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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 10 January 2023



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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 10 January, the Committee considered the following instruments under its remit and agreed to draw them to the attention of the relevant lead committee:
 - First-tier Tribunal for Scotland (Transfer of Functions of the Council Tax Reduction Review Panel) Regulations 2023 (SSI 2022/Draft);
 - First-tier Tribunal for Scotland Local Taxation Chamber (Rules of Procedure) Regulations 2022 (SSI 2022/364);
 - Upper Tribunal for Scotland (Local Taxation Rules of Procedure) Regulations 2022 (SSI 2022/365); and
 - Official Controls and Import Conditions (Transitional Periods) (Miscellaneous Amendment) (Scotland) Regulations 2022 (SSI 2022/371).
2. The Committee's recommendations in relation to these 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.

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

First-tier Tribunal for Scotland (Transfer of Functions of the Council Tax Reduction Review Panel) Regulations 2023 (SSI 2022/Draft)

4. The instrument is made under powers in the Tribunals (Scotland) Act 2014. It transfers the functions of the Council Tax Reduction Review Panel to the First-tier Tribunal for Scotland.
5. It also makes transitional provisions to manage the transfer of ongoing casework, by providing:
 - that cases which were in progress immediately before 1 April 2023 will transfer to, and must be completed by, the First-tier Tribunal;
 - that decisions or orders given in exiting cases remain in force and carry over with the case when it transfers to the First-tier Tribunal; and
 - that time limits which had started to run in existing cases carry over to the First-tier Tribunal.
6. The instrument also makes consequential amendments to secondary legislation, including to abolish the Council Tax Reduction Review Panel after its functions transfer.
7. In correspondence with the Scottish Government, the Committee highlighted an incorrect cross-reference identified in regulation 94(3) of the Council Tax Reduction (Scotland) Regulations 2021, as substituted by paragraph 2(5) of schedule 2 of the instrument.
8. In its response, the Scottish Government acknowledged the cross-reference error, confirming that that the reference to regulation 70A(2) should be to regulation 93(4)(c), and committed to rectify it in the instrument when made, as an error that could be corrected by correction slip.
9. A copy of the correspondence can be found in the **Annex**.

10. **The Committee draws the instrument to the attention of the Parliament on the general reporting ground in respect of a cross-referencing error.**

11. **The Committee notes the Scottish Government's commitment to rectifying the error in the instrument when made, as an error that could be corrected by correction slip.**

First-tier Tribunal for Scotland Local Taxation Chamber (Rules of Procedure)

Regulations 2022 (SSI 2022/364)

12. The instrument is made under powers in the Tribunals (Scotland) Act 2014. It lays down the rules of procedure which are to apply in the Local Taxation Chamber, which is a new chamber of the First-tier Tribunal for Scotland. This chamber will hear appeals under the Valuation Acts, council tax-related appeals and penalty notice appeals relating to non-domestic rates. These appeals are currently heard by the Valuation Appeals Committees and the Council Tax Reduction Review Panel.
13. In correspondence with the Scottish Government, the Committee highlighted a number of issues identified in the regulations.
14. Firstly, that the preamble cites an enabling power which would have required the instrument to be laid under the affirmative procedure. The instrument is laid under the negative procedure.
15. In its response, the Scottish Government advised that the power is included in the preamble in error, and is not in fact relied upon for making the instrument. The Scottish Government proposed to remove reference to this power by way of a correction slip.
16. The Committee also identified:
 - a number of cross-referencing errors in rules 20(4); 26(2)(i) and (j); 26(5); 27(1)(b) and 27(2)(a)(iii);
 - an error in regulation 26(2)(i); and
 - that the definition in rule 1 of “respondent” could be clearer as to the types of appeal to which it relates; and that rule 20 could be clearer as regards what expenses the Tribunal can award.
17. In its response, the Scottish Government accepted that these were errors and committed to addressing these points in an amending instrument before the regulations come into force.
18. Details of the points raised are set out in the correspondence which can be found in the **Annex**.

