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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 8 November 2017



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Contents

| | |
|--|----------|
| Introduction | 1 |
| Points raised: Instrument subject to negative procedure | 2 |
| No points raised | 5 |
| Annex | 7 |

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.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meeting on 8 November 2017, the Committee agreed to draw to the attention of the Parliament the following instrument—

First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (SSI 2017/328)

2. The Committee's recommendations and conclusions in relation to this instrument are set out in the following section of this report. The correspondence between the Committee's legal advisers and the Scottish Government is contained in the Annex.
3. The Committee determined that it did not need to draw the Parliament's attention to the instruments set out by the relevant lead committee at the end of this report.

Points raised: Instrument subject to negative procedure

First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (SSI 2017/328) (Justice)

Purpose

4. The Regulations make provision for the rules of procedure for the First-tier Tribunal for Scotland Housing and Property Chamber.
5. The instrument is subject to the negative procedure. It comes into force on 1 December 2017.

Background

6. The Tribunals (Scotland) Act 2014, under which these Regulations are made, created a new structure for tribunals dealing with devolved matters, and provided for a First-tier Tribunal and an Upper Tribunal. Within that structure the First-tier Tribunal has been divided into chambers, according to subject matter. One of these is the Housing and Property Chamber, in relation to the operation of which this instrument makes procedural provision.
7. The Policy Note indicates that a single set of operational rules will apply across all jurisdictions in the Housing and Property Chamber from December 2017 when the First-tier Tribunal starts to hear more private rented sector housing cases, including cases to be transferred from the sheriff court, the new letting agent regime and new tenancies.
8. The 2014 Act allows rules regulating the practice and procedure of both the First-tier and Upper Tribunals to be made by the Scottish Ministers (by means of regulations) until such time as rule making responsibility passes to the Court of Session.

Discussion

9. There are a number of errors in the instrument that engage four of the Committee's reporting grounds as detailed below. The Scottish Government has agreed to lay an amending instrument to address these errors.

Recommendations

10. **The Committee draws the Regulations to the attention of the Parliament on the following grounds:**
11. **On reporting ground (e), as there appears to be a doubt as to whether rule 37(3)(a) in the schedule is *intra vires* the parent Tribunals (Scotland) Act 2014 insofar as it appears to preclude an appeal permitted by section 46(1) of that Act in relation to a decision arising from a re-decided matter made by the First-tier Tribunal on review.**

12. **On reporting ground (i), as the instrument appears to be defectively drafted in the following respects:**
 1. **Rule 86 in the schedule refers to the “lessor” making an application under section 76 of the Rent (Scotland) Act 1984 and also requires that the application must be signed and dated by the “lessor or a representative of the lessee”. However, as applications under section 76 are made by the lessee, those references to “lessor” should be to “lessee”.**
 2. **Rule 106(a)(iv) and (v) do not make provision in relation to applications made by landlords under section 14(2) of the Private Housing (Tenancies) (Scotland) Act 2016.**
13. **On reporting ground (h), as the meaning of the instrument could be clearer in the following respects:**
 1. **The defined term “assured tenancy reference to the First-tier Tribunal” in rule 1(1) could more clearly align to the words “assured tenancy reference” used in the remainder of the schedule;**
 2. **It could be clearer in rule 10(4) that anything permitted or required under a practice direction or order may be done by a lay representative on behalf of a party;**
 3. **In rules 44(4) and 53(4), it could be clearer that sufficient notice of an inspection should be given in writing by the First-tier Tribunal to both parties, rather than “the party”.**
14. **On the general reporting ground, in respect of the following issues:**
 1. **Sub-paragraph (f) of the list in rule 43(1) in the schedule unnecessarily duplicates the requirement in section 17(2) of the Property Factors (Scotland) Act 2011, which is already referred to in rule 43(1).**
 2. **The reference in rule 69 in the schedule to an application under section 36(6A) or (6B) of the of the Housing (Scotland) Act 1988 is incorrect.**
 3. **Rule 92(g) in chapter 8 of the schedule appears to be unnecessary insofar as it refers to an application made under section 92(2) of the Rent (Scotland) Act 1984 in circumstances where chapter 8 does not make substantive provision in relation to that section.**
 4. **The requirements in rules 97(1) and 97(2) of the schedule for the First-tier Tribunal to notify “both parties” in relation to the variation or revocation of a letting agent enforcement order is inconsistent with rule 96(c), which refers to more than two parties.**
15. **The Committee welcomes that the Scottish Government has agreed to make an amending instrument addressing these points. However, it is highly unsatisfactory for the instrument to have been laid before the**

Parliament in its present form. The Committee's role is not to provide a substitute for internal checking by the relevant Scottish Government department. The Committee urges the Government to examine its quality control procedures to avoid laying instruments containing so many errors in the future.

