

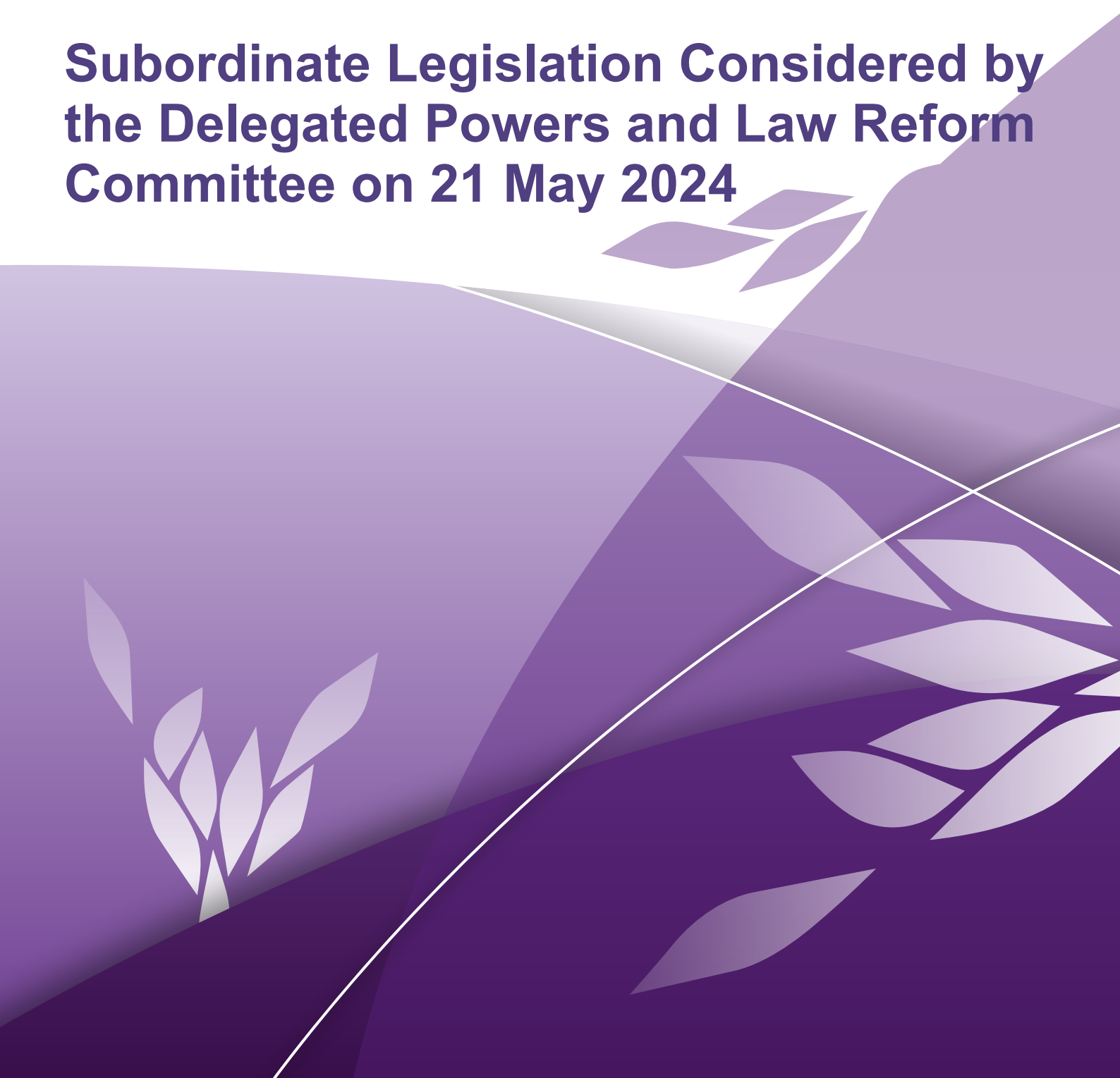


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Pàrlamaid na h-Alba

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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 21 May 2024**



