Delegated Powers and Law Reform Committee

Subordinate Legislation
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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—

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; and

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; and

i. any Consolidation Bill as defined in Rule 9.18.1 referred to it by the Parliamentary Bureau in accordance with Rule 9.18.3.
Committee Membership

Convener
Nigel Don
Scottish National Party

Deputy Convener
John Mason
Scottish National Party

John Scott
Scottish Conservative and Unionist Party

Stewart Stevenson
Scottish National Party
Introduction

1. At its meeting on 12 January 2016, the Committee agreed to draw the attention of the Parliament to the following instruments—

   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];

   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).

2. The Committee’s recommendations in relation to the above instruments are set out below.

3. The Committee determined that it did not need to draw the Parliament’s attention to the instruments which are set out at pages 9 and 10. The Committee did however make some observations in relation to the following instruments—

   Management of Offenders etc. (Scotland) Act 2005 (Specification of Persons) Amendment Order 2015 (SSI 2015/431);

   Management of Offenders etc. (Scotland) Act 2005 (Commencement No. 8) Order 2015 (SSI 2015/429 (C.27)).

4. The Committee’s observations are set out at the end of the report.
Points raised: 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) (Education and Culture)

5. The purpose of the Order (‘the second remedial Order’) is to amend the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 to ensure that the Scottish Ministers do not act incompatibly with rights under the European Convention of Human Rights, in particular article 8 (the right to respect for private life), following the judgement of the United Kingdom Supreme Court in the case R (on the application of T and another) v Secretary of State for the Home Department and another.

6. The Order revokes and replaces the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015 (SSI 2015/330) (‘the first remedial Order’), which the Committee considered and reported on in November 2015.

7. The second remedial order was made on 10 December 2015 and is subject to the “made affirmative” procedure. It has been signed and laid before the Parliament for approval by resolution within 120 days of the date the first remedial order was made (9 September 2015). If approved by the Parliament it will come into force on 8 February 2016.

8. The Order should be considered in conjunction with the draft Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2016, which is outlined below.

9. In considering the instrument, the Committee asked the Scottish Government to explain the policy intention regarding the inclusion of offences under section 67(2) and (3) (offences under Part III) of the Medicines Act 1968, as listed at paragraph 75 of Schedule 8B to the Police Act 1997 (inserted by the Order). The Committee also sought clarification on the inclusion of paragraph 19(3) of Schedule 2 the Civic Government (Scotland) Act 1982, at paragraph 81(c) of Schedule 8B to the Police Act 1997. The correspondence is reproduced at Annexe A.

10. Regarding paragraph 75, the Scottish Government explained the policy intention that a conviction should be disclosed (in accordance with the rules applying to convictions for offences listed in Schedule 8B to the Police Act 1997) where it is for an offence under either section 67(2) or section 67(3) of the Medicines Act 1968.
11. The entry at paragraph 75 of Schedule 8B lists “An offence under section 67(2) and (3) (offences under Part III) of the Medicines Act 1968”. In the Scottish Government’s view, the word “and” in that paragraph should be construed disjunctively. The effect in the Scottish Government’s view is that a conviction for an offence under section 67(2) of the 1968 Act requires to be disclosed in accordance with the rules, as does a conviction for an offence under section 67(3) of that Act.

12. The Committee considers however that the drafting of the paragraph is liable to give rise to confusion for lay readers of the instrument. Giving the words in paragraph 75 their ordinary meaning, the paragraph appears to require disclosure of a conviction only where it is a conviction for an offence under both section 67(2) and 67(3). The Committee accepts the Scottish Government’s contention that, in light of the terms of section 67(2) and (3), it is not possible for an offence under one subsection to constitute an offence under the other section. However the ordinary meaning of the words “an offence under section x and y” is an offence which is an offence under both sections x and y. Accordingly the Committee considers that the meaning of the provision could be clearer.

13. The Committee is not persuaded by the Scottish Government’s suggestion that the word ‘and’ is used at the end of the list of offences in many of the other subparagraphs of Schedule 8A and 8B “and therefore its use in paragraph 75 is not inconsistent with the approach taken elsewhere throughout Schedules 8A and 8B”. The word ‘and’ does appear at the end of the lists of offences in other subparagraphs throughout the Schedules, but only where the provision is expressed in the following way:

“An offence under any of the following provisions of the relevant Act: (a) […] (b) […] and (c) […].”

