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# **Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh**

## **Subordinate Legislation considered on 25 April 2017**



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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 25 April 2017, the Committee agreed to draw to the attention of the Parliament the following instruments—
  - Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/101)
  - Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/102)
  - Act of Sederunt (Fatal Accident Inquiry Rules) 2017 (SSI 2017/103)
2. The Committee's recommendations in relation to the above instruments are set out in the following chapters of this report.
3. The Committee determined that it did not need to draw the Parliament's attention to the instruments set out at the end of this report.

# Points raised: instruments subject to negative procedure

Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/101)

(Environment, Climate Change and Land Reform)

## Purpose

4. The purpose of these Regulations is to update and replace the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2000 in order to implement Directive 2014/52/EU (the “2014 Directive”).
5. The Regulations integrate environmental considerations into the preparation of projects related to the Scottish Electricity Works system, with a view to reducing their environmental impact. This is achieved by requiring an Environmental Impact Assessment (“EIA”) in relation to qualifying developments.
6. The Regulations are subject to the negative procedure and come into force on 16 May 2017.

## Comment

7. Through correspondence with the Scottish Government Legal Directorate, the Committee has identified some relatively minor drafting inconsistencies in the instrument, which the Scottish Government acknowledged (see Annex A for more information).
8. The Committee notes that the meaning of regulation 30(1)(c) could be clearer if the provision referred to the “consultation bodies”, as defined in regulation 2(1), rather than “those authorities” as drafted. This is particularly where no authorities appear to be referred to in regulation 30(1)(c)<sup>i</sup>.
9. The Committee highlights that the errors in regulations 13(5)(b)<sup>ii</sup>, 18(1), 29(3) and 34 are all similar in nature insofar as those provisions all fail to properly cross-reference other provisions either in the same instrument or in other Regulations. These errors are relatively minor and patent. The cross-references which were intended can be quite clearly identified when the context of the provisions is considered.
10. The Scottish Government intends to bring forward an amending instrument to rectify the errors identified.

## Recommendation

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<sup>i</sup> It is worth noting that the same error is also contained in regulation 42(1)(c) of the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 (“SSI 2017/102”), which the Committee also highlights in this report.

<sup>ii</sup> It is worth noting that the error in regulation 13(5)(b) is also contained in regulation 19(6)(b) of SSI 2017/102, which, as stated above, is also highlighted in this report.

**The Committee draws the instrument to the attention of the Parliament on ground (h), as the meaning of regulation 30(1)(c) could be clearer. Regulation 30(1)(c) refers to a notification to “those authorities”. The provision could be clearer, as the intention is to refer to the “consultation bodies” as defined in regulation 2(1).**

**The Committee draws the instrument to the attention of the Parliament on the general ground, as the Regulations contain the following minor drafting errors related to cross-referencing:**

- a. Regulation 13(5)(b) refers to regulation 11(1) of the Environmental Information (Scotland) Regulations 2004, but it was intended to refer to regulation 11(2) of those Regulations.**
- b. Regulation 18(1) refers to a notice published under regulation 21(1), but it was intended to refer only to regulation 14(2)(c).**
- c. Regulation 29(3) refers to particulars in paragraph (2)(c), but it was intended to refer to paragraph (2)(a).**
- d. Regulation 34 refers to regulations 30 to 32, but it was intended to refer to regulations 31 to 33 on electronic communications.**

**The Committee welcomes the Scottish Government’s commitment to bring forward an amending instrument.**

## [Town and Country Planning \(Environmental Impact Assessment\) \(Scotland\) Regulations 2017 \(SSI 2017/102\)](#)

### **(Local Government and Communities)**

#### **Purpose**

- 11. The purpose of these Regulations is to update and replace the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 (SSI 2011/139), to implement certain provisions of the Directive 2014/52/EU. They are similar to the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (“SSI 2017/101”) reported above.
- 12. Generally, the Regulations integrate ‘EIA’ procedures into the Scottish planning system, and supplement the usual planning process to provide a more systematic method of assessing the environmental implications of developments likely to have significant environmental effects.
- 13. The Regulations are subject to the negative procedure and come into force on 16 May 2017.