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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 21 May, the Committee considered the following instruments under its remit and agreed to draw them to the attention of the Parliament:
  - Scottish Pubs Code Regulations 2024 (SSI 2024/Draft); and
  - Tied Pubs (Fees and Financial Penalties) (Scotland) Regulations 2024 (SSI 2024/Draft).
2. The Committee's recommendations in relation to these instruments are set out in the next section of this report.
3. These instrument form part of a package of 6 instruments. The Committee considered 4 of them last week, as set out in its report of the [meeting of 14 May](#).
4. 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 Parliament

## Scottish Pubs Code Regulations 2024 (SSI 2024/Draft)

5. These draft Regulations establish the Scottish Pubs Code. They contain rules and procedures which will govern the relationship between pub-owning businesses and tied-pub tenants.
6. The lead committee for the draft Regulations is the Economy and Fair Work Committee.
7. The parent Act is the Tied Pubs (Scotland) Act 2021. Key elements of the Code are as follows.
  - The Act itself establishes the Scottish Pubs Code Adjudicator<sup>i</sup>. The Adjudicator can investigate whether a landlord is complying with the Code; must arbitrate disputes between landlord and tenant in this regard; and can take enforcement action (issuing directions and fines) against a landlord who is not complying with the Code<sup>ii</sup>. The Code sets out the rules and procedures for this.
  - The Code contains contract terms which are prohibited by the Code and cannot be enforced by the landlord (these include upwards-only rent review clauses; and clauses which would prevent the tenant from, or penalise the tenant for, taking action to enforce the Code).<sup>iii</sup>
  - The Code gives tied-pub tenants the right:
    - to a “market-rent only” (“MRO”) lease (regulations 14–19);
    - to request a rent review if their existing lease does not provide for this (regulation 13); and
    - to a “guest beer agreement” (regulations 20-23).
  - New tied-pub leases cannot compel tied-pub tenants to buy or rent a gaming machine from the landlord (or the landlord’s nominee) (regulation 24).
  - A landlord cannot rely upon a reading from a flow monitoring device without additional evidence before subjecting their tied-pub tenant to a detriment or a liability as a consequence (regulation 25).
  - Landlords must notify the Adjudicator that they are a pub-owning business, and notify any changes of ownership (regulation 6).
  - Landlords must give specified information to prospective tied-pub tenants before entering into a tied-pub lease (regulations 9-11).

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<sup>i</sup> section 2 and schedule 2 of the Act

*Statutory requirement to lay the Regulations by 6 May 2023*

8. Section 4(1) of the parent Act provides that the Scottish Ministers must lay the draft Regulations containing the Code before the end of the period of 2 years beginning with the date that section came into force. Accordingly, this should have been done by 6 May 2023. However, the Scottish Government has explained that it was not possible for the Scottish Ministers to lay the Regulations by that date because the parent Act was judicially reviewed, (*Greene King Limited and others v Lord Advocate*), in relation to which the Scottish Ministers were subject to a court order preventing them from making or laying SSIs under the Act. This explanation is contained in the Business and Regulatory Impact Assessment ("BRIA"). The judgment of the Inner House confirms that the court suspended the provisions of section 4 of the Act.<sup>iv</sup>
  9. Court proceedings were ongoing at 6 May 2023. The decision of the Court of Session at first instance (Outer House) was given on 9 December 2022,<sup>v</sup> and this was appealed to the Inner House, which gave its decision on 7 July 2023. The BRIA advises that the last possible stage of appeal in the court process ended on 8 March 2024 when the UK Supreme Court refused a request for permission to appeal.
10. **The Committee notes that there is good reason why the requirement in the parent Act to lay the Code within two years was not met.**

*Questions to the Scottish Government*

11. In [correspondence with the Scottish Government](#), the Committee queried three aspects of the Regulations.
12. The first question concerned the compatibility of key elements of the Code with article 1 of protocol 1 ("A1P1") of the European Convention on Human Rights.
13. A1P1 says:  
  
"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law ...  
  