14. Had paragraph 75 been expressed in that way (i.e. as “An offence under any of the following provisions of the Medicines Act 1968: (a) section 67(2), and (b) section 67(3)”), no issues of clarity or risk of confusion to the reader would, in the Committee’s view, have arisen.

15. Regarding paragraph 81(c) of Schedule 8B, the Scottish Government confirmed that its policy intention in making the second remedial Order was to delete the entry for an offence under paragraph 19(3) of Schedule 2 to the Civic Government (Scotland) Act 1982. However the entry remains listed at paragraph 81(c) of Schedule 8B, and accordingly convictions for offences under the provision are ostensibly required to be disclosed subject to rules. The Scottish Government regrets that the change to the order was not made as intended.

16. Insofar as the effect of the entry is concerned, the Committee notes that paragraph 19(3) does not contain any offence, but rather provides the maximum penalty for offences under paragraph 19(1) and (2) of Schedule 2 to the Civic Government (Scotland) Act 1982. Accordingly no person can ever be convicted of
an offence under section 19(3), and therefore no such offence could be included on a person’s criminal record.

17. The Committee considers however that the inclusion of the entry is liable to give rise to confusion for lay readers of the instrument. A lay reader is likely to assume that the provision is intended to have some effect, and attempting to give it effect may lead to unforeseen consequences. As such the Committee considers that the meaning of paragraph 81(c) is insufficiently clear.

18. Finally, the Committee notes that the Scottish Government has undertaken to delete paragraph 81(c) at the next available opportunity.

19. The Committee accordingly draws the instrument to the Parliament’s attention under ground (h) in respect that:

(a) The meaning of paragraph 75 of Schedule 8B to the Police Act 1997, as inserted by article 3(8) of the order, could be clearer.

Schedule 8B lists offences which require to be disclosed in response to an application for higher level disclosure, subject to rules contained in the Police Act 1997 as amended by the order. Paragraph 75 of that Schedule lists “An offence under section 67(2) and (3) of the Medicines Act 1968” as such an offence.

The policy intention indicated by the Scottish Government is to list any offence committed under section 67(2) and, separately, any offence committed under section 67(3).

Giving the words in paragraph 75 their ordinary meaning however, the paragraph appears only to list an offence where it is an offence under both section 67(2) and section 67(3). Given the terms of section 67(2) and (3), the Committee accepts it is not possible for an offence under one subsection to constitute an offence under the other subsection. However in the Committee’s view the wording gives rise to a risk of confusion for lay readers of the instrument. The Committee accordingly considers that the effect of paragraph 75 is insufficiently clear.

(b) The meaning of paragraph 81(c) of Schedule 8B to the Police Act 1997, as inserted by article 3(8) of the order, could be clearer. The policy intention as indicated by the Scottish Government was to delete paragraph 81(c) as it does not contain any offence. The continued inclusion of the paragraph in Schedule 8B gives rise to a risk of confusion for lay readers of the instrument. The Committee accordingly considers that the effect of paragraph 81(c) is insufficiently clear.
Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Amendment Order 2016 [draft] (Education and Culture)

20. The purpose of the instrument (‘the draft order’) is to amend the offence lists in Schedules A1 and B1 to the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013, (“the 2013 Order”), as inserted by the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2015, (“the 2015 Order”). The Committee considered the 2015 Order in September 2015.

21. The amendments are necessary because of changes being made to the offence lists in Schedules 8A and 8B of the Police Act 1997, as inserted by the Police Act 1997 and Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2015. The reason why the draft order is necessary is to ensure there is consistency between the offence lists associated with self-disclosure, (Schedules A1 and B1 of the 2013 Order), and the offence lists associated with state disclosure by Disclosure Scotland, (Schedules 8A and 8B of the Police Act 1997).

22. Therefore, the draft order should be considered alongside the changes being made by the Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No 2.) Order 2015 (“the second remedial Order”) above.

23. The draft order is subject to the affirmative procedure. If approved by the Parliament, it will come into force on 8 February 2016.