#### **Comment**



14. Similar to the Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/101) already highlighted in this report, the Committee notes that these Regulations raise a matter of drafting clarity. Specifically, with regard to regulation 42(1)(c), it would be clearer if the provision referred to the “consultation bodies” as defined in regulation 2(1), rather than “those authorities” as drafted.
15. The Committee also notes that the instrument contains some additional minor drafting errors in relation to regulation 19(6)(b) and schedule 6 which have been acknowledged by the Scottish Government.
16. The Scottish Government has confirmed that it intends to bring forward an amending instrument to make the changes to regulations 19(6)(b) and 42(1)(c). However, it is the Scottish Government's view that the error in schedule 6 does not give rise to any doubt about the intended meaning. Accordingly, it has not offered to amend this error. (see Annex B for further information).

### **Recommendation**

**The Committee draws the Regulations to the attention of the Parliament on ground (h), as the meaning of regulation 42(1)(c) could be clearer. Regulation 42(1)(c) refers to a notification to “those authorities”. The provision could be clearer, as the intention is to refer to the “consultation bodies” as defined in regulation 2(1).**

**The Committee draws the Regulations to the attention of the Parliament on the general reporting ground in light of the following minor drafting errors:**

- **Regulation 19(6)(b) refers to regulation 11(1) of the Environmental Information (Scotland) Regulations 2004, but it was intended to refer to regulation 11(2) of those Regulations.**
- **There is an error in schedule 6 (revocations) in the citation of the “Waste (Meaning of Hazardous Waste and European Waste Catalogue) (Miscellaneous Amendments) (Scotland) Regulations 2016”, as they are 2015 Regulations.**

**The Committee recommends that the Scottish Government takes the opportunity in its planned amending instrument to also correct the error in schedule 6.**

# Points raised: Instruments not subject to any parliamentary procedure

[Act of Sederunt \(Fatal Accident Inquiry Rules\) 2017 \(SSI 2017/103\)](#)

(Justice)

## **Purpose**

17. The purpose of the instrument is to set the procedural rules that apply in the Sheriff Court in relation to Fatal Accident Inquiries (“FAI”). This follows the enactment by the Scottish Parliament last year of the Inquires into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016. The purpose of the 2016 Act was to reform and modernise the law governing the holding of FAIs in Scotland.
18. In summary, the procedural rules:
  - provide an overview of the structure of an FAI, setting out inquiry principles and requiring judicial continuity where possible;
  - give a broad inquiry management power to the Sheriff;
  - set out how applications are made and how various things are intimated;
  - set out requirements for notification before the inquiry starts, from the giving of the first notice by the procurator fiscal to the conclusion of the preliminary hearing;
  - establish how information is gathered, agreed and presented at an FAI, including providing for information management powers for the Sheriff, citation of witnesses (including overseas witnesses), witness statements, expert witnesses, video recordings and the lodging of productions and witness lists;
  - provide for the sheriff’s determination and responses to recommendations made by the sheriff;
  - create a number of court forms to be used in the conduct of an FAI;
  - deal with various miscellaneous and general matters such as lodging, live links, reporting restrictions, the style of oath and affirmation, interventions and lay representation;
  - make provision which applies where a vulnerable witness gives testimony at an inquiry.
19. The instrument is laid before the Parliament under section 30(2) of the Interpretation and Legislative Reform (Scotland) Act 2010. It is not subject to any Parliamentary procedure.

## **Comment**

20. In considering the instrument, the Committee asked the Lord President's Private Office ("LPPO") for an explanation of certain matters. The correspondence is reproduced at Annex C.
21. The correspondence with the LPPO identified some relatively minor drafting inconsistencies in the instrument, but also more serious instances of defective drafting. There were also some areas where the LPPO was able to clarify that the drafting did not cause any issues of concern<sup>iii</sup>.
22. The Committee notes that rules 1.2(1) and 3.5 and paragraph 19 of schedule 4 as currently drafted appear to be defective. The Committee also noted a number of minor drafting errors.
23. The LPPO has undertaken to rectify all of the errors identified at the next available opportunity, which will be considered in light of the meeting timetable of the Scottish Civil Justice Council. However, while they have acknowledged in correspondence that a signing block, including the place and date of signature, is missing from Form S4.7 in schedule 3, this is not included in their summary of the issues to be addressed.

### **Recommendation**

**The Committee accordingly draws the instrument to the attention of the Parliament on ground (i) in respect of the following instances of defective drafting:**

- **The definition of "apply" and related expressions in rule 1.2(1), which means to apply in accordance with schedule 1, does not provide for an exception where the context requires otherwise. This is despite the instrument containing a number of references to "apply" and related expressions that are not intended to engage the procedure in schedule 1.**
- **In addition, the procedure in schedule 1 incorrectly applies in relation to rule 3.5, in connection with a person who is not given notice of an inquiry under section 17(1) of the Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016, but who wishes to apply.**
- **Paragraph 19 of schedule 4 incorrectly includes in the definition of "legal representative" a person having a right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.**

**The Committee draws the instrument to the attention of the Parliament on the general ground, as the instrument contains the following minor drafting errors:**

- **Rule 4.8(4) refers to the fees payable under paragraph (2), but it was intended to refer to paragraph (3).**

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<sup>iii</sup> The answers provided by the LPPO in relation to questions 5, 6 and 10 satisfied the Committee.