"The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest ..."
14. When considering the proportionality of the parent Act for A1P1 purposes, the Inner House said:  
  
"the achievement of a fair balance between the rights of the individual (in this case

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ii sections 8, 14 and 9 of the Act respectively

iii section 7 of the Act and regulation 8 of the Code

iv [paragraph 15 of the Inner House judgment, Opinion of the Court in the reclaiming motion \[2023\] CSIH 27](#)

v [Opinion of Lord Harrower \[2022\] CSOH 89](#)



the landlord) and the community as a whole is something which, as the Lord Ordinary found, cannot be assessed until at least the promulgation of a Code and probably not until it is seen in operation in relation to a particular tied pub or lease"<sup>vi</sup>

15. The Committee asked the Scottish Government to provide a summary of its consideration of the compatibility with A1P1 of:
  - the provisions of the Code which require landlords to offer a “market rent only” lease (in part 4); and
  - the provisions of the Code which require landlords to offer a guest beer agreement (in part 5).
16. In its [response](#), the Scottish Government set out its analysis of A1P1 compliance, against the standard legal tests.
17. The Committee notes one additional point, in relation to the consideration of whether a “less intrusive” measure could have been used in the Code: that in order to satisfy this test it may be necessary to demonstrate that there is no measure which is less intrusive that could have been used to achieve the relevant objective. In that regard, the Committee observes that the Scottish Government’s [Business and Regulatory Impact Assessment](#) (laid alongside the Regulations) contains a detailed analysis of all the options which it considered, including weaker options such as requiring MRO leases only to be offered to new tenants, and not setting any guest beer requirement. The BRIA gives the reasons why the Scottish Government believes that the less intrusive measures would not achieve the policy objective.
18. The Committee considers that the draft Code is capable of being operated compatibly with landlords’ A1P1 rights.

**19. The Committee is content that no reporting ground is engaged in relation to Convention rights or legislative competence.**

**20. The Committee draws to the attention of the Economy and Fair Work Committee the explanation provided by the Scottish Government in relation to the compliance of the Code with article 1 of protocol 1 of the European Convention on Human Rights.**

21. The second question concerned a requirement imposed by the Act itself. The Act

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<sup>vi</sup> The conclusion of the Inner House in relation to A1P1 begins at paragraph 40 of the judgment: “The objective of the 2021 Act is a legitimate one. This was, as expressed in the Policy Memorandum, the improvement of the position of tied pub tenants by introducing a Code to govern their relationships with the landlords.... The proposal to introduce a tied pub Code which attempted to redress the balance, was rationally connected to the objective.... [41] The issue of a less intrusive measure was addressed in Mr Bibby’s research on the effectiveness of the voluntary code. No realistic alternative to cure the perceived ills of the tied pub systems was advanced.”

says that the Code “must” oblige the landlord to use its best endeavours to enter into a market rent only (“MRO”) lease as soon as possible after the tenant asks for one.

22. The [Committee asked the Scottish Government](#) whether, in order to comply with the Act, the Code should impose the “best endeavours” obligation on the landlord also:
  1. before the negotiation period (that is, from the day the landlord receives the tenant’s request until the day the tenant receives the offer of the MRO lease (which can be up to 4 weeks after the date of the tenant’s request (regulation 16(2)(a)); and
  2. after the negotiation period (that is, during the process of appointing a rent assessor and during the rent assessment period provided for in regulation 17 (which includes the landlord making an offer of a lease under regulation 17(8) after the assessor has determined the market rent)).
23. In its [response](#), the Scottish Government sets out why it considers that the Code does do what the Act requires in this regard. The response explains that period (a) is covered by the requirement in the Code that the landlord has to make the offer of the MRO lease as soon as possible and in any event within 4 weeks of the request. In relation to period (b), the Committee notes that it is arguably unnecessary to impose the “best endeavours” obligation expressly during this period, because at this point the matter is in the hands of the rent assessor, and the Code specifies a time limit (4 weeks from the rent assessor’s decision on the market rent) within which the landlord must make the offer of an MRO lease.

**24. The Committee is content with the Scottish Government’s answer to this question.**

25. Finally, regulation 17(10) of the instrument provides that the rent assessment period comes to an end if the offer of an MRO lease has not been accepted by the tenant within 2 weeks after the tenant receives the market rent determination. However, the Committee observed that, at that point, the tenant may not yet have received the MRO lease offer, because the landlord has 4 weeks from receiving the determination to make the offer.
26. The Committee queried whether this achieves the Scottish Government’s policy intention.
27. The [Scottish Government advised](#) the intention is for the rent assessment period to come to an end if the tenant doesn’t accept the offer of an MRO lease within 2 weeks of the offer, rather than within 2 weeks of the rent determination.
28. It intends to correct this by amending instrument.

