



The Scottish Parliament
Pàrlamaid na h-Alba

DELEGATED POWERS AND LAW REFORM COMMITTEE

AGENDA

2nd Meeting, 2016 (Session 4)

Tuesday 12 January 2016

The Committee will meet at 11.30 am in the Adam Smith Room (CR5).

1. **Decision on taking business in private:** The Committee will decide whether to take item 6 in private.
2. **Instruments subject to affirmative procedure:** The Committee will consider the following—

[Police Act 1997 and the Protection of Vulnerable Groups \(Scotland\) Act 2007 Remedial \(No. 2\) Order 2015 \(SSI 2015/423\);](#)
[Rehabilitation of Offenders Act 1974 \(Exclusions and Exceptions\) \(Scotland\) Amendment Order 2016 \[draft\];](#)
[Welfare Funds \(Scotland\) Regulations 2016 \[draft\];](#)
[Advice and Assistance and Civil Legal Aid \(Financial Conditions and Contributions\) \(Scotland\) Amendment Regulations 2016 \[draft\];](#)
[Scottish Public Services Ombudsman Act 2002 Amendment Order 2016 \[draft\];](#)
[Bankruptcy and Debt Advice \(Scotland\) Act 2014 \(Consequential Provisions\) Order 2016 \[draft\];](#)
[Water Environment \(Amendment of Part IIA of the Environmental Protection Act 1990: Contaminated Land\) \(Scotland\) Regulations 2016 \[draft\].](#)

3. **Instruments subject to negative procedure:** The Committee will consider the following—

[Housing \(Scotland\) Act 2014 \(Commencement No. 5 and Consequential Provision\) Order 2015 \(SSI 2015/430 \(C.58\)\);](#)
[Management of Offenders etc. \(Scotland\) Act 2005 \(Specification of Persons\) Amendment Order 2015 \(SSI 2015/431\);](#)
[Public Bodies \(Joint Working\) \(Integration Joint Boards and Integration Joint Monitoring Committees\) \(Scotland\) Amendment \(No. 2\) Order 2015 \(SSI 2015/432\);](#)

[Food \(Scotland\) Act 2015 \(Consequential Provisions\) \(No. 2\) Order 2015 \(SSI 2015/433\);](#)
[Inshore Fishing \(Prohibition of Fishing and Fishing Methods\) \(Scotland\) Order 2015 \(SSI 2015/435\);](#)
[Inshore Fishing \(Prohibited Methods of Fishing\) \(Luce Bay\) Order 2015 \(SSI 2015/436\);](#)
[South Arran Marine Conservation Order 2015 \(SSI 2015/437\);](#)
[Waste \(Meaning of Recovery\) \(Miscellaneous Amendments\) \(Scotland\) Order 2015 \(SSI 2015/438\).](#)

4. **Instruments not subject to any parliamentary procedure:** The Committee will consider the following—

[Act of Sederunt \(Rules of the Court of Session, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment\) \(Sheriff Appeal Court\) 2015 \(SSI 2015/419\);](#)
[Management of Offenders etc. \(Scotland\) Act 2005 \(Commencement No. 8\) Order 2015 \(SSI 2015/429 \(C.27\)\);](#)
[Act of Adjournment \(Criminal Procedure Rules Amendment No. 6\) \(Special Measures in the Justice of the Peace Court\) 2015 \(SSI 2015/443\).](#)

5. **Apologies (Scotland) Bill:** The Committee will consider the delegated powers provisions in this Bill after Stage 2.
6. **Report on instruments considered during the second quarter of the parliamentary year 2015-16:** The Committee will consider a draft of its second quarterly report for the parliamentary year 2015-16.

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The papers for this meeting are as follows—

Agenda Items 2, 3 and 4

Briefing on Instruments (private)

DPLR/S4/16/2/1(P)

Instrument Responses

DPLR/S4/16/2/2

Agenda Item 5

[Apologies \(Scotland\) Bill - as amended at Stage 2](#)

[Apologies \(Scotland\) Bill - Supplementary Delegated Powers Memorandum](#)

Briefing Paper (private)

DPLR/S4/16/2/3(P)

Agenda Item 6

Draft Report (private)

DPLR/S4/16/2/4(P)

DELEGATED POWERS AND LAW REFORM COMMITTEE

2nd Meeting, 2016 (Session 4)

Tuesday 12 January 2015

Instrument Responses

INSTRUMENTS SUBJECT TO AFFIRMATIVE PROCEDURE

Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015 (SSI 2015/423)

On 17 December 2015, the Scottish Government was asked:

1. Schedule 8B of the Police Act 1997 as inserted by the order lists the offences convictions for which are to be disclosed subject to rules. Paragraph 75 lists “An offence under section 67(2) **and** (3) (offences under Part III) of the Medicines Act 1968”.