24. In considering the instrument, the Committee asked the Scottish Government (as for the second remedial Order above) to explain the policy intention regarding the inclusion of offences under section 67(2) and (3) (offences under Part III) of the Medicines Act 1968, as listed at paragraph 75 of Schedule B1 to the 2013 Order. The Committee also sought clarification on the inclusion of paragraph 19(3) of Schedule 2 the Civic Government (Scotland) Act 1982, at paragraph 81(c) of Schedule B1 to the 2013 Order. The correspondence is reproduced at Annexe B.

25. The Scottish Government’s responses to the questions asked are in the same terms as for the second remedial Order. The Committee accordingly reaches the same conclusions as it reached in relation to the second remedial Order, and reports in the same terms.

26. The Committee accordingly draws the instrument to the Parliament’s attention under ground (h) in respect that:

(a) The meaning of paragraph 75 of Schedule B1 to the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 (“the 2013 Order”), as substituted by article 5 of the draft order, could be clearer.
Schedule B1 lists offences which require to be disclosed, subject to rules contained in the 2013 order. Paragraph 75 of that Schedule lists “An offence under section 67(2) and (3) of the Medicines Act 1968” as such an offence.

The policy intention indicated by the Scottish Government is to list any offence committed under section 67(2) and, separately, any offence committed under section 67(3).

Giving the words in paragraph 75 their ordinary meaning however, the paragraph appears only to list an offence where it is an offence under both section 67(2) and section 67(3). Given the terms of section 67(2) and (3), the Committee accepts it is not possible for an offence under one subsection to constitute an offence under the other subsection. However in the Committee’s view the wording gives rise to a risk of confusion for lay readers of the instrument. The Committee accordingly considers that the effect of paragraph 75 is insufficiently clear.

(b) The meaning of paragraph 81(c) of Schedule B1 to the 2013 Order, as substituted by article 5 of the draft order, could be clearer. The policy intention as indicated by the Scottish Government was to delete paragraph 81(c) as it does not contain any offence. The continued inclusion of the paragraph in Schedule B1 gives rise to a risk of confusion for lay readers of the instrument. The Committee accordingly considers that the effect of paragraph 81(c) is insufficiently clear.
Points raised: 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) (Justice)**

27. This Act of Sederunt amends the Rules of the Court of Session 1994 and various sheriff court rules, in consequence of the Sheriff Appeal Court taking up its civil jurisdiction and competence on 1st January 2016.

28. The various amendments mainly remove inconsistent appeal provisions from individual sets of rules, as the procedure in the new Sheriff Appeal Court will be regulated instead by the Act of Sederunt (Sheriff Appeal Court Rules) 2015. The Act of Sederunt (Expenses of Party Litigants) 1976 is also amended, to make provision about the expenses of party litigants in the Sheriff Appeal Court, in consequence of the Litigants in Person (Costs and Expenses) (Sheriff Appeal Court) Order 2015.

29. The Act of Sederunt (Contempt of Court in Civil Proceedings) 2011 is also amended, to extend the procedure for dealing with certain contempts of court to the Sheriff Appeal Court.

30. Paragraph 19 makes a number of amendments to the Act of Sederunt (Sheriff Appeal Court Rules) 2015. A point of defective drafting is corrected, which the Committee reported on in relation to that instrument. (The correction is made at paragraph 19(2)). Various minor points and “typos” are also corrected.

31. Paragraph 20 contains saving provisions, to preserve the existing law in respect of decisions of a sheriff made before 1st January 2016.

32. Generally the instrument comes into force on 1st January 2016. However paragraph 19 comes into force on 31st December 2015, to correct the errors in the Act of Sederunt (Sheriff Appeal Court) Rules 2015 before that instrument comes into force.

33. In considering the instrument, the Committee asked the Lord President’s Private Office to explain why one reference to the “sheriff principal” was retained. The Committee also queried the substitution of a new paragraph (10) into the Small Claim Rules 2002, given that there is no existing paragraph (10) of the relevant rule. The correspondence is reproduced at Annexe C. This disclosed a couple of drafting errors, which are explained below.
34. The Committee draws this instrument to the attention of the Parliament on the general reporting ground, as it contains two drafting errors.

35. Firstly, in paragraph 4(2)(a), which amends rule 72(3) of the Act of Sederunt (Proceedings in the Sheriff Court under the Debtors (Scotland) Act 1987) 1988, the reference to “sheriff principal” should have been omitted within rule 72(3)(b).

