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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 31 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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Committee Membership



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Jeremy Balfour
Scottish Conservative
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Carol Mochan
Scottish Labour



Oliver Mundell
Scottish Conservative
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Introduction

1. At its meeting on 31 January, the Committee considered the following instrument under its remit and agreed to draw it to the attention of the relevant lead committeeⁱ:
 - First-tier Tribunal for Scotland Housing and Property Chamber (Amendment) Regulations 2023 (SSI 2023/6)
2. The Committee's recommendations in relation to this instrument are set out in the next section of the 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.

ⁱ Jenni Minto MSP substituted for Stuart McMillan MSP

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

First-tier Tribunal for Scotland Housing and Property Chamber (Amendment) Regulations 2023 (SSI 2023/6)

4. The instrument is made under the Tribunals (Scotland) Act 2014 and the Cost of Living (Tenant Protection) (Scotland) Act 2022 (“the 2022 Act”). It amends the First-tier Tribunal’s existing procedural rules to make provision for new rules to accommodate the new appeal mechanism created by the 2022 Act.
5. In line with standard drafting practice, the title of the instrument should read, ‘the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Amendment Regulations 2023’.
6. The Scottish Government has apologised for this oversight, however, will not be taking any corrective action as it is content that the title is not misleading and adequately highlights the purpose of the regulations.
7. 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 17 January 2023 and came into force on 24 January 2023.
8. In correspondence with the Presiding Officer, the Scottish Government stated that this breach was necessary as it is now possible for landlords to increase their rents in response to an increase in prescribed property costs, and this instrument requires to be brought into force urgently to create the necessary procedural rules should any appeal be brought against the decision of a rent officer.
9. A copy of the correspondence can be found in the **Annex**.
10. The Committee draws the instrument to the attention of the Parliament under:
 - A. the general reporting ground, in that “(Procedure)” was omitted from the title of the instrument.
 - The Committee notes the apology from the Scottish Government for this oversight; and
 - The Committee is content that corrective action is not necessary in this instance.
 - B. reporting ground (j) for failure to comply with the laying requirements in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010.
 - The Committee is also content with the explanation provided by the Scottish

Government for failure to comply with the laying requirements.

No points raised

Education, Children and Young People Committee

Provision of Early Learning and Childcare (Specified Children) (Scotland) Amendment Order 2023 (SSI 2023/Draft)

Local Government, Housing and Planning Committee

Cost of Living (Tenant Protection) (Scotland) Act 2022 (Early Expiry and Suspension of Provisions) Regulations 2023 (SSI 2023/8)

- While the Committee was content with the above instrument, Jeremy Balfour MSP highlighted his concerns in relation to this legislation.

The full transcript of the discussion can be read in the [Official Report](#) for the meeting.

Planning (Scotland) Act 2019 (Commencement No. 11 and Saving and Transitional Provisions) Regulations 2023 (SSI 2023/10 (C.2))

Net Zero, Energy and Transport Committee

Environmental Regulation (Enforcement Measures) (Scotland) Amendment Order 2023 (SSI 2023/Draft)

Packaging Waste (Data Reporting) (Scotland) Regulations 2023 (SSI 2023/7)

Land Reform (Scotland) Act 2016 (Register of Persons Holding a Controlled Interest in Land) Amendment Regulations 2023 (SSI 2023/Draft)

Annex

First-tier Tribunal for Scotland Housing and Property Chamber (Amendment) Regulations 2023 (SSI 2023/6)

On 16 January 2023, the Scottish Government wrote to the Presiding Officer:

The First-tier Tribunal for Scotland Housing and Property Chamber (Amendment) Regulations 2023 (“the Amendment Regulations”) were made by the Scottish Ministers under paragraph 4(2) of schedule 9 of the Tribunals (Scotland) Act 2014 and section 12(1) of the Cost of Living (Tenant Protection) (Scotland) Act 2022 on 17 January 2023 and were laid before Parliament on the same day. The Amendment Regulations will come into force on 24 January in breach of the 28 day rule as set out in section 28(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. This letter explains why it is necessary to lay the Amendment Regulations less than 28 days before they are brought into force.

Schedule 1 of the Cost of Living (Tenant Protection) (Scotland) Act 2022 introduced a variable rent cap with a power for landlords to apply to a rent officer for an increase in rent above the rent cap to reflect increases in prescribed property costs. The landlord or tenant can appeal the decision of the rent officer to the First-tier Tribunal. There are currently no bespoke procedural rules in place for these appeals.