Is the policy intention that a conviction should only be subject to rules where it is a conviction for an offence under both section 67(2) *and* section 67(3)? Alternatively, is the policy intention that the rules should apply to conviction for an offence under either section 67(2) *or* section 67(3)? Depending on your answer, is any corrective action proposed?

2. Appendix 1 to Annex A of the Policy Note lists the offences to be deleted from Schedule 8B of the Police Act 1997, as inserted by the order. It lists “Civic Government (Scotland) Act 1982, paragraph 19(2) of Schedule 2 (enforcement)” as an offence to be deleted. However that offence is still listed in Schedule 8B, at paragraph 81(c).

Does paragraph 81 of Schedule 8B as drafted correctly give effect to the policy intention? If not, is any corrective action proposed?

The Scottish Government responded as follows:

1. In relation to paragraph 75 of Schedule 8B to the Police Act 1997, the Scottish Government considers that the drafting could have been better expressed.

Nevertheless, in the context of the lists of offences in both Schedules 8A and 8B the word ‘and’, where it appears in “*An offence under section 67(2) **and** (3) (offences under Part III) of the Medicines Act 1968*” should be construed disjunctively.

The opening wording of paragraph 75 refers to ‘an offence’ in the singular. “An” offence cannot be committed under both subsections (2) and (3) of section 67 of the Medicines Act 1968 (“the 1968 Act”). More than one offence would be committed under section 67(2) and (3).

Section 67(2) specifies as offences breaches of sections 63 and 64 of the 1968 Act as well as the breach of an order made under section 62 of the 1968 Act prohibiting

the importation, sale or supply of medicinal products. Under section 67(3) of the 1968 Act, where a medicinal product has been sold, supplied or imported in contravention of an order made under section 62 of the 1968 Act, an offence is committed if a person, who is in possession of the medicinal product, knows or has reasonable cause to suspect that it was sold, supplied or imported in contravention of the section 62 order. The section 67(3) offence could only be committed by a person other than person who committed the offence of breaching the order under section 62 of the 1968 Act.

The Scottish Government is therefore of the view that, in the context of the lists of offences in the new Schedules to the Police Act 1997, paragraph 75 cannot be interpreted as meaning that there should be an offence under both section 67(2) **and** (3). This reflects the Scottish Government's policy intention. Accordingly Disclosure Scotland will disclose any offences under section 67(2) and any offences under section 67(3).

The word 'and' is also used at the end of the lists of offences in many of the other sub-paragraphs of Schedules 8A and 8B and therefore its use in paragraph 75 is not inconsistent with the approach taken elsewhere throughout Schedules 8A and 8B which provides further context.

2. The Scottish Government confirms that the policy intention was that the matter listed at paragraph 81(c) of Schedule 8B to the Police Act 1997 (as inserted by the Order) - namely, paragraph 19(3) (and not paragraph 19(2), as suggested in the question) of Schedule 2 to the Civic Government (Scotland) Act 1982 - was to be deleted from Schedule 8B as stated in Appendix 1 to Annex A of the Policy Note. The Scottish Government regrets that this is not reflected in the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015.

However, the reference to paragraph 19(3) was to be deleted as that subparagraph does not contain any offence, but rather provides the maximum penalty for offences under paragraph 19(1) and 19(2) of Schedule 2 to the Civic Government (Scotland) Act 1982. It is not the policy intention to disclose any offences under paragraph 19(1) and 19(2) of Schedule 2 to the Civic Government (Scotland) Act 1982. Therefore, while the intention was to delete paragraph 81(c) of Schedule 8B and it is not ideal that it remains in the Order, the continued inclusion of it in the Order has no effect.

No person can ever be convicted of an offence under paragraph 19(3) since no such offence exists and therefore no such offence could ever be included in their record in the police databases. Disclosure Scotland will therefore never be able to disclose an offence under paragraph 19(3) and therefore paragraph 81(c) of Schedule 8B to the Police Act 1997 is of no effect. The Scottish Government would, however, intend to delete paragraph 81(c) of Schedule 8B to the Police Act 1997 at the next available opportunity.

Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2016 [draft]

On 17 December 2015, the Scottish Government was asked:

1. Schedule B1 to the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 (“the 2013 Order”) as inserted by article 5 of the draft order lists the offences convictions for which are to be disclosed subject to rules. Paragraph 75 lists “An offence under section 67(2) **and** (3) (offences under Part III) of the Medicines Act 1968”.

