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

## **Subordinate Legislation considered on 23 May 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.



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



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# Committee Membership



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**Alison Harris**  
Scottish Conservative  
and Unionist Party



**Monica Lennon**  
Scottish Labour



**David Torrance**  
Scottish National Party

# Introduction

1. At its meeting on 23 May 2017, the Committee agreed to draw to the attention of the Parliament the following instrument—

Act of Adjournal (Criminal Procedure Rules 1996 Amendment)  
(Miscellaneous) 2017 (SSI 2017/144)

2. The Committee's recommendation in relation to the above instrument is set out in the following chapter of this report titled Points raised: instruments not subject to any parliamentary procedure.

3. The Committee also identified an inconsistency in drafting approach between this instrument and the following instrument—

Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (No.2) (Human Trafficking and Exploitation) 2017 (SSI 2017/145).

4. The Committee's recommendation in relation to this drafting inconsistency is outlined in more detail in the chapter titled Drafting matters.

5. 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: instruments not subject to any parliamentary procedure

Act of Adjournment (Criminal Procedure Rules 1996 Amendment) (Miscellaneous) 2017 (SSI 2017/144) (Justice)

## Purpose

6. This instrument makes some amendments to the Criminal Procedure Rules 1996, further to the commencement of Parts 3 and 5 of the Criminal Justice (Scotland) Act 2016. The provisions made include:
  - for the lodging of a written record of the state of preparation by both the Crown and defence in sheriff court cases under solemn procedure. This is similar to existing practice in the High Court;
  - to reflect the fact that the High Court no longer has power to reject a reference from the Scottish Criminal Cases Review Commission on the basis that it is not in the interests of justice to hear the appeal; and
  - to reflect a change in procedure for continuing a sheriff and jury trial from one day to the next, up to a maximum of 4 days.
7. The instrument is laid before Parliament, but not subject to further procedure. Some provisions come into force on 29 May 2017 and others on 28 August 2017.

## Comment

8. The Lord President's Private Office (LPPO) has acknowledged that there is a minor drafting error in the instrument (see Annex A for further information). The error appears in paragraph 2(8)(a), which omits various words from the middle part of a form used solely by the Court (a record of proceedings at judicial examination). The omitted words are in the form of statements by the Sheriff Clerk, and the signing details by the Sheriff Clerk should also have been omitted.
9. The LPPO has undertaken to remove the signing details at the next appropriate opportunity (by means of an amendment). It is also clarified that no legal effect flows from the inclusion of the superfluous signing details. There is a provision in the Criminal Procedure Rules which allows for variation of the court forms which are annexed to the Rules, where circumstances require it.

## Recommendation

10. **The Committee draws the instrument to the attention of the Parliament on the general reporting ground, as it contains a minor drafting error.**

**Paragraph 2(8)(a) omits various words from a form of record of proceedings at judicial examination (Form 5.2), in the Appendix to the Criminal Procedure Rules 1996. It was intended that the signing details by the Sheriff Clerk would also be omitted from the form.**

11. **The Lord President's Private Office has clarified that no legal effect flows from the inclusion of the signing details. Accordingly, the Committee accepts that the Lord President's Private Office has undertaken to correct the minor error at the next appropriate opportunity by means of an amendment.**



# Drafting matters

## [Act of Adjournal \(Criminal Procedure Rules 1996 Amendment\) \(No.2\) \(Human Trafficking and Exploitation\) 2017 \(SSI 2017/145\) \(Justice\)](#)

12. This instrument amends the Criminal Procedure Rules 1996 by inserting a new Chapter 64 which makes provision in connection with trafficking and exploitation prevention orders under the Human Trafficking and Exploitation (Scotland) Act 2015.
13. While no points have been raised by our legal advisers on this instrument, the Committee has identified an inconsistency in drafting approach between this instrument and the Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (Miscellaneous) 2017 (SSI 2017/144) referenced in the previous chapter of this report.
14. In summary, the Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (No.2) (Human Trafficking and Exploitation) 2017 (SSI 2017/145) refers in certain places to an “offender”, while the Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (Miscellaneous) 2017 (SSI 2017/144) refers, in places which are comparable, to a “person”.
15. The LPPO acknowledges that an alternative drafting approach on a similar point was taken in the Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (Miscellaneous) 2017 (SSI 2017/144) and intends to discuss consistency in drafting approach at their next drafters’ meeting (See Annex B for further information).
16. **In light of the Committee’s general interest in promoting consistency in drafting, the Committee welcomes the Lord President’s Private Office’s intention to consider the inconsistency in drafting approach at their next drafters’ meeting.**

# No points raised

## Environment, Climate Change and Land Reform

Prohibited Procedures on Protected Animals (Exemptions) (Scotland) Amendment Regulations 2017 [draft]