- **Form 3.1 in schedule 3 does not reflect rule 3.1(2)(f) insofar as it does not provide for the first notice to set out, in the case of a discretionary inquiry under section 6 of the 2016 Act, which condition in section 6(3)(a) of that Act is met.**
- **The signing block in Form S4.7 in schedule 3 is missing.**
- **The heading of Form S5.5C in schedule 3 does not reflect that the form can be completed by the participant who obtained an order for recovery of documents in terms of paragraph 5(3)(b) of schedule 5.**
- **Paragraph 5(1)(b) of schedule 5 refers to a participant executing commission and diligence under paragraph 4, but it was intended to refer to paragraph 6.**

**The Committee notes that the LPPO has undertaken to rectify all of the errors identified above at the next available opportunity and welcomes that the LPPO has undertaken to keep the Committee informed of this.**

**However, by way of clarification, the Committee recommends that the proposed amendments should also include inserting a signing block in Form S4.7 within schedule 3.**

# No points raised

## **Environment, Climate Change and Land Reform**

Flood Risk Management (Flood Protection Schemes, Potentially Vulnerable Areas and Local Plan Districts) (Scotland) Amendment Regulations 2017 (SSI 2017/112)

## **Justice**

Apologies (Scotland) Act 2016 (Excepted Proceedings) Regulations 2017 [draft]

# Annex A

## Electricity Works (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/101)

### On 11 April 2017, the Scottish Government was asked:

1. In regulation 13(5)(b), reference is made to regulation 11(1) of the Environmental Information (Scotland) Regulations 2004 (the “2004 Scottish Regulations”). Unlike regulation 13(1) of the Environmental Information Regulations 2004, paragraph (1) of regulation 11 of the 2004 Scottish Regulations relates to the applicant’s own data. Should this be a reference to paragraph (2) of regulation 11 of the 2004 Scottish Regulations, which relates to the personal data of others?
2. In regulation 18(1), reference is made to the place named “(by virtue of regulation 14(2)(c)) in the notice published under regulation 21(1)”.
  - a. Should the reference to regulation 21(1) be a reference to 14(2)(c)?
  - b. If so, are the words “(by virtue of regulation 14(2)(c))” necessary?
3. In regulation 29(3), should the particulars referred to be those in paragraph (2)(a) rather than paragraph (2)(c)?
4. The first line of regulation 30(1)(c) refers to “those authorities”. However, no previous reference is made to any “authorities”.
  - a. Is this intended to be a reference to the “consultation bodies” as defined in regulation 2(1) or some other authorities?
  - b. Could it be clearer which authorities are being referred to?
5. In regulation 34, should the reference to regulations 30 to 32 be a reference to regulations 31 to 33 on electronic communications?
6. Is any corrective action proposed in relation to the above matters?

### The Scottish Government responded as follows:

1. The Scottish Government agree that the reference in regulation 13(5)(b) to regulation 11(1) of the Environmental Information (Scotland) Regulations 2004 should be to regulation 11(2) of those Regulations and are grateful to the Committee for drawing this to their attention.
2. The reference in regulation 18(1) to regulation 21(1) should be a reference to regulation 14(1) and the Scottish Government are grateful to the Committee for drawing this to their attention. The words “(by virtue of regulation 14(2)(c))” correctly refer to the provision which requires the notice published under regulation 14(1) to name the places at which a copy of the EIA report is available for inspection. It is correct that these words are not strictly necessary.

3. The Scottish Government agree that the reference in regulation 29(3) to paragraph (2)(c) should be a reference to paragraph (2)(a) and are grateful to the Committee for drawing this to their attention.
4. The Scottish Government confirm that the reference to “those authorities” in regulation 30(1)(c) is intended to be a reference to the “consultation bodies” and agree that it could be clearer which authorities are being referred to. The Scottish Government are grateful to the Committee for drawing this to their attention.
5. The Scottish Government agree that the reference in regulation 34 to regulations 30 to 32 should be a reference to regulations 31 to 33 and are grateful to the Committee for drawing this to their attention.
6. The Scottish Government intend to bring forward an amending instrument to make changes to the Regulations as identified in paragraphs 1 to 5 above.