**29. The Committee draws this instrument to the attention of the Parliament on the general reporting ground in respect that, in regulation 17(10), the end of the rent assessment period should be after the tenant has received the MRO lease offer.**

- 30. The Committee welcomes that the Scottish Government intends to make an amending instrument correcting the error, to come into force at the same time as the principal regulations.**

### **Tied Pubs (Fees and Financial Penalties) (Scotland) Regulations 2024 (SSI 2024/ Draft)**

31. This draft instrument sets the maximum penalty which can be imposed on the landlord of a tied pub for breaching the Scottish Pubs Code.
32. The instrument sets this at 1% of the total annual UK turnover of the landlord, or (where the landlord is part of a group of companies) of its group.
33. The lead committee for this instrument is the Economy and Fair Work Committee.
34. In [correspondence with the Scottish Government](#), the Committee queried two aspects of the instrument.
35. First, the Committee queried the reference at the start of regulation 4(2) to a business being “part of a group undertaking”, given that the term “group undertaking” takes the Companies Act definition, which means a single company, not the group.
36. The policy intention is that, where the landlord is part of a group, the maximum fine is to be calculated with reference to the turnover of the whole group. Where the landlord is (for example) a company, the landlord’s “group” is intended to consist of the parent company of the landlord, its subsidiaries and its sister companies.
37. In its [response](#), the Scottish Government agreed that this reference is not sufficiently clear. It intends to correct this by amending instrument.

- 38. The Committee draws the instrument to the attention of the Parliament on reporting ground (h) (meaning could be clearer), in respect of the reference in regulation 4(2) to a business being “part of a group undertaking”.**

- 39. The Committee welcomes that the Scottish Government intends to correct the error in an amending instrument which should come into force at the same time as the principal instrument.**

40. Secondly, the Committee queried a provision in regulation 4 regarding the method for calculating a business’s “annual turnover” for the purposes of calculating the maximum permitted penalty.
41. Regulation 4(4) sets out how the “annual turnover” is to be calculated where the business has published accounts during the previous 12 months. Regulation 4(5) sets out how this is to be done where accounts have not been published in the previous 12 months.
42. Regulation 4(5)(a) and (c) provide that:

- where there is relevant turnover in each of the 12 preceding months, the “annual turnover” is the sum of the relevant turnover in each of those months; and
  - where there is no relevant turnover in any of the 12 preceding months, the “annual turnover” is nil.
43. The provision the Committee asked about is regulation 4(5)(b). It provides that where there is relevant turnover in some but not all of the 12 preceding months, the “annual turnover” is calculated by adding up the figures for those months, dividing the total by the number of those months, and multiply by 12. As set out in the question, the Committee observes that this could result in the “annual turnover”, being many times more than the total of the actual turnover of the business during the previous 12 months. The Committee asked whether this achieves the policy intention.
44. The Scottish Government [confirmed](#) that this does achieve the policy intention and confirmed specifically that it is intentional that the “annual turnover” could be more than the total actual turnover. The Scottish Government also noted that the actual level of the fine (which is a maximum of 1% of the “annual turnover”) will be determined by the Adjudicator, and that the drafting approach follows the equivalent England & Wales regulations<sup>vii</sup>. The Scottish Government does not propose to take any corrective action.

**45. The Committee is content that no reporting ground is engaged.**

**46. The Committee nonetheless draws to the attention of the Economy and Fair Work Committee, the Committee’s correspondence with the Scottish Government regarding how “annual turnover” is to be calculated in the circumstances governed by regulation 4(5)(b).**

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vii [Pubs Code \(Fees, Costs and Financial Penalties\) Regulations 2016 SI 2016/802](#)

# No points raised

## Education, Children and Young People Committee

Education (Fees and Student Support) (Miscellaneous Amendments) (Scotland) Regulations 2024 (SSI 2024/140)

## Social Justice and Social Security Committee

Disability Assistance for Older People (Consequential Amendment and Transitional Provision) (Scotland) Regulations 2024 (SSI 2024/141)