No points raised

Economy, Jobs and Fair Work

Land Registration etc. (Scotland) Act 2012 (Amendment) Order 2017 [draft]

Registers of Scotland (Digital Registration, etc.) Regulations 2017 [draft]

Education and Skills

Section 70 (Procedure) (Scotland) Regulations 2017 (SSI 2017/353)

Additional Support for Learning (Collection of Data) (Scotland) Regulations 2017 (SSI 2017/355)

Additional Support for Learning Dispute Resolution (Scotland) Amendment Regulations 2017 (SSI 2017/356)

Education (Scotland) Act 2016 (Commencement No. 3) Amendment Regulations 2017 (SSI 2017/352 (C.27))

Environment, Climate Change and Land Reform

Development of Water Resources (Designated Bodies: Modification) (Scotland) Regulations 2017 (SSI 2017/347)

Water and Sewerage Services to Dwellings (Collection of Unmetered Charges by Local Authority) (Scotland) Amendment Order 2017 (SSI 2017/348)

Justice

Criminal Justice (Scotland) Act 2016 (Modification of Part 1 and Ancillary Provision) Regulations 2017 [draft]

Criminal Justice (Scotland) Act 2016 (Consequential and Supplementary Modifications) Regulations 2017 [draft]

First-tier Tribunal for Scotland (Transfer of Functions of the Additional Support Needs Tribunal for Scotland) Regulations 2018 [draft]

First-tier Tribunal for Scotland (Transfer of Functions of the Scottish Charity Appeals Panel) Regulations 2018 [draft]

First-tier Tribunal for Scotland Health and Education Chamber and Upper Tribunal for Scotland (Composition) Regulations 2018 [draft]

Public Records (Scotland) Act 2011 (Authorities) Amendment Order 2018 [draft]

Rent Regulation and Assured Tenancies (Forms) (Scotland) Regulations 2017 (SSI 2017/349)

Pensions Appeal Tribunals (Scotland) (Amendment) Rules 2017 (SSI 2017/367)

Criminal Justice (Scotland) Act 2016 (Commencement No. 5, Transitional and Saving Provisions) Order 2017 (SSI 2017/345 (C.25))

Local Government and Communities

Town and Country Planning (Fees for Monitoring Surface Coal Mining Sites) (Scotland) Regulations 2017 (SSI 2017/350)

Private Housing (Tenancies) (Scotland) Act 2016 (Commencement No. 3, Amendment, Saving Provision and Revocation) Regulations 2017 (SSI 2017/346 (C.26))

Annex

First-tier Tribunal for Scotland Housing and Property Chamber (Procedure) Regulations 2017 (SSI 2017/328)

On 18 October 2017, the Scottish Government was asked:

16. Rule 1(1) in the schedule includes a definition of "*assured tenancy reference to the First-tier Tribunal*". However, the term that appears to be used in the rules is "assured tenancy reference" - see, for example, the definition of "application" and chapter 5 generally. Should the defined term be "assured tenancy reference"?
17. Rule 1(1) in the schedule includes a definition of "regulated tenancy reference". That definition refers to a "Part VII contract". However, neither the rules nor the parent Tribunals (Scotland) Act 2014 appear to define that term. Should the meaning of "Part VII contract" be made clearer by defining it in the schedule?
18. Rule 10(4) in the schedule provides that "*A practice direction, an order, or anything permitted or required to be done by a party under these Rules, may be done by a lay representative, except the signing of an affidavit or precognition.*" Is the intended meaning that *anything permitted or required* in a practice direction or an order (in addition to anything so permitted or required under the Rules) may be done by a lay representative (on behalf of the party)? Should this provision be made clearer, to clarify what is meant by providing that a practice direction or an order may be done by a lay representative?
19. Rule 37(3)(a) in the schedule provides that no application to appeal may be made in relation to a decision *arising* from a review by the First-tier Tribunal under rule 39(1).