## Annex B

### **Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2017 (SSI 2017/102)**

#### **On 12 April 2017, the Scottish Government was asked:**

1. In regulation 19(6)(b), reference is made to regulation 11(1) of the Environmental Information (Scotland) Regulations 2004 (the “2004 Scottish Regulations”). Unlike regulation 13(1) of the Environmental Information Regulations 2004, paragraph (1) of regulation 11 of the 2004 Scottish Regulations relates to the applicant’s own data. Should this be a reference to paragraph (2) of regulation 11 of the 2004 Scottish Regulations, which relates to the personal data of others?

2. The first line of regulation 42(1)(c) refers to “those authorities”. However, no previous reference is made to any “authorities”.

a. Is this intended to be a reference to the “consultation bodies” as defined in regulation 2(1) or some other authorities?

b. Could it be clearer which authorities are being referred to?

3. Is it agreed that there is an error in schedule 6 (revocations) in the citation of the Waste (Meaning of Hazardous Waste and European Waste Catalogue) (Miscellaneous Amendments) (Scotland) Regulations “2016” as these are 2015 Regulations?

4. Is any corrective action proposed in relation to the above matters?

#### **The Scottish Government responded as follows:**

1. The Scottish Government agree that the reference in regulation 19(6)(b) to regulation 11(1) of the Environmental Information (Scotland) Regulations 2004 should be to regulation 11(2) of those Regulations and are grateful to the Committee for drawing this to their attention.

2. The Scottish Government confirm that the reference to “those authorities” in regulation 42(1)(c) is intended to be a reference to the “consultation bodies” and agree that it could be clearer which authorities are being referred to. The Scottish Government are grateful to the Committee for drawing this to their attention.

3. The Scottish Government agree that the reference in schedule 6 (revocations) to the Waste (Meaning of Hazardous Waste and European Waste Catalogue) (Miscellaneous Amendments) (Scotland) Regulations 2015 should, in column 1, refer to “2015” Regulations and are grateful to the Committee for drawing this to their attention. The related citation in column 2 is correct and, given that there is no other instrument with this title, it is not considered that there is any doubt that schedule 6 refers to regulation 9 of the Waste (Meaning of Hazardous Waste and European Waste Catalogue) (Miscellaneous Amendments) (Scotland) Regulations 2015. Regulation 9 of those Regulations is a redundant provision as it amended the Town and Country Planning (Environmental Impact Assessment) (Scotland) Regulations 2011 which are themselves revoked by these Regulations.



4. The Scottish Government intend to bring forward an amending instrument to make changes to the Regulations as identified in paragraphs 1 and 2 above.

# Annex C

## Act of Sederunt (Fatal Accident Inquiry Rules) 2017 (SSI 2017/103)

### On 13 April 2017, the Lord President's Private Office was asked:

1. Rule 1.2(1) defines “apply” in the Rules as to apply in accordance with schedule 1, and related expressions are to be construed accordingly. The rule does not provide for an exception where the context requires otherwise.

There are several references in the Rules to “apply” or related expressions where it appears that, in the context, the definition with reference to the various procedures set out in schedule 1 is not intended to apply, or may not be intended to apply (as the case may be). These references appear to include within rules 4.1(1) and (3), 4(3)(6)(a) and (7), 4.12(1) and (8), 4.13(1), 4.16(1), 4.17(1), 14(1); Form 4.1a in the fifth line on page 31; Form S5.5A on page 52 in the second line of note 3; in schedule 4(2)(2), (3)(1), (7)(1), (10), (15)(4) and (17)(1); schedule 5(3)(1), (3)(4), (4)(1), (5)(8), (7)(1)(b) and (8)(7); schedule 6(6)(7) and (7)(1).

(a) Is it considered therefore that some adjustment may be needed to how “apply” is defined?

(b) Given the number of those references listed, might there be an intention to define “apply” also with reference to rule 3.5, which provides that a person who is not given notice under section 17(1) of the 2016 Act but who wishes to participate in an inquiry may “apply” to the sheriff to participate?

2. In regard to rule 2.4(1)(b) (representation and support), please explain why it is appropriate that the provision is limited to representation by a solicitor or an advocate, or both; or is there any intention to make provision for a solicitor advocate and/or a person having a right to conduct litigation or a right of audience by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 (which is referred to in paragraph 19(1)(c) of schedule 4)?

