

Age of Criminal Responsibility (Scotland) Bill

Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government in accordance with Rule 9.4A of the Parliament's Standing Orders, in relation to the Age of Criminal Responsibility (Scotland) Bill. It describes the purpose of each of the subordinate legislation provisions in the Bill and outlines the reasons for seeking the proposed powers. This memorandum should be read in conjunction with the Explanatory Notes and Policy Memorandum for the Bill.

2. The contents of the Memorandum are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament.

Outline of Bill provisions

3. The main purpose of the Bill is to raise the age of criminal responsibility (ACR) in Scotland from 8 to 12 to align it with the current age of criminal prosecution and reflect Scotland's commitment to further realisation of international human rights standards so that:

- Children are not stigmatised by being criminalised at a young age due to being labelled an "offender".
- Children are not treated disadvantaged by having convictions for the purposes of disclosure, which can affect them later in life.

4. In consequence of the change to the ACR, the Bill also provides for a number of measures to ensure that action can still be taken by the police and other authorities when children under the age of 12 are thought to have been involved in serious incidents of harmful behaviour. These measures include specific investigatory powers for the police; information about behaviour that occurred when a child was under the age of 12 being

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disclosed on an enhanced disclosure certificate or PVG scheme record following a review by an independent reviewer; provisions for victim information; and a right for a child to have access to children's advocacy services during a police interview conducted under a child interview order.

5. The Bill is arranged in 5 Parts. Part 1 changes the age of criminal responsibility to 12 and makes provision consequential on that. Part 2 deals with the consequence of that change on disclosure of conviction and other information in respect of the behaviour of children under the age of 12. Part 3 provides for the sharing of information with victims in respect of actions taken by the children's hearings system. Part 4 provides the police with limited powers to investigate seriously harmful behaviour by children under 12. There is provision for the police to question children and for support to be given to the child at interview. There are powers of search, including the taking of forensic samples. There is an emergency power for the police to take a child to a place of safety. Part 5 contains general and ancillary provision.

Rationale for subordinate legislation

6. Section 66(2) to (4) is the general provision on regulation-making powers. Section 66(2) to (4) makes provision as to whether the powers in the Bill are subject to the negative or affirmative procedure. Regulation 66(1) provides that each power of the Scottish Ministers to make regulations under the Bill includes a power to make different provision for different purposes, and to make any incidental supplementary consequential, transitional, transitory or saving provision which they consider appropriate. This ensures that each of the powers in the Bill can operate effectively as required.

7. In deciding whether provisions should be specified on the face of the Bill or delegated powers proposed to be exercisable by subordinate legislation, we have carefully considered the importance of each matter against the need to:

- achieve the appropriate balance between the importance of the issue and the need to provide flexibility to respond to changing and unforeseen circumstances quickly, in light of experience, without the need for primary legislation; and
- ensure the proper use of parliamentary time is made.

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8. The relevant provisions are described in detail below, For each provision, the memorandum sets out:

- The person upon whom the power to make subordinate legislation is conferred and the form in which the power is to be exercised;
- Why it is considered appropriate to delegate the power to subordinate legislation and the purpose of each such provision; and,
- The parliamentary procedure to which the exercise of the power to make subordinate legislation is to be subject, if any.

Delegated powers

Section 17 – Guidance

Power conferred on: the Scottish Ministers

Power exercisable by: guidance

Parliamentary procedure: none

Provision

9. Section 17(1) of the Bill requires Scottish Ministers to issue guidance to the independent reviewer about the exercise of the reviewer's functions and enables Scottish Ministers to issue revised guidance from time to time. Section 17(2) requires Scottish Ministers to consult the independent reviewer and such other persons Ministers consider appropriate before issuing guidance or revised guidance. Section 17(3) requires the independent reviewer to have regard to that guidance in exercising any of the reviewer's functions. More specifically, section 13(3)(b) of the Bill also requires the independent reviewer to have regard to that guidance when carrying out a review under section 13.

Reason for taking power

10. The guidance will be a resource to support the independent reviewer's operational functions. The statutory tests for the independent reviewer, and the terms of the determination to be made are set out in section 13 the Bill.

