

# Equalities, Human Rights and Civil Justice Committee

3rd Meeting, 2023 (Session 6), Tuesday 31 January 2023

## Subordinate legislation

### Note by the Clerk

#### Purpose of the paper

1. This paper invites the Committee to consider the following two negative instruments:
  - The First-tier Tribunal for Scotland Local Taxation Chamber (Rules of Procedure) Regulations 2022 (SSI 2022/364) – Policy Note and links to relevant impact assessments are at [Annexe A](#).
  - The Upper Tribunal for Scotland (Local Taxation Rules of Procedure) Regulations 2022 (SSI 2022/365) – Policy Note and links to relevant impact assessments are at [Annexe B](#).

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

2. The Tribunals (Scotland) Act 2014 created a new structure for tribunals dealing with devolved matters under the judicial leadership of the Lord President of the Court of Session as head of the Scottish Tribunals.
3. It provided for a First-tier Tribunal and an Upper Tribunal and for the First-tier Tribunal to be divided into chambers dependent on the subject matter of the case before it and similarly for the Upper Tribunal to be divided into divisions. The First-tier Tribunal has been divided into chambers, one of which is the Local Taxation Chamber.
4. These Regulations provide for the rules of procedure which are to apply in the Local Taxation Chamber when hearing appeals under the Valuation Acts, council tax appeals, appeals against a determination of an application for council tax reduction, and penalty notice appeals under the Non-Domestic Rates Act 2020.

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

5. These Regulations make the Upper Tribunal for Scotland Local Taxation Rules of Procedure 2022 regulating 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.
6. These Rules will apply until such time as the powers of the Scottish Civil Justice Council and the Court of Session to make Tribunal Rules (under paragraph 13(2) to (5) of schedule 9 of the Tribunals (Scotland) Act 2014) come into force and are exercised.
7. The Upper Tribunal for Scotland, set up by section 1 of the Tribunals (Scotland) Act 2014, hears appeals from, and referrals to it by, the First-tier Tribunal for Scotland, which is divided into chambers based on the subject matter of the cases before it. Regulation 3 of the Upper Tribunal for Scotland (Transfer of Valuation for Rating Appeal Functions of the Lands Tribunal for Scotland) Regulations 2023 transferred the valuation appeals functions of the Lands Tribunal for Scotland to the Upper Tribunal.

## Delegated Powers and Law Reform Committee Consideration

8. The Delegated Powers and Law Reform Committee (DPLR) considered the instruments at its meeting on [10 January 2023](#) and agreed to draw the instruments to the attention of the Parliament on general reporting grounds. Full details of points raised for both instruments are set out in [Annexe C](#) and [Annexe D](#).

## Equalities, Human Rights and Civil Justice Committee Consideration

9. The instruments were laid on 12 December 2022 and referred to the Equalities, Human Rights and Civil Justice Committee. They are subject to negative procedure and are due to come into force on 1 April 2023.
10. **The Committee is invited to consider any issues which it wishes to raise on these instruments and is required to report to the Parliament by 5 February 2023 on both instruments.**

## Procedure for negative instruments

11. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This means they become law unless they are annulled by the Parliament. The annulment process would require a motion to be agreed in the Chamber.
12. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
13. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
14. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
15. If the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book). Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.
16. Each negative instrument appears on the Equalities, Human Rights and Civil Justice Committee’s agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
17. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Clerks to the Committee  
January 2023

# Annexe A

## SSI 2022/364

### The First-tier Tribunal for Scotland Local Taxation Chamber (Rules of Procedure) Regulations 2022

#### Policy Note

The above instrument was made in exercise of the powers conferred by sections 41(1) and 43(3)(b) and paragraph 4(2) of schedule 9 of the Tribunals (Scotland) Act 2014 (“the 2014 Act”). The instrument is subject to negative procedure.

In accordance with paragraph 4(3) of schedule 9 of that Act, the Scottish Ministers have consulted the President of the Scottish Tribunals in respect of these Regulations, as well as the Lord President as an appropriate person under paragraph 4(3)(b) of that Schedule.