36. Secondly, paragraph 12(3)(a)(iv) substitutes a new paragraph (10) of rule 23.1 (appeals) of the Small Claim Rules 2002. This provision should have substituted a new paragraph (9).

37. The Lord President’s Private Office has confirmed that those provisions will be corrected within a further instrument, to be laid in due course.
No points raised

38. At its meeting on 12 January 2016, the Committee considered the following instruments. The Committee determined that it did not need to draw the attention of the Parliament to any of the instruments on any grounds within its remit:

**Economy, Energy and Tourism**

Bankruptcy and Debt Advice (Scotland) Act 2014 (Consequential Provisions) Order 2016 [draft].

**Health and Sport**

Scottish Public Services Ombudsman Act 2002 Amendment Order 2016 [draft];

Public Bodies (Joint Working) (Integration Joint Boards and Integration Joint Monitoring Committees) (Scotland) Amendment (No. 2) Order 2015 (SSI 2015/432);


**Infrastructure and Capital Investment**

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

**Justice**

Advice and Assistance and Civil Legal Aid (Financial Conditions and Contributions) (Scotland) Amendment Regulations 2016 [draft];

Management of Offenders etc. (Scotland) Act 2005 (Specification of Persons) Amendment Order 2015 (SSI 2015/431);

Management of Offenders etc. (Scotland) Act 2005 (Commencement No. 8) Order 2015 (SSI 2015/429 (C.27));

Act of Adjournal (Criminal Procedure Rules Amendment No. 6) (Special Measures in the Justice of the Peace Court) 2015 (SSI 2015/443).

**Rural Affairs, Climate Change and Environment**

Water Environment (Amendment of Part IIA of the Environmental Protection Act 1990: Contaminated Land) (Scotland) Regulations 2016 [draft];
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);


**Welfare Reform**

Welfare Funds (Scotland) Regulations 2016 [draft].
Observations

Management of Offenders etc. (Scotland) Act 2005 (Specification of Persons) Amendment Order 2015 (SSI 2015/431) (Justice)

Management of Offenders etc. (Scotland) Act 2005 (Commencement No. 8) Order 2015 (SSI 2015/429 (C.27)) (Justice)

40. Section 10 of the Management of Offenders etc. (Scotland) Act 2005 ("the 2005 Act") requires the police, local authorities, health boards and the Scottish Prison Service as the "responsible authorities" to establish multi-agency arrangements, to assess and manage the risk posed by certain categories of offender. Commencement of relevant provisions of the 2005 Act has already taken place in respect of registered sex offenders and mentally disordered restricted patients.

41. The Multi-Agency Public Protection Arrangements ("MAPPA") provide these arrangements through guidance issued by the Scottish Ministers under section 10(6) of the 2005 Act. MAPPA provides a framework for agencies to share information, jointly assess risk and apply resources proportionately, to manage the risk of serious harm posed to the public by relevant offenders.

42. The general purpose of the Management of Offenders etc. (Scotland) Act 2005 (Specification of Persons) Amendment Order 2015, together with the Management of Offenders etc. (Scotland) Act 2005 (Commencement No. 8) Order 2015, is to extend MAPPA beyond registered sex offenders and restricted patients, by providing the responsible authorities with the ability to include in the arrangements certain high risk offenders managed in the community, where they assess that a risk of serious harm to the public exists, which requires an active multi-agency response.

43. The Management of Offenders etc. (Scotland) Act 2005 (Specification of Persons) Amendment Order 2015 is subject to the negative procedure. The Management of Offenders etc. (Scotland) Act 2005 (Commencement No. 8) Order 2015 is laid, but not subject to further procedure. Both SSIs come into force on 31 March 2016.

44. The Committee notes that those Orders SSI 2015/429 and 431 replace the provisions of the Management of Offenders etc. (Scotland) Act 2005 (Commencement No. 8 and Consequential Provisions) Order 2015 (SSI 2015/397 (C. 49)). The Scottish Government confirmed to the Committee in relation to that Order that in its view it is of no legal effect, and undertook to lay the corrective instruments. The correspondence from the Scottish Government is reproduced in Annexe D.
45. The Scottish Government has confirmed with the National Archives that SSI 2015/397 will not be printed as a Scottish statutory instrument, and no longer appears on legislation.gov.uk.