Is the policy intention that a conviction should only be subject to rules where it is a conviction for an offence under both section 67(2) *and* section 67(3)? Alternatively, is the policy intention that the rules should apply to conviction for an offence under either section 67(2) *or* section 67(3)? Depending on your answer, is any corrective action proposed?

2. Annex A to the Policy Note lists the offences to be deleted from Schedule B1 to the 2013 Order, as inserted by the order. It lists “Civic Government (Scotland) Act 1982, paragraph 19(2) of Schedule 2 (enforcement)” as an offence to be deleted. However that offence is still listed in Schedule B1, at paragraph 81(c).

Does paragraph 81 of Schedule B1 as drafted correctly give effect to the policy intention? If not, is any corrective action proposed?

The Scottish Government responded as follows:

1. In relation to paragraph 75 of Schedule B1 to the 2013 Order (as inserted by the draft Order), the Scottish Government considers that the drafting could have been better expressed.

Nevertheless, in the context of the lists of offences in both Schedules A1 and B1 the word ‘and’, where it appears in “*An offence under section 67(2) **and** (3) (offences under Part III) of the Medicines Act 1968*” should be construed disjunctively.

The opening wording of paragraph 75 refers to ‘an offence’ in the singular. “An” offence cannot be committed under both subsections (2) and (3) of section 67 of the Medicines Act 1968 (“the 1968 Act”). More than one offence would be committed under section 67(2) and (3).

Section 67(2) specifies as offences breaches of sections 63 and 64 of the 1968 Act as well as the breach of an order made under section 62 of the 1968 Act prohibiting the importation, sale or supply of medicinal products. Under section 67(3) of the 1968 Act, where a medicinal product has been sold, supplied or imported in contravention of an order made under section 62 of the 1968 Act, an offence is committed if a person, who is in possession of the medicinal product, knows or has reasonable cause to suspect that it was sold, supplied or imported in contravention of the section 62 order. The section 67(3) offence could only be committed by a person other than person who committed the offence of breaching the order under section 62 of the 1968 Act.

The Scottish Government is therefore of the view that, in the context of the lists of offences in the new Schedules to the 2013 Order, paragraph 75 cannot be interpreted as meaning that there should be an offence under both section 67(2) **and**

(3). This reflects the Scottish Government's policy intention. Accordingly individuals will be required to disclose any offences under section 67(2) and any offences under section 67(3).

The word 'and' is also used at the end of the lists of offences in many of the other sub-paragraphs of Schedules A1 and B1 and therefore its use in paragraph 75 is not inconsistent with the approach taken elsewhere throughout those Schedules which provides further context.

2. The Scottish Government confirms that the policy intention was that the matter listed at paragraph 81(c) of Schedule B1 to the 2013 Order (as inserted by the draft Order) - namely, paragraph 19(3) (and not paragraph 19(2), as suggested in the question) of Schedule 2 to the Civic Government (Scotland) Act 1982 - was to be deleted from Schedule B1 as stated in Annex A of the Policy Note. The Scottish Government regrets that this is not reflected in the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2016.

However, the reference to paragraph 19(3) was to be deleted as that subparagraph does not contain any offence, but rather provides the maximum penalty for offences under paragraph 19(1) and 19(2) of Schedule 2 to the Civic Government (Scotland) Act 1982. It is not the policy intention to disclose any offences under paragraph 19(1) and 19(2) of Schedule 2 to the Civic Government (Scotland) Act 1982. Therefore, while the intention was to delete paragraph 81(c) of Schedule B1 and it is not ideal that it remains in the Order, the continued inclusion of it in the Order will have no effect.

No person can ever be convicted of an offence under paragraph 19(3) since no such offence exists and therefore no such offence could ever be included in their record in the police databases. Individuals will therefore not be required to disclose an offence under paragraph 19(3). The Scottish Government would, however, intend to delete paragraph 81(c) of Schedule B1 to the 2013 Order at the next available opportunity.

INSTRUMENTS SUBJECT TO NEGATIVE PROCEDURE

Housing (Scotland) Act 2014 (Commencement No. 5 and Consequential Provision) Order 2015 (SSI 2015/430 (C. 58))

On 21 December 2015, the Scottish Government was asked:

1. Article 3(2) of the Order amends article 2 of the Tenant Information Packs (Assured Tenancies) (Scotland) Order 2013, to add a copy of any electrical safety record that requires to be given to the tenant under section 19A(3) of the Housing (Scotland) Act 2006 to the list of standard tenancy documents a landlord is under a duty to provide, for the purposes of section 30A(1) of the Housing (Scotland) Act 1988 ("the 1988 Act").