#### Purpose of the Instrument

The purpose of the instrument is to make provision for the rules of procedure which are to apply in the Local Taxation Chamber of the First-tier Tribunal. The rules of procedure are set out in the first schedule of this instrument.

The 2014 Act created a new structure for tribunals dealing with devolved matters. It provided for a First-tier Tribunal for Scotland (“First-tier Tribunal”), to be divided into chambers dependent on the subject matter of the case before it.

#### Policy Objectives

The First-tier Tribunal and the Upper Tribunal for Scotland (“Upper Tribunal”) were established by the 2014 Act. The First-tier Tribunal is organised into chambers according to, among other things, the different subject matters falling within the Tribunal's jurisdiction. The Upper Tribunal will in due course be organised into divisions. The 2014 Act also allows the Scottish Ministers to transfer the functions of tribunals listed in schedule 1 of that Act to the Scottish Tribunals.

These regulations make provision for the rules of procedure which are to apply in the Local Taxation Chamber (“the LTC”) of the First-tier Tribunal when hearing appeals under the Valuation Acts, council tax appeals, appeals against a determination of an application for council tax reduction, and penalty notice appeals under the Non-Domestic Rates Act 2020 Act. The relevant functions relating to these appeals, currently exercised by Valuation Appeals Committees (“VACs”) and the Council Tax Reduction Review Panel (“CTRRP”) are to be transferred to the First-tier Tribunal by way of regulations which are being laid concurrently with these regulations (the First-

tier Tribunal for Scotland (Transfer of Functions of Valuation Appeals Committees) Regulations 2023 and the First-tier Tribunal for Scotland (Transfer of Functions of the Council Tax Reduction Review Panel) Regulations 2023).

The transfer in to the First-tier Tribunal of the functions of these bodies has provided an opportunity to bring together, so far as appropriate, the rules of procedure of the VACs and the CTRRP. Accordingly, this instrument sets down one set of rules for the LTC which will cover all cases which would have gone to the VACs or the CTRRP. However, due to the nature of these appeals, the instrument contains bespoke rules, as well as general rules, which relate to the specific functions the LTC will exercise.

Appeals of decisions of the LTC in relation to non-domestic rates matters will continue to be to the Lands Valuation Appeal Court post-transfer. Appeals in relation to an LTC decision on a council tax case, which currently go to the Court of Session on a point of law only, will after transfer be made to the Upper Tribunal, subject to the 2014 Act.

Fuller details of the policy objectives relating to the 2014 Act are described in the Policy Memorandum which accompanied the Tribunals Bill. The link below shows the passage of the Bill through Parliament and includes the Policy Memorandum:

<http://www.scottish.parliament.uk/parliamentarybusiness/Bills/62938.aspx>

## Consultation

A consultation with interested parties took place between 20 September and 28 November 2021. There were 13 responses to this consultation. 11 respondents gave permission to publish their responses, which are available on the Scottish Government website:

[Published responses for Local taxation - Valuation Appeals Committees etc: transfer of functions - Scottish Government - Citizen Space \(consult.gov.scot\)](#)

## Impact Assessments and Financial Effects

An Equality Impact Assessment (“EQIA”) has already been completed for the Tribunals (Scotland) Bill – see link below:

[Tribunals \(Scotland\) Bill - Equality Impact Assessment - Results \(webarchive.org.uk\)](#)

The Bill EQIA made a number of Key Findings:

- The operation of the tribunal jurisdictions transferring into the new structure will not be affected.
- Tribunal users will not be affected directly by the Bill provisions.

- Tribunals distinctiveness will be protected.
- Tribunal members will not be adversely affected and their independence will be enhanced.

Given the conclusions set out in the Bill EQIA, a separate Equality Impact Assessment is not considered necessary for these regulations.

A Business and Regulatory Impact Assessment has been completed and is linked below:

[Transfer of the functions of the Valuation Appeals Committees, Council Tax Reduction Review Panel and valuation for rating appeal functions of the Lands](#)

The impact on the Scottish Government is minimal. The impact of this policy on the Scottish Legal Aid Board is minimal.

A Data Protection Impact Assessment was not considered to be required for these regulations. The transfer will involve a change in data controller, but no change to the data to be processed. A consultation with the Information Commissioner's Office took place in November 2022. The Information Commissioner's Office confirmed that no further engagement was required at that point in time.