46. The Committee notes that those steps have been taken in highly unusual circumstances, where the Scottish Ministers have publicised subsequent to the laying of an instrument which has been purportedly made by the Ministers that the entire instrument is of no legal effect, the Committee has also reported to the Parliament that there is doubt whether the instrument is intra vires, and the instrument has not been laid for approval by the Parliament. The Committee considers that the normal practice is to expressly revoke provisions, to remove them from the statute book.

47. While those steps have been taken with the intention of causing readers less confusion, it appears to the Committee that some confusion may still arise. For example, stakeholders with an interest in the instruments may read the Parliament’s official report of the consideration of SSI 2015/397, or may read legal resources beyond legislation.gov.uk which might possibly have retained a record of the instrument.

48. The Committee therefore encourages the Scottish Government to consider whether any further steps could usefully be taken to clarify the position to those with an interest in the provisions.

49. The Committee notes that SSI 2015/397 was laid before Parliament on 20 November 2015, by means of the submission of a copy of the instrument to the Chamber Office. The Committee invites the Standards Procedures and Public Appointments Committee to consider whether, if the circumstances of this instrument as outlined in paragraph 38 above were to arise again after laying, it would be useful to have any further parliamentary processes, and if so what these could be.


3 This instrument was discussed at the Delegated Powers and Law Reform Committee meetings on 8 December 2015 and 15 December 2015 and included in its 79th report. Delegated Powers and Law Reform Committee. 79th Report, 2015 (Session 4) *Subordinate Legislation* (SP Paper 849) is available at the following website: [http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/94751.aspx](http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/94751.aspx)
Annexe A

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.
Annexe B

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.
Annexe C

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.
Annexe D

Correspondence from the Scottish Government

On 30 December 2015 the Minister for Parliamentary Business wrote to the Convener as follows:


As agreed at the meeting of the Delegated Powers and Law Reform Committee on the 15th December 2015, I am writing in relation to the above instrument.

As explained to the Committee, the Management of Offenders etc. (Scotland) Act 2005 (“2005 Act”) applied affirmative procedure to consequential amendments of enactments both of primary and subordinate legislation. Ordinarily, for subordinate legislation, this would be subject to negative procedure and this is the procedure initially (and, in retrospect, erroneously) adopted when drafting the order in question.

The Order amended the Management of Offenders etc. (Scotland) Act 2005 (Specification of Persons) Order 2007 (“the 2007 Order”). When laid, the DPLRC legal advisers correctly questioned if the instrument had adopted the proper Parliamentary procedure. As it did not, the Scottish Government accept that the Order was ultra vires and has no legal effect.

The Scottish Government committed to the Committee to lay new instruments to commence the relevant provisions of the 2005 Act and to amend the 2007 Order - a Commencement Order (laid - no procedure) and an Order under other enabling powers (using negative procedure). These were made later on 15th December and, subject to parliamentary scrutiny, will come into force on 31st March 2016. This will keep the original date.

These are unusual circumstances, but for the reasons set out in evidence to the Committee and summarised here, we do not consider it necessary to revoke the original ultra vires Order since, on that basis, there is nothing to revoke. Although it was allocated a number, my officials have had confirmation from National Archives that this SSI has been removed, will not be printed and will not appear on legislation.gov.uk. As explained to the Committee, our view is that it would be potentially more confusing for readers to see a revocation order on the statute book (which might mistakenly be thought by users to revoke the corrective instruments that were made on 15 December).

The Scottish Government believes this represents the most satisfactory and pragmatic solution to this difficulty, in these circumstances. The properly enacted instruments are near identical in their legislative wording and will have the same legal effect and so,
from the users’ perspective, there is no risk of ambiguity, inconsistency or uncertainty. Crucially, the integrity of the final outcome remains intact.

I should stress though that these factors may not recur in relation to other instruments where doubts are expressed as to their vires. This is a bespoke solution, intended to address these unusual circumstances.

The Committee raised a concern regarding transparency and how the Scottish Government’s position could be placed on public record (to meet a concern that a reader of the Official Report might see reference to SSI 2015/397, and then not be able to locate the instrument). I undertook to write to you, explaining our view and proposed solution. I trust that this letter meets that concern.

For the reasons set out in this letter it was concluded that it made better practical sense to proceed in this way and I am happy to put our view of the position on the record.