay the instrument on 1st July 2022; and
2. this could not have been done earlier to facilitate parliamentary scrutiny of an instrument already in force so there is no delay in parliamentary consideration.

On 29 July 2022, the Scottish Government responded:

1. There had been considered to be a need to clarify the law relating to when a taxable disposal has occurred for the purposes of SLfT, to assist taxpayers. To that end, a consultation was published in November 2021 and closed in December 2021. Following the closure of the consultation at the end of December 2021, the Scottish Government took time to consider carefully the responses received and the case for amending the proposed statutory instrument, including through further discussion with stakeholders. Time was also required to consider the decision of 9 May 2022 of the Upper Tribunal for Scotland in the case of Barr Environmental Limited v Revenue Scotland, which related to the law in this area. It was considered important to clarify the law as soon as possible. The instrument was made and laid on 1 July as this was the first practicable day on which it was possible to do so.

2. As noted in paragraph 1, the instrument could not have been made and laid earlier than 1 July as it was not practicable to do so. It is regretted that it was not possible to lay the instrument until the day before recess, but in the event that it had not been possible to do so, the instrument would have been laid as soon as possible after that day. It is considered that the importance of clarifying the law for taxpayers and others was such that it would not have been appropriate to delay laying of the instrument until the end of recess.

Act of Sederunt (Rules of the Court of Session 1994 Amendment (Court Sittings) 2022 (SSI 2022/250)

On 25 August 2022, the Committee asked the Lord President's Private Office:

1. In the table in Schedule 3 of the instrument, the last two entries under the column

heading “2024” read “Wednesday 23rd December 2024” and “Wednesday 30th December 2024” (reproduced and highlighted below for ease of reference). Both of these dates appear to fall on a Monday rather than a Wednesday. Is there an error in the selection of the days (or dates)?

Schedule 3

Table		
2024	2025	2026
Wednesday 3rd January 2024	Wednesday 16th April 2025	Wednesday 1st April 2026
Wednesday 27th March 2024	Wednesday 23rd April 2025	Wednesday 8th April 2026
Wednesday 3rd April 2024	Tuesday 23rd December 2025	Wednesday 23rd December 2026
Wednesday 23rd December 2024	Tuesday 30th December 2025	Wednesday 30th December 2026
Wednesday 30th December 2024		

2. Please confirm whether any corrective action is proposed, and if so, what action and when.

On 30 August 2022, the Lord President’s Private Office responded:

1. There is an error in the days identified. 23 and 30 December 2024 are Mondays. The error appears to have arisen at the point at which the draft instrument was placed on the template. We apologise for this oversight. The table below reflects the correct days/dates:

Schedule 3

Table		
2024	2025	2026
Wednesday 3rd January 2024	Wednesday 16th April 2025	Wednesday 1st April 2026
Wednesday 27th March 2024	Wednesday 23rd April 2025	Wednesday 8th April 2026
Wednesday 3rd April 2024	Tuesday 23rd December 2025	Wednesday 23rd December 2026
Monday 23rd December 2024	Tuesday 30th December 2025	Wednesday 30th December 2026
Monday 30 th December 2024		

2. We shall take corrective action, by way of amendment, at the next available opportunity.

Coronavirus (Scotland) Acts 2020 (Saving Provision) Regulations 2022 (SSI 2022/261)

On 30 August 2022, the Scottish Government wrote to the Presiding Officer:

The Coronavirus (Scotland) Acts 2020 (Saving Provision) Regulations 2022 were made by the Scottish Ministers under section 12(9) of the Coronavirus (Scotland) Act 2020 and section 9(9) of the Coronavirus (Scotland) (No.2) Act 2020. They are being laid before the Scottish Parliament today, 30 August 2022. The Regulations come into force on 1 October 2022.

Section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010 sets out that a negative SSI must be laid before the Scottish Parliament at least 28 days before the instrument comes into force. On this occasion, this has not been complied with and to meet the requirements of section 31(3) that Act, this letter explains why.

The remaining provisions of the Coronavirus (Scotland) Act 2020 and the Coronavirus (Scotland) (No.2) Act 2020 (“two Scottish Coronavirus Acts”) are due to expire at the end

of 30 September 2022. However, there is a need for saving provision to be in place once certain of these provisions expire at the end of 30 September. This SSI makes provision for such saving provision to come into force on 1 October 2022 following the expiry of the two Scottish Coronavirus Acts at the end of 30 September.

An SSI coming into force on 1 October needed to be laid in late June to allow for the full 28 laying days before coming into force. This coincided with the final Bill stages of what is now the Coronavirus (Recovery and Reform) (Scotland) Act 2022. It was possible that issues may have arisen in the context of that Bill process that highlighted the need for other saving or transitional provision in addition to those that had already been identified.

This SSI is being laid before the end of the summer recess to allow as much time as possible for Parliamentary scrutiny before the SSI comes into force on 1 October. I trust this letter explains why this SSI has not been laid to allow the full 28 days before coming into force per Standing Orders. There has been engagement at official level with clerks to the Covid-19 Recovery and the Delegated Powers and Law Reform Committees about this SSI.

Scottish Social Housing Charter: November 2022 (SG/2022/146)

On 25 August 2022, the Committee asked the Scottish Government:

A revised Housing Charter was previously laid before the Parliament in February 2022 (SG/2022/32) ('the April 2022 Charter'). This was subsequently withdrawn following correspondence with the Committee's legal advisors on whether the mandatory consultation requirements in section 33 of the Housing (Scotland) Act 2010 had been complied with given the terms of paragraph 1.3 of the April 2022 Charter on consultation. Notably, while there are some minor differences between the two charters, paragraph 1.3 of the November 2022 Charter is in the same terms as the April 2022 Charter.

In the absence of any indication in the November 2022 Charter:

1. Please confirm whether there has now been direct communication with all eight statutory consultees listed in section 33(2) of the 2010 Act as it was indicated there would be in previous correspondence with the Committee.
2. Please confirm whether any changes were made in light of any direct communication there has been with the statutory consultees, and if so, what they are.

On 30 August 2022, the Scottish Government responded:

1. The Scottish Government made direct contact with all eight statutory consultees and provided a further 12 weeks for them to respond. Of the various bodies consulted, the bodies who responded to this new consultation are outlined in the table annexed below.
2. In light of the comments received from the statutory consultees, the Scottish Government made the following changes to the Charter before it was re-laid:
 - Equalities outcome – further provision added that landlords should consider the need to eliminate discrimination and advance equality of opportunity.
 - Quality of Housing outcome – the wording of this outcome was revised to provide additional clarity.

- Value for Money outcome – this was changed from a standard to an outcome and the outcome highlighted the legal requirement to consult on rents and service charges in the supporting narrative.

ANNEX A

Statutory Consultees	Organisation which responded
Regulator	Scottish Housing Regulator
Tenants of social landlords or their representatives	Regional Networks
	Tenants Information Service
	Tenant Participation Advisory Service
Homeless persons or bodies representing the interests of homeless persons	Shelter
Recipients of housing services provided by social landlords or their representatives	Gypsy /TravellersArticle 12
	Positive Action in Housing
Social landlords or their representatives	COSLA
	ALACHO
	SFHA
	GWSF
	CIH
Secured creditors of registered social landlords or their representatives	UK Finance
The Accounts Commission for Scotland	Audit Scotland / Accounts Commission
The Commission for Equality and Human Rights and such other bodies representing equal opportunities interests	Equality and Human Rights Commission
	Scottish Human Rights Commission