Section 46(1) of the Tribunals (Scotland) Act 2014 provides that a decision of the First-tier Tribunal in any matter in a case before the Tribunal may be appealed to the Upper Tribunal. By virtue of section 46(5)(b), section 46 does not apply in relation to an excluded decision. Excluded decisions are set out in section 51, and include a decision falling within section 52. Section 52(1)(b) includes a decision in a review under section 43, except a decision of the kind mentioned in subsection (2). Section 52(2) expressly excludes from the scope of an excluded decision a decision made by virtue of section 44(2)(a) - i.e. a re-decided matter made by the First-tier Tribunal on review (- as well as a decision made by virtue of section 44(3)(a) or (4)).

In light of the above, please explain why rule 37(3)(a) is *intra vires* the parent statute insofar as it purports to preclude the possibility of an appeal in relation to a re-decided matter made by the First-tier Tribunal on review? This would appear to be contrary to section 44(2)(a) of the 2014 Act.

20. Rule 43(1) in the schedule provides what the application must state "*in addition to the homeowner's reasons as required by section 17(2) of the 2011 Act*". Paragraph (f) provides that one of the things that the application must also state is "the homeowner's concern". Rule 43(4) defines "homeowner's concern" as "*the homeowner's reason for considering that the property factor has failed to carry out the property factor's duties or, as the case may be, to comply with the section 14 duty*". However, with the exception of the word "reason", which is stated in the plural in section 17(2), the requirement is the same as section 17(2).

Does rule 43(1)(f) provide for anything in addition to the homeowners reasons as required by section 17(2) as stated in rule 43(1), and are these provisions sufficiently clear when read together?

21. Rules 44(4) and 53(4) in the schedule require the First-tier Tribunal to give in writing sufficient notice of an inspection to "*the party*" (sub-paragraph (5) in both those rules refers to "the parties"). By way of contrast, rule 73(3) refers to the First-tier Tribunal giving sufficient notice of an inspection to the "*party or parties*". Is it sufficiently clear in each case which "party" is to be given the notices referred to?
22. Rule 69 in the schedule applies where a former residential occupier makes an application under section 36(6A) or (6B) of the Housing (Scotland) Act 1988. However, it does not appear that section 36 admits of different applications under those subsections. Instead, they both appear to relate to an application to enforce a liability under section 36(3) to pay damages to a former residential occupier. Subsection (4A), which is to be inserted by paragraph 45 of schedule 1 of the Housing (Scotland) Act 2014 into section 36 of the 1988 Act, refers to "*Any action to enforce liability arising from this section*".

It appears that, rather than setting out types of application that can be made, subsection (6A) provides when proceedings to enforce a liability are finally decided and subsection (6B) provides for the orders that the court can make to enforce a liability arising by virtue of subsection (3). Accordingly, is it correct to refer in rule 69 to a former residential occupier making an application under section 36(6A) or (6B)? (see also the references to section 36(6A) or (6B) in rule 71(b)).

23. Rule 86 in the schedule makes provision "*where a lessor makes an application under section 76*" of the Rent (Scotland) Act 1984. Rule 86(b) provides that the application must "*be signed and dated by the lessor or a representative of the lessee*".
- Is it only the lessor that would make an application for postponement under section 76(2) or could it also be made by the lessee?
 - Should rule 86(b) provide either that the application must "*be signed and dated by the lessor or lessee or a representative of the lessor or lessee*" or "*be signed and dated by the lessor or a representative of the lessor*"?

24. Rule 92(g) in chapter 8 of the schedule provides that the parties to be notified are in relation to an application "*under section 92(2) of the 1984 Act, the person whose application for registration is refused or who is removed from the register and the local authority*". However, chapter 8 of the schedule does not appear to make provision in relation to section 92(2) of the 1984 Act.

Rule 102(b) in chapter 10 provides that the parties to be notified are in relation to an application "*under section 92(2) of the 2004 Act, the person whose application for registration is refused or who is removed from the register and the local authority*".

Is the provision in rule 92(g) required?