## Health and Sport

Mental Health (Absconding) (Miscellaneous Amendments) (Scotland) Regulations 2017 [draft]

Mental Health (Cross-border Visits) (Scotland) Amendment Regulations 2017 [draft]

Carers (Scotland) Act 2016 (Commencement No. 2 and Savings Provision) Regulations 2017 (SSI 2017/152 (C.12))

## Justice

First-tier Tribunal for Scotland (Oaths) Regulations 2017 (SSI 2017/148)

Act of Sederunt (Fees of Sheriff Officers) (Amendment) 2017 (SSI 2017/153)

Inquiries into Fatal Accidents and Sudden Deaths etc. (Scotland) Act 2016 (Consequential Provisions) Regulations 2017 (SSI 2017/156)

Act of Sederunt (Sheriff Court Rules Amendment) (Miscellaneous) 2017 (SSI 2017/154)

## Rural Economy and Connectivity

Road Works (Qualifications of Operatives and Supervisors) (Scotland) Regulations 2017 (SSI 2017/147)

# Annex A

## **Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (Miscellaneous) 2017 (SSI 2017/144)**

**On 10 May 2017, the Lord President's Private Office was asked:**

Paragraph 2(8)(a)(i) omits various words from Form 5.2 (form of record of proceedings at judicial examination) in the Appendix to the Criminal Procedure Rules 1996. It appears that in that Form, underneath those words to be omitted, there are signing details: "(Signed) Sheriff Clerk".

(a) Is it also intended therefore to omit those signing details?

(b) If so, is any corrective action proposed? Otherwise please explain why it is correct that those signing details should remain in the Form.

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

Question (a)

We are grateful to the Committee for bringing this point to our attention. It was intended that the signing details be omitted from the form.

Question (b)

We are content to undertake to remove the signing details at the next appropriate opportunity. We observe that no legal effect flows from the inclusion of the signing details, that rule 1.3 of the Criminal Procedure Rules 1996 permits the signing details to be omitted as a matter of practice, and that Form 5.2 is a form used solely by the court.

# Annex B

## **Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (No.2) (Human Trafficking and Exploitation) 2017 (SSI 2017/145)**

### **On 12 May 2017, the Lord President's Private Office was asked:**

Form 64.2 refers throughout to the “offender”, as the person who is to be made subject to a Trafficking and Exploitation Prevention Order under section 17 of the Human Trafficking and Exploitation (Scotland) Act 2015.

Section 17 of that Act provides that a Trafficking and Exploitation Prevention Order may be made against an adult who is (a) convicted of a relevant trafficking or exploitation offence; (b) acquitted of such an offence by reason of the special defence of mental disorder or (c) found to be unfit for trial by reason of incapacity and the court determines that the adult has done the act constituting the offence.

Is the reference to “offender” in Form 64.2 considered to be appropriate, given that section 17 may apply equally to an offender or to a person acquitted of a relevant offence or found unfit for trial? If not, is any corrective action proposed?

### **The Lord President's Private Office responded as follows:**

We thank the Committee for raising this issue.

In this case we consider “offender” the best word to summarise the class of individual in question. Section 17(1) of the 2015 Act specifies three categories of individual. Paragraph (a) is an adult convict, paragraph (b) is an adult who has been acquitted under section 51A of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) and paragraph (c) is an adult found unfit for trial but whom the court has determined the adult has committed the offence.

Therefore in relation to paragraphs (a) and (c) it is clear that the adult in question is an “offender” – this is consistent with section 307(1) of the 1995 Act which defines “offence” as meaning any act, attempt or omission punishable by law rather than by reference to conviction. As regards paragraph (b), section 51A of the 1995 Act provides that the person is “not criminally responsible for conduct constituting an offence, ... if the person was at the time of the conduct unable by reason of mental disorder to appreciate the nature or wrongfulness of the conduct”. Further, section 57(4)(a) of the 1995 Act makes provision for disposal of section 51A cases and provides that in applying disposal powers elsewhere in the 1995 Act “offender” is to be construed as including a person in section 51A. We would also highlight the terms of section 19(2) of the 2015 Act which itself defines “relevant offender” as meaning, among others, the three categories of person mentioned in section 17(1).

Taken together, we consider that “offender” is an appropriate reference in Form 64.2 because it is consistent with the drafting in both the 2015 and 1995 Acts and, separately, because it is a legitimate shorthand for the purposes of a form which might otherwise become unwieldy. We do not therefore propose to take any action.

We acknowledge that an alternative drafting approach on a similar point was taken in the Act of Adjournal (Criminal Procedure Rules 1996 Amendment) (Miscellaneous) 2017.

While we do not regard either instrument as defectively drafted on this point, we will be discussing consistency in approach at our next drafters' meeting.