19. The Committee draws the instrument to the attention of the Parliament under:

A. the general reporting ground, in that:

- **the preamble cites an enabling power (section 41(1) of the Tribunal (Scotland) Act 2014) which is not in fact relied upon for making the instrument and which, if it had been relied upon, would have required the instrument to be laid under a different procedure;**
- **cross-referencing errors in rules 20(4); 26(2)(i) and (j); 26(5); 27(1)(b) and 27(2)(a)(iii); and**
- **an error in regulation 26(2)(i) which refers to notice “sent under**

regulations made under” regulation 14.

B. reporting ground (h) (meaning could be clearer), insofar as:

- the definition in rule 1 of “respondent” could be clearer as to the types of appeal to which it relates; and

- rule 20 could be clearer as regards:

(i) whether the Tribunal may make an order awarding expenses as taxed or whether it can only award a specified sum; and

(ii) what expenses the award may cover, given the different provision in this regard made in subparagraphs (3) and (5).

20. The Committee notes that the Scottish Government proposes to rectify the error in the preamble by way of correction slip.

21. The Committee welcomes that the Scottish Government undertakes to:

- review the point in the preamble for the future to make sure that a consistent approach is taken to these instruments;
- correct the cross-referencing errors and the error in regulation 26(2)(i) in an amending instrument before the regulations come into force; and
- clarify the meaning of the points in rules 1 and 20 in an amending instrument before the regulations come into force.

Upper Tribunal for Scotland (Local Taxation Rules of Procedure) Regulations 2022 (SSI 2022/365)

22. The instrument makes the Upper Tribunal for Scotland Local Taxation Rules of Procedure 2022 which regulate the practice and procedure to be followed in the Upper Tribunal for Scotland in relation to any appeal or complaint under the Valuation Acts referred to it by the First-tier Tribunal, or when hearing an appeal against a decision by the First-tier Tribunal not to make such a referral.

23. In correspondence with the Scottish Government, the Committee highlighted some minor drafting errors identified in schedules 1 and 3.

24. In its response, the Scottish Government committed to correcting these errors by way of an amending instrument before the regulations come into force on 1st April 2023.

25. A copy of the correspondence can be found in the **Annex**.

26. **The Committee draws the instrument to the attention of the Parliament under:**
- **reporting ground (h) on account that the meaning of rules 31 and 32 in schedule 1 could be clearer; and**
 - **the general reporting ground in respect of the referencing errors identified in schedule 3.**

27. **The Committee welcomes that the Scottish Government intends to bring forward an amending instrument before it comes into force on 1 April 2023.**

Official Controls and Import Conditions (Transitional Periods) (Miscellaneous Amendment) (Scotland) Regulations 2022 (SSI 2022/371)

28. The instrument amends the Official Controls (Extension of Transitional Periods) Regulations 2021 and Commission Decision 2000/572 to extend the transitional staging periods, which apply in relation to the import of animals and goods which originate from certain third countries and territories, from 31 December 2022 to 31 January 2024.
29. 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. The instrument breaches this requirement as it was laid on 14 December 2022 and came into force on 1 January 2023.
30. The Scottish Government wrote to the Presiding Officer stating that the breach had occurred due to UK Government delays in agreeing policy, which resulted in the Scottish Government pursuing separate Scottish legislation.
31. A copy of the correspondence can be found in the **Annex**.

32. **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.**

33. **The Committee notes the Scottish Government's reasons for the breach, and draws these to the attention of the lead committee.**

No points raised

Education, Children and Young People Committee

St Mary's Music School (Aided Places) (Scotland) Amendment (No. 2) Regulations 2022 (SSI 2022/377)

Finance and Public Administration Committee

Land and Buildings Transaction Tax (additional amount: transactions relating to second homes etc.) (Scotland) Amendment Order 2022 (SSI 2022/375)

Net Zero, Energy and Transport Committee

Heat Networks (Scotland) Act 2021 (Commencement) (No. 1) Regulations 2022 (SSI 2022/376) (C.20)

Rural Affairs, Islands and Natural Environment Committee

Red Rocks and Longay Marine Conservation Order 2022 (SSI 2022/372)

Food and Feed (Miscellaneous Amendments) (Scotland) Regulations 2022 (SSI 2022/373)

Annex

First-tier Tribunal for Scotland (Transfer of Functions of the Council Tax Reduction Review Panel) Regulations 2023 (SSI 2022/Draft)

On 15 December 2022, the Committee asked the Scottish Government:

Paragraph 2(5) of schedule 2 of the instrument substitutes regulation 94 of the 2021 Regulations. In regulation 94(3), as substituted, is the reference to regulation 70A(2) an error? Should the reference be to regulation 93(2) or to regulation 93(4)(c)?