25. Rule 97(1) requires the First-tier Tribunal to notify "*both parties*" in writing where it revokes a letting agent enforcement order under section 49 of the 2014 Act. However, with regard to notifications in relation to section 48(1) of the Housing

(Scotland) Act 2014, rule 96(c) refers to notifying "*the tenant, landlord (of a party to the proceedings) or the Scottish Ministers and the letting agent*" - i.e. three parties. Section 48(7) introduces the concept of a "letting agent enforcement order", which may be varied or revoked under section 49.

Should rule 97(1) refer to the same parties as referred to in rule 96(c) for consistency and clarity? (see also the reference to "both parties" in rule 97(2)).

26. Rule 106(a)(iv) in the schedule provides that where a person makes an application under section 14(2) of the Private Housing (Tenancies) (Scotland) Act 2016, the application must state "*which of the statutory terms the tenant considers has been displaced*". Likewise, rule 106(a)(v) refers to the "*reasons why the tenant considers the statutory term has been displaced*".

However, section 14(2) applies "*if the tenant or landlord thinks that the written terms of the tenancy purport to displace a statutory term in an unlawful manner.*"

Accordingly, should rule 106(a)(iv) and (v) refer to both the tenant and the landlord?

27. What, if any, corrective action is proposed and, if corrective action is proposed, when is it intended that it would occur?

The Scottish Government responded as follows:

28. We agree that the defined term should be "assured tenancy reference". The words "to the First-tier Tribunal" are otiose but not necessarily misleading but we shall amend this definition to make it completely clear.
29. When preparing these Rules, we tried to strike a balance between allowing defined terms to be read down from the parent legislation and setting out definitions again where this would be helpful. It is intended that applicants should be able to represent themselves so the Rules need to be accessible. Where the term is understood clearly in the sector, such as an assured tenancy or a Part VII contract, we felt that the term could be read down. Therefore, there is no need to further define "Part VII contract" as rule 46(2)(c) clarifies that where terms are used in Chapters 7 and 8 which are defined terms in the Rent (Scotland) Act 1984, those definitions apply to those Chapters.
30. Rule 10(4) is intended to mean that anything permitted or required under a practice direction or order may be done by a lay representative; therefore, this provision will be amended to be clearer.
31. We think that this provision is *intra vires* the parent statute as there is no intention to interfere with the right of appeal in relation to a re-decided matter. Rule 37(3)(a) is intended to relate to the situation described in section 43(4) of the Tribunals (Scotland) Act 2014 which provides that the exercise of discretion whether a decision should be reviewed cannot give rise to a review or to an appeal under section 46. The footnote to rule 39(1) refers to section 43(4). On reflection, we agree that rule 37(3)(a) is not necessary as section 43(4) already makes provision to exclude such exercise of discretion so we shall amend accordingly.
32. We accept that including the requirement to provide reasons in addition to the reasons required under section 17(2) of the 2011 Act is duplication so have removed the reference to and definition of 'homeowner's concern'.

33. Rules 44(4) and 53(4) require notice to be given to the party in relation to an inspection. However, as the notice will also need to be given to the other party, we have changed the reference to the plural.
34. A former residential occupier may raise an action to enforce liability under section 36. The references to subsections (6A) and (6B) ought to have been to subsection (3). Therefore, rule 69 and 71 will be amended to refer to the correct subsection.
35. An application under section 76 of the 1984 Act is made by a lessee to postpone the date of possession set out in a notice to quit served by the lessor. Therefore, rule 86 refers wrongly to 'lessor' in the opening wording and in paragraph (b) when it should refer to 'lessee'. These references will be corrected.
36. We confirm that the procedural rules in respect of an application under section 92(2) of the 1984 Act are set out in Chapter 9 of the Rules. Therefore, rule 92(g) is not required and should be removed as it appears correctly in rule 102(b).
37. In relation to notification of a variation or revocation of a letting agent enforcement order, rule 97 should refer to the same parties as rule 96(c). Therefore, 'both parties' will be amended to say 'the parties'.
38. We agree that an application under section 14(2) of the Private Housing (Tenancies) (Scotland) Act 2016 may be made by either the landlord or the tenant. Therefore, rule 106(a)(i), (ii), (iv) and (v) should be changed to make reference to the person making the application. These changes will be made.
39. It is proposed that an amending instrument is made to address points 1,3, 4, 5, 6, 7, 8, 9, 10 and 11 raised by the Committee and will be laid for 28 days to ensure compliance with the requirements of the negative procedure.