A Child Rights and Wellbeing Impact Assessment was not considered necessary as there are no children's impact issues arising.

## Annexe B

### SSI 2022/365

## The Upper Tribunal for Scotland (Local Taxation Rules of Procedure) Regulations 2022

### Policy Note

The above instrument was made in exercise of the powers conferred by sections 76(1) and (2) and paragraph 4(2) of schedule 9 of the Tribunals (Scotland) Act 2014 (“the 2014 Act”) This instrument is subject to negative procedure.

In accordance with section 76(3) of that Act, the Scottish Ministers have consulted the Lord President and to the extent they considered appropriate, persons having an interest in the operation and business of the Scottish Tribunals.

In accordance with paragraph 4(3) of schedule 9 of that Act, the Scottish Ministers have consulted the President of the Scottish Tribunals and such other persons as they considered appropriate.

### Purpose of the Instrument

The Upper Tribunal for Scotland, established by section 1 of the 2014 Act, hears appeals from, and referrals to it by, the First-tier Tribunal for Scotland.

The purpose of the instrument is to 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 by a party against a decision by the First-tier Tribunal not to make such a referral.

Paragraph 4 of schedule 9 of the 2014 Act enables the Scottish Ministers, by regulations, to make Tribunal Rules until such time as the provisions of that Act conferring responsibility on the Scottish Civil Justice Council and the Court of Session for the making of Tribunal Rules are commenced.

### Policy objectives

The First-tier Tribunal for Scotland (“First-tier Tribunal”) and the Upper Tribunal for Scotland (“Upper Tribunal”) were established by the 2014 Act. The First-tier Tribunal is organised into chambers according to, among other things, the different subject-matters falling within the Tribunal's jurisdiction. The jurisdiction of the Local Taxation Chamber of the First-tier Tribunal will include appeals against rating assessments for non-domestic premises. The Local Taxation Chamber may refer cases to the Upper

Tribunal if they meet specified criteria, e.g. if they are complex or highly technical or the applicable law applicable is uncertain or difficult to apply.

Appeals at first instance against rating valuations for non-domestic premises are currently heard by the Lands Tribunal for Scotland (“LTS”). Regulations which are being laid concurrently with these regulations (the Upper Tribunal for Scotland (Transfer of Valuation for Rating Appeal Functions of the Lands Tribunal for Scotland) Regulations) make provision for the transfer to the Upper Tribunal of the functions of the Lands Tribunal for Scotland that relate to appeals arising from the valuation of property for rating purposes.

These regulations make provision for the rules of procedure which are to apply in the Upper Tribunal 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.

The Upper Tribunal for Scotland (Rules of Procedure) Regulations 2016 provide rules of procedure for the Upper Tribunal, but these relate to appeals from the First-tier Tribunal only, and so it is necessary to constitute new rules for the Upper Tribunal when it sits as an initial appellate tribunal.

Fuller details of the policy objectives relating to the 2014 Act are described in the Policy Memorandum which accompanied the Tribunals Bill. The link below shows the passage of the Bill through Parliament and includes the Policy Memorandum:

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Given the conclusions set out in the Bill EQIA, a separate Equality Impact Assessment is not considered necessary for these regulations.

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A Child Rights and Wellbeing Impact Assessment was not considered necessary as there are no children's impact issues arising.

## Annexe C

### SSI 2022/364

## Points raised and correspondence with the Scottish Government on the First-tier Tribunal for Scotland Local Taxation Chamber (Rules of Procedure) Regulations 2022

The Delegated Powers and Law Reform Committee drew this 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).

Correspondence from the Delegated Powers and Law Reform Committee to the Scottish Government:

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.

## Annexe D

### SSI 2022/365

## Points raised and correspondence with the Scottish Government on the Upper Tribunal for Scotland (Local Taxation Rules of Procedure) Regulations 2022

The Delegated Powers and Law Reform Committee drew this 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.

Correspondence from the Delegated Powers and Law Reform Committee to the Scottish Government on 14 December 2022:

1. 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?
2. 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:

1. 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.
2. 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.