Under paragraph 4(2) of schedule 9 of the Tribunals (Scotland) Act 2014, the Scottish Ministers have the function of making rules of procedure for the First-tier Tribunal, such rules being made by regulations which are subject to negative procedure (see paragraph 5(2) of the 2014 Act. The Amendment Regulations provide procedural rules for the new appeals process created by the 2022 Act.

The 2022 Act is emergency legislation brought into force quickly in order to address the harms caused by the cost of living crisis. As it is now possible for landlords to seek to increase rents in response to an increase in prescribed property costs, there is an urgent requirement to create the necessary procedural rules for the FTT to handle an appeal brought against the decision of a rent officer. Due to the speed with which the 2022 Act came into force, an expedited timescale to implement the Act is also needed.

There is a requirement in paragraph 4 of schedule 9 of the 2014 Act that, in making these rules of procedure, the Scottish Ministers must consult with the President of Tribunals and any other parties the Scottish Ministers deem appropriate. In complying with this requirement, the Scottish Ministers have consulted with the President of Tribunals and the Lord President and their comments have helped to shape the Amendment Regulations. This consultation process has impacted on the Scottish Ministers’ ability to enact the Amendment Regulations quickly.

The Amendment Regulations now require to be brought into force quickly to ensure that the necessary procedural arrangements are in place should any appeal be brought under the new appeal process created by the 2022 Act. If the Amendment Regulations were brought in force 28 days after they were laid, these procedural arrangements would not be in place until late February and it is possible that an appeal could be brought to the Tribunal before then.

Accordingly, the Scottish Ministers consider it necessary to breach the 28-day rule and bring the Amendment Regulations into force on 24 January. This gives the Parliament and

parties to the appeal process some minimal notice of the changes being brought into force.

On 19 January 2023, the Committee asked the Scottish Government:

1. The above named instrument is making amendments to the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 to provide for a bespoke procedure relating to prescribed property costs applications and how they are handled. Should the title of the instrument as cited in regulation 1(1) of the instrument include “(Procedure)” before “(Amendment)”?
2. Regulation 2(9) of the instrument inserts a new Part 4 into the 2017 regulations. The newly inserted rule 114 in Part 4 of the 2017 regulations provides for modifications to the rules when prescribed property costs applications are being considered by the tribunal. Rule 114(7) modifies rule 26 (decisions of the First-tier Tribunal), but no modifications are made to rule 26(9) for such applications. Should the reference to “conducting the hearing” at the end of rule 26(9) also be omitted in respect of such applications?
3. Please confirm whether any corrective action is proposed, and if so, what action and when.

On 24 January 2023, the Scottish Government responded:

1. We agree that the title of the instrument should have been the First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) (Amendment) Regulations 2023. The omission of “(Procedure)” from the title was an oversight, for which we apologise, but we are content that the title is not misleading and adequately highlights the purpose of the Regulations. As the Regulations amend the 2017 Regulations, the user will ultimately refer to the 2017 Regulations as amended and the title of the 2017 Regulations does include the word “Procedure”.
2. Rule 26(9) of the 2017 Regulations notes that in the absence of the chairing member, the chairing member’s functions may be carried out by another member of the Tribunal conducting the hearing. This rule was not modified in new rule 114(7) (as inserted by the current Regulations) as it was considered that it had no impact on prescribed property costs (“PPC”) applications where no hearing takes place. In PPC applications the chairing member is simply the member making the decision – rule 26(2) (as amended by the current regulations). If, at any time before the decision is made, the chairing member is absent then the decision would be made by another member and that member making the decision becomes the chairing member under rule 26(2). As another member could step into the role of chairing member more easily in written proceedings, it was not considered that a modification of rule 26(9) was necessary.
3. In relation to the first issue, it would not be possible to amend the title of the Regulations via a correction slip or via further amendment regulations. As the omission does not create confusion as to the purpose of the Regulations, the Scottish Ministers consider that revoking the Regulations and re-laying regulations with an amended title would not be a proportionate means of addressing the problem. Accordingly, the Scottish Ministers do not propose to take any remedial action on this issue. In relation to the second issue, no remedial action is proposed as rule 26(9) doesn’t impact on PPC applications.