3. In rule 4.8(4), should the reference to paragraph (2) of the rule be to paragraph (3)?

4. With regard to Form 3.1 in schedule 3 on page 24, rule 3.1(f) of the instrument states that the first notice must set out, in the case of a discretionary inquiry under section 6 (inquiries into deaths occurring abroad: general) of the Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (the “2016 Act”), which condition in section 6(3)(a) of that Act is met. However, Form 3.1 does not appear to provide for this. Should this be provided for?

5. In relation to Form 3.3A in schedule 3 on page 26, section 17(1) of the 2016 Act requires that the public notice is of the matters specified in subsection (1)(a) and (b). Sub-paragraph (b) refers, among other things, to the place (i) for the holding of the preliminary hearing; and (ii) at which the inquiry is to be held. The heading of the form includes the name of the Sheriff Court.

a. Will the location of either (i) or (ii) ever be somewhere other than the relevant Sheriff Court noted in the heading?

- b. Should the alternatives of paragraph 3 of the form also state the place of the preliminary hearing or where the inquiry is to be held to comply with section 17(1)(b) of the 2016 Act?
- c. Does this also apply to Form 3.4 on page 29 by virtue of section 17(3) of the 2016 Act?
- 6. While Form S1.7 is referred to in paragraph (7)(2)(a) of schedule 1, no reference is made in the instrument to a Form S2.7.
  - a. Is Form S2.7 in schedule 3 on page 46 a duplicate of Form S1.7 on the previous page?
  - b. Should Form S2.7 be removed?
- 7. In Form S4.7 in schedule 3 on page 48, is it correct that there is no “signing block” with the signature, place and date? If the Form is considered to be correct, please explain why.
- 8. In Form S5.5C in schedule 3 on page 54, the heading in bold is “Form of receipt from participant other than participant who originally recovered documents”. While the other participant may use this form in terms of paragraph 5(5)(b) of schedule 5, Form S5.5C is also to be completed by the participant who obtained the order in terms of paragraph 5(3)(b). Accordingly, does the title of Form S5.5C fail to reflect the terms of paragraph 5(3)(b)?
- 9. In paragraph 5(10)(b) of schedule 5 on page 77, should the reference to paragraph 4 be a reference to paragraph 6 (execution of commission and diligence)?
- 10. Paragraph 6(7) of schedule 6 on page 82 makes provision that an application may be made by “application”. Would it be clearer if this provision mirrored the drafting in paragraph 8(7) of Schedule 5?
- 11. Is any corrective action proposed in relation to the above matters?

**The Lord President’s Private Office responded as follows:**

1. We agree that not all references to “apply” (and cognate expressions) are intended to engage the procedure provided for in Schedule 1. Having considered all of the references to which your legal advisers have drawn our attention, we consider that the addition, in rule 1.2, of the words “unless the context otherwise requires” will be sufficient to make the position clear.

However, we do think that there might be some ambiguity regarding rule 3.5 because it is concerned with an “application” made by a person who is not yet a participant to the inquiry. As such, they are unlikely to know who the other participants are and so will be unable to intimate. Furthermore, the references to “lodging participant” in Schedule 1 will be inaccurate, as at that point the applicant will not be a participant. We therefore propose to make this rule subject to a specific exception. This can be achieved by the addition of a subparagraph (3) to provide “Schedule 1 does not apply to applications under this rule”.

2. The intention is that a participant may be represented by a solicitor advocate. We consider that this intention is given effect to in the rules because solicitor advocates are a type of solicitor. They are solicitors who have been granted extended rights of audience before the superior courts in Scotland: the Court of Session in civil cases; the High Court of Justiciary in criminal cases; and the Supreme Court and Judicial Committee of the Privy Council in London. Section 25A of the Solicitors (Scotland) Act 1980 created a route for

solicitors to qualify for a grant of rights of audience in the higher courts when they have sufficient training and experience.

There is no intention to provide that a participant may be represented by a person having a right to conduct litigation or a right of audience by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990.

The anomaly is that, in the context of considering whether a lay representative can represent a non-natural person at an FAI, the sheriff must be satisfied that the non-natural person could not afford the services of certain types of legal representative (which includes a section 27 legal representative) even though that type of legal representative cannot represent a participant at an inquiry under rule 2.4.