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

On 20 December 2022, the Scottish Government responded:

The reference in paragraph 2(5) of schedule 2 of the instrument to regulation 70A(2) is a drafting error, with apologies. The correct reference should be to regulation 93(4)(c).

As the reference to this regulation is self-evidently an error – there is no regulation 70A in the 2021 Regulations, and regulation 94(3) makes clear it relates to preventing a “relevant authority” from notifying the applicant as under regulation 93(4)(c), as opposed to notice under regulation 93(2) where the notice is served on the relevant authority – it is proposed that the error be rectified in the instrument when made as an error that could be corrected by correction slip.

First-tier Tribunal for Scotland Local Taxation Chamber (Rules of Procedure) Regulations 2022 (SSI 2022/364)

1. One of the enabling powers cited in the preamble is section 41(1) of the Tribunals (Scotland) Act 2014. Section 79(2)(c) of the Act provides that regulations under section 41(1) are subject to the affirmative procedure. It appears that the power in section 41(1) has been used to make the provision in rule 17(1). Should the instrument have been subject to the affirmative procedure?

2. While appreciating that the preamble records that the President of Tribunals has been consulted in accordance with the requirement in paragraph 4(3) of schedule 9 of the 2014 Act, should the preamble also make reference to consultation having taken place as required by section 11(2) of the 2014 Act, in relation to the provision made under section 41(1)?

3. In rule 1, the definition of “appeal” provides:

“appeal”, except where otherwise specified, means—... (b) an appeal under—... (ii) a council tax appeal”

Is the intention that “appeal” should mean a council tax appeal, rather than “an appeal under a council tax appeal”? Is this sufficiently clear?

4. In rule 1, “council tax appeal” is defined as meaning an appeal under four specified provisions of the 1992 Act. However, in the definition of “respondent”, paragraph (a) refers to “a council tax appeal under Part II of the 1993 Regulations”, which is not one of the provisions specified in the definition of “council tax appeal”. Should the definition of

“council tax appeal” also include an appeal under Part II of the 1993 Regulations, or should an appeal under Part II not be referred to in the definition of “respondent” (paragraph (a)) as a “council tax appeal”?

5. Should the reference in Rule 20(4) to paragraph (1) be to paragraph (2)?

6. In Rule 20, paragraphs (2), (3) and (5) all make provision in relation to what expenses may be awarded.

- Paragraph (2) provides that the Tribunal may award expenses as taxed by the Auditor, but paragraph (5) provides that an award under paragraph (2) is to require the paying party to pay a “specified sum”. Is there an inconsistency in that, if the tribunal awards expenses as taxed by the Auditor, the figure is not known (until the Auditor has carried out the taxation), and therefore the award cannot specify it? Is it sufficiently clear whether the Tribunal may award expenses as taxed or whether the Tribunal can only award a specified sum?
- Is there an inconsistency between paragraphs (3) and (5) in that paragraph (3) provides that the amount of expenses awarded must be “the amount required to cover any unnecessary or unreasonable expense incurred by the party”, whereas paragraph (5) is wider, providing that the award must require payment of a sum “in respect of the expenses incurred by [the] party in connection with the proceedings”? Is it sufficiently clear what expenses the award may cover?

7. Regulation 26(2)(i) refers to notice “sent under regulations made under” regulation 14. Is this an error? Secondly, should the reference to regulation 14 be instead to regulation 15 (or to another provision of the 2022 Regulations)? This second point applies also to the reference to regulation 14 in regulation 27(2)(a)(iii).

8. Regulation 26(2)(j) refers to regulation 16 of the 2022 Regulations. Should this refer instead to regulation 18?

9. Regulation 26(5) requires a notice of appeal to be served within the period of time specified in the schedule of the Valuation Timetable (Scotland) Order 2022. That Order has two schedules. Should the reference be to Schedule 1?