Is it acknowledged that the enabling power which more directly enables the provision in article 3(2) is that contained in section 30B(1) of the 1988 Act rather than section 102 of the Housing (Scotland) Act 2014, and that it would have been in accordance with proper drafting practice to have also cited section 30B(1) in the preamble?

2. (a) Has it been considered that the consultation requirements specified in section 30B(2) of the 1988 Act properly apply to the provision in article 3(2)? Please explain, if these are considered not to apply.

(b) Please explain whether and how those consultation requirements have been implemented in relation to article 3(2)?

The Scottish Government responded as follows:

Whilst the Tenant Information Packs (Assured Tenancies) (Scotland) Order 2013 ("the 2013 Order") could have been amended by an Order under 30B(1) of the Housing (Scotland) Act 2006 the amendment made to the 2013 Order is consequential on section 23 of the Housing (Scotland) Act 2014 ("the 2014 Act"). The 2013 Order is amended to recognise the duty to supply an electrical safety record that is imposed by provisions of the 2014 Act. No new requirement is created. As such it was considered appropriate to use only the power contained in section 102 of the 2014 Act.

Although the power in section 102 of the 2014 Act is not subject to a consultation requirement, a consultation was carried out in relation to the proposed changes to the 2013 Order with such persons and bodies as would have been considered appropriate by Scottish Ministers had the duty in section 30B(2) of the 1988 Act applied.

INSTRUMENTS NOT SUBJECT TO ANY PARLIAMENTARY PROCEDURE

Act of Sederunt (Rules of the Court of Session, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Sheriff Appeal Court) 2015 (SSI 2015/419)

On 14 December 2015, the Lord President's Private Office was asked:

1. In relation to paragraph 4(2)(a) of the instrument, which amends rule 72(3) of the Act of Sederunt (Proceedings in the Sheriff Court under the Debtors (Scotland) Act 1987) 1988, please explain why it is appropriate that the reference to "sheriff principal" is retained (and not substituted with Sheriff Appeal Court) in rule 72(3)(b)? (Rule 72(3)(b) provides that an appeal shall be nearly as may be in the terms- "The applicant [or respondent or other] appeals to the sheriff principal/Court of Session".)
2. Paragraph 12(3)(a)(iv) substitutes a new paragraph (10) of rule 23.1 (appeals) of the Small Claim Rules 2002. Is there an error as it appears that there is no existing paragraph (10) of that rule?
3. If there is an error in those provisions, is corrective action proposed?

The Lord President's Private Office responded as follows:

Question 1

We are grateful to the DPLRC and its legal advisers for drawing this matter to our attention. The reference to "sheriff principal" ought to have been omitted from rule 72(3)(b) of the Act of Sederunt (Proceedings in the Sheriff Court under the Debtors (Scotland) Act 1987) 1988. It would not be appropriate to substitute a reference to the Sheriff Appeal Court because rule 73(3) is amended by paragraph 4(2)(a) of this instrument so that it applies only to the Court of Session. Paragraph 4(2)(b) inserts a new paragraph (3A) into rule 72 in respect of appeals to the Sheriff Appeal Court.

That being said, we observe that "sheriff principal" and "Court of Session" have always been alternatives in rule 72(3)(b): the appellant has always had to omit one of the references depending on the appellate forum selected. In future, paragraph (3) will apply only to Court of Session appeals and so the appellant will always omit "sheriff principal". Accordingly, we do not think that any prejudice or inconvenience arises for appellants. Standing our response to question 2, however, we will make a further amendment to rule 72(3)(b) to omit "sheriff principal" at the first available opportunity.

Question 2

Again, we are grateful to the DPLRC and its legal advisers for drawing this matter to our attention. As Mr Gilchrist indicates, there is no existing paragraph (10) and so the provision is of no effect. The intention was to amend rule 23.1(9). However, we tend to the view that paragraph (9) is in any case impliedly revoked by the inconsistent subsequent provision in rule 29.2 of the Act of Sederunt (Sheriff Appeal Court Rules) 2015. However, to put the matter beyond doubt we will bring forward provision at the first available opportunity to amend paragraph (9). In the meantime, sheriff clerks will be alerted to the provisions of rule 29.2 of the Sheriff Appeal Court Rules so that there is no doubt as to the duty that they are under.

Question 3

As indicated, we will bring forward further provision on these matters at the first available opportunity.