Section 27 concerns the exercise of rights of audience by members of a professional or other body, which has acquired rights to conduct litigation on behalf of its members. Only one professional body has been granted such rights; the Association of Commercial Attorneys. Those rights do not extend to fatal accident inquiries (see the Act of Sederunt (Sections 25 to 29 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990) (Association of Commercial Attorneys) 2009. Those rights are restricted to cases involving “construction litigation”.

It follows that it would not be correct to extend the definition of legal representative in rule 2.4 to include legal representative falling under section 27. In light of this, we propose to omit the reference to such legal representatives in paragraph 19 of Schedule 4.

3. Yes, the reference in rule 4.8(4) should be to paragraph (3), rather than paragraph (2). We apologise for this error and undertake to rectify it at the next available opportunity.

4. We agree that to achieve complete consistency between Rule 3.1 and Form 3.1 that the requirement in 3.1(f) should be narrated. We would propose to do so by inserting at the end of the second alternative paragraph 2 in Form 3.1 *“and set out which condition in section 6(3) is met.”*

5. (a) It is possible that a preliminary hearing or an inquiry may be held in a building other than the local sheriff court building. In the vast majority of cases those hearings will take place in a courtroom within the Sheriff Court specified in the public notice. If the FAI is to be held, for reasons of size or accessibility, in another venue such as council chambers, that venue will have been designated as a Sheriff Court by Regulations made under section 12(1) of the 2016 Act, or an Order under section 2(1)(d) of the Courts Reform (Scotland) Act 2014. We draw the Committee’s attention to rule 1.4, which makes it clear the Forms may be adjusted to suit the circumstances where that is appropriate. That rule is designed specifically to address situations such as the one your legal adviser mentions and therefore we do not intend to make any change to the Form.

(b) We do not consider that this is necessary. In the majority of cases the FAI will be held within a courtroom in the relevant Sheriff Court. Where this is not the case, we expect the procurator fiscal will include that information in the notice.

(c) For the reasons set out above, we do not think that Form 3.4 requires amendment. In the small percentage of inquiries which are held in venues other than the local sheriff court, we would expect the procurator fiscal to include this information in the form. As noted above, rule 1.4 permits the forms to be varied where the circumstances require it.

6. (a) Forms S1.7 and S2.7 are in exactly the same terms and this is intentional. Both are Certificates of Intimation. The reason that the SCJC instructed duplicate forms is to maintain consistency in the numbering of the forms, all of which correlate to a rule.

In Schedule 1, paragraph 7 (lodging of applications in writing) a participant who lodges something is required to also lodge a certificate of intimation. Similarly, under schedule 2, where intimation is carried out, paragraph 7 requires a certificate of intimation.

(b) We do not therefore consider that Form S2.7 should be deleted. As mentioned, we took this approach for the purposes of drafting consistency. This is the only circumstance in which a form in the same terms is required to be used under two different provisions. We consider that clarity is afforded by ensuring that all forms correlate to a rule.

7. The signing block in Form S2.7 has been omitted in error. We shall rectify this at the next available opportunity.

8. Form S5.5C may be completed by either the participant who obtained the commission and diligence (paragraph 5(3)(b)(i)) or by another participant who has obtained a document and who wishes to lodge it in process (Schedule 5, paragraph 5(5)(b)). We therefore agree that the heading of the form is misleading in that it only refers to a participant other than the participant who originally recovered the documents. We propose to rectify this by renaming the form, "Form of Receipt for recovered documents".

9. Yes, the reference should be to paragraph 6. This is an error. We undertake to rectify this at the next available opportunity.

10. We accept that the drafting approach taken in these paragraphs is inconsistent, and they are intended to have the same effect. However, we consider that the legal effect in both cases is the same and that amendment is not necessary.

11. Yes, as set out in the answers above, we propose to amend as follows—

- Rule 1.2 (interpretation) to insert the words "unless the context otherwise requires";
- Rule 3.5 by the addition of a new paragraph (3) to provide that "Schedule 1 does not apply to applications under this rule".
- Schedule 4, paragraph 19(1), to omit the reference to a "person having a right to conduct litigation, or a right of audience, by virtue of section 27 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990";
- Rule 4.8(4) to correct the cross-reference;
- Form 3.1, at the end of the second alternative paragraph 2 to inset the words "and set out which condition in section 6(3) is met";
- Renaming Form S5.5C, "Form of Receipt for recovered documents".
- In Schedule 5, paragraph 5(10)(b) to correct the cross-reference.

We are currently considering (in light of the SCJC meeting timetable) when these changes might be made but we intend to do so at the next available opportunity and shall keep the Committee informed in this regard.