10. Regulation 27(1)(b) requires that, on receipt of the notice of appeal, the tribunal must send to the assessor (among other things) anything supplied under “rule 26(3)(b) (notice of appeal)”. Should this refer instead to rule 26 (or perhaps rule 26(2))?

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

On 21 December 2022, the Scottish Government responded:

1. We thank the Committee for bringing these points to our attention. Citing section 41(1) of the Tribunals (Scotland) Act 2014 was an oversight — preliminary analysis suggested using this power, but on reflection we intended to rely upon and consider that the powers in paragraph 4(2) of schedule 9 (which confer on the Scottish Ministers the function of making Tribunal rules by regulations until the coming into force of paragraph 13(2) to (5) of that schedule) include the power to make such provision. Previous regulations setting out rules of the Chambers of the First-tier Tribunal have taken that approach and included similar provision (e.g. rule 52 of schedule 1 of S.S.I. 2016/339, and rule 19 of the schedule of S.S.I. 2017/69) in reliance on the powers in schedule 9, hence this would be consistent

with the legislative practice in this area. The powers conferred by section 41(1) have not to our knowledge previously been exercised. As the view of the Scottish Government is that this power is not being relied upon and its inclusion was an oversight, it is proposed that the preamble be amended by correction slip, if the Committee would be content with that approach in this instance. We will review this point for the future to make sure that a consistent approach is taken to these instruments.

2. As the Scottish Government does not propose to rely on section 41(1) of the 2014 Act in making these regulations, it is not considered necessary to refer to consultation in accordance with section 11(2) of that Act. The President of Tribunals was though consulted on the Regulations (and was content subject to some comments on the regulations which were accepted).

3. The Scottish Government considers the reference to “council tax appeal” in the meaning of “appeal” in rule 1 of the schedule is sufficiently clear from the context to ensure that it would be interpreted as intended, but that the definition of “respondent” should be amended to ensure effective operation. Accordingly, provision will be made to clarify the meaning by amending instrument before the regulations come into force, also correcting the following points.

4. The Scottish Government considers that the provision for expenses payments set out in rule 20 of the schedule, and in particular in paragraphs (2), (3) and (5) of that rule, are capable of being operated effectively, but provision will be made to clarify the meaning of the points raised on rule 20 in an amending instrument.

5. The Scottish Government considers that the reference in rule 26(2)(i) of the schedule to notice “sent under regulations made under” regulation 14 is sufficiently clear from the context to be interpreted as intended. However, for the avoidance of doubt provision will be made to amend the drafting to make the meaning clear in an amending instrument. That includes reference in that rule and in rule 27(2)(a)(iii) to regulation 14 of the 2022 Regulations and in rule 26(2)(j) to regulation 18 of the 2022 Regulations where provision will be also made to clarify the meaning.

6. The Scottish Government considers that the reference in rule 26(5) to the schedule of the Valuation Timetable (Scotland) Order 2022 is sufficiently clear from the context to be interpreted in the way intended. The rule relates to the date by which an appeal is to be served, and of the two schedules of the 2022 Order one relates to dates and the other lists revocations. However, provision will be made to amend the drafting to ensure the meaning is beyond doubt.

7. The Scottish Government considers that the requirement on the Tribunal to send to assessors information or documents supplied under rule 26 should be amended to ensure effective operation. Accordingly, provision will be made to clarify the meaning in an amending instrument.

Upper Tribunal for Scotland (Local Taxation Rules of Procedure) Regulations 2022 (SSI 2022/365)

On 14 December 2022, the Committee asked the Scottish Government:

In schedule 1, rule 31 (reviews) and rule 32 (appeal) refer to a review under “section 43 of that Act” and “section 48 of that Act” respectively, however, “that Act” is not defined. Should these rules instead refer to “the 2014 Act”? If so, is any corrective action proposed?

In schedule 3: -

- in the first paragraph, should the reference be to the First-tier Tribunal for Scotland Local Taxation Chamber (Rules of Procedure) Regulations 2022, rather than 2023?
- should the reference to regulation 26, in the first place it occurs, be a reference to regulation 30?
- should the reference to regulation 23 be a reference to regulation 26?
- should the reference to regulation 26, in the second place it occurs, be a reference to regulation 29?

If, so is any corrective action proposed?

On 20 December 2022, the Scottish Government responded:

In relation to schedule 1, rule 31 (reviews) and rule 32 (appeal), the intention is that these rules refer to the Tribunals Act 2014. The Scottish Government considers that while the meaning would be clearer if reference was made to “the 2014 Act” rather than “that Act”, the meaning would be clear from the context, in particular the appeal procedures in the relevant provisions of the 2014 Act. However, provision will be made for the avoidance of doubt to clarify the meaning in an amending instrument before the Regulations come into force.

In relation to the references in schedule 3 to the First-tier Tribunal for Scotland Local Taxation Chamber (Rules of Procedure) Regulations 2022, the Scottish Government considers that each of the provisions identified should be amended. Accordingly, provision will be made to clarify the meaning in that amending instrument.

Official Controls and Import Conditions (Transitional Periods) (Miscellaneous Amendment) (Scotland) Regulations 2022 (SSI 2022/371)

On 14 December 2022, the Scottish Government wrote to the Presiding Officer:

The Official Controls and Import Conditions (Transitional Periods) (Miscellaneous Amendment) (Scotland) Regulations 2022 was made by the Scottish Ministers in exercise of the powers conferred by paragraph 2 of Annex 6 to Regulation (EU) 2017/6251, and paragraph 10A(1) of schedule 2 of the Trade in Animals and Related Products (Scotland) Regulations 20122. It is being laid before the Scottish Parliament today, 14 December and comes into force on 1 January 2023.

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.

In order to bring the instrument into force on 1 January 2023, the Scottish Government has, on this occasion, been unable to lay this negative instrument before the Scottish Parliament at least 28 days before it comes into force.

The UK Government (with the consent of the Scottish Government) has implemented several extensions of the transitional staging period which has postponed the normal application of sanitary and phytosanitary checks (SPS) on animals and goods from the EU

and certain other countries and territories under the Official Control Regulations (OCR) since they were originally due to be implemented in 2021. The most recent extension expires on 31 December 2022, at which point the requirement for checks at border control posts under the OCR will come into effect, unless legislation to once again extend the transitional staging period is made before then. Similarly, an exemption for meat preparations originating in certain countries and territories, from the import condition that they be deep frozen at the plant of origin expires on 31 December 2022. In order to continue the transitional staging period, and the exemption from the import condition for meat preparations this instrument must be brought into force on 1 January 2023.

It has not been possible to make and lay this instrument before now. The former UK Minister for Brexit Opportunities and Government Efficiency issued a Written Statement on 28 April 2022, which set out the UK Government's intention to suspend further introduction of border controls until the end of 2023, and that the UK Government would be accelerating their programme to digitise Britain's borders. In that statement the then Minister outlined the re-envisioned approach would be presented in a UK Government-led Target Operating Model, due for publication in the autumn and implemented by the end of 2023.

It had been anticipated that in order to implement an extension of the transitional staging period in line with the development and implementation of a Target Operating Model, that a UK Statutory Instrument would have been brought forward in good time for Parliamentary consideration. Due to numerous UK Government delays in agreeing policy it has been decided to pursue separate Scottish legislation. The UK Government agreed on 9 December 2022 to Scottish and Welsh Government proposals to extend the transitional staging period to 31 January 2024. On this basis the transitional staging period is being extended until 31 January 2024, in alignment with legislation that will be made by the other administrations in Great Britain.

It had also been planned that a Scottish Statutory Instrument would have been made in good time to extend the current suspension of the requirement for meat preparations imported from EEA member states, the Faroe Islands, Greenland or Switzerland to be made once the UKG position on the extension of the transitional staging period, and whether a similar suspension of the condition would be applied to meat preparations imported into England, was known. Having regard to the animal health situation in those countries and territories, we do not consider it necessary to impose that requirement. Again though due to repeated UK Government delays in clarifying policy this instrument is now being made at the earliest possible opportunity to ensure that the exemption from the import condition for meat preparations will continue to apply.

The Scottish Government is cognisant of the difficulties that breaching the 28 day rule poses in terms of Parliamentary scrutiny, and regret that on this occasion it has been impossible to comply with this requirement.