11. The guidance will discuss the factors that may be pertinent to the independent reviewer's functions and could be used to set out examples of

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how the independent reviewer might deal with particular circumstances. The level of detail that will be required in the guidance is beyond that which would normally be contained in primary legislation. Guidance provides a responsive and flexible way of supporting the independent reviewer, and to reflect evolving knowledge, research evidence and best practice as that emerges. It is considered that an operational resource that supports exercising those functions should not take up parliamentary time.

Choice of procedure

12. There is no parliamentary procedure.

Section 18– Regulation of procedure for review

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish
statutory instrument
Parliamentary procedure: negative

Provision

13. Section 6 of the Bill establishes an office of independent reviewer for the purpose of reviewing information which the chief constable of the Police Service of Scotland considers ought to be provided as ‘Other Relevant Information’ (“ORI”) to Scottish Ministers for inclusion on an enhanced disclosure or PVG scheme record. The independent reviewer’s main function is to review ORI that is about behaviour that occurred when the applicant for enhanced disclosure or PVG scheme record was under the age of 12. Section 18(1) enables the Scottish Ministers to make provision about the procedure for the review.

Reason for taking power

14. The power is being taken so that Scottish Ministers can make detailed provision about the review process. The regulations will deal with aspects such as timescales for the independent reviewer to handle cases, suspension of that period during the absence of the independent reviewer, for example, due to leave or illness. The regulations will also set timescales for third parties to respond to requests from the independent reviewer. It is considered appropriate that regulations be used to make

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such provision so that Ministers can respond promptly to any issues that arise in relation to case handling, than would be the case if a Bill opportunity had to be awaited. These procedures are new and may need to be amended from time to time as practice develops.

Choice of procedure

15. Regulations made under these provisions will be subject to the negative procedure. This is considered appropriate because of the nature of the provision. The regulations cannot be used to amend primary legislation and will relate to how the independent reviewer will operate, including timescales within which the independent reviewer will exercise their functions. It is therefore considered appropriate that the scrutiny offered by negative procedure achieves the best balance of parliamentary time and resource on the one hand, and the nature of the content of the regulations on the other.

Section 19– Modifications of the functions of the independent reviewer

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish
statutory instrument
Parliamentary procedure: affirmative

Provision

16. Section 19(1) of the Bill gives Scottish Ministers a power to modify the functions of the independent reviewer. Section 19(3) provides that such regulations may modify any enactment (including this Act) and may include transitional, transitory, or saving provision. Section 19(2) requires Scottish Ministers to consult before laying draft regulations.

Reason for taking power

17. The independent reviewer's main function is, as noted in paragraph 13 above, the review of ORI that is proposed to be disclosed in an enhanced disclosure or PVG scheme record. Part 2 of the Bill also confers other functions on the independent reviewer (for example, section 16

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imposes a duty to prepare an annual report). It is possible that with future developments in the disclosure system, the functions might require to be amended in future. If that is the case, Ministers would like to be able to respond promptly. Having a regulation-making power would enable them to do so.

Choice of procedure

18. These regulations will be subject to affirmative procedure. This is because any regulations made using this power could extend the functions of the independent reviewer. Therefore, it is appropriate, given the potential for expansion of the functions as set out in Part 2 of the Bill that any proposed expansion in the role should be considered by the Parliament.

Section 22 – Provision of information to victims

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

19. Section 22 of the Bill inserts new sections 179A – 179C into the Children’s Hearings (Scotland) Act 2011 (“the 2011 Act”) and repeals section 53 of the Criminal Justice (Scotland) Act 2003 (“the 2003 Act”). Section 53 of the 2003 Act conferred a power on the Principal Reporter to disclose information to a victim about the action taken by the Reporter in a case where it appears that an offence has been committed by a child. Sections 179A–179C replace section 53 and extend the power to disclose so that it covers the scenarios where, firstly, a child aged 12 and over appears to have committed an offence and, secondly, a child under the age of 12 has harmed another person by engaging in certain violent, sexual, dangerous, threatening or abusive behaviour.

20. The potential recipients of the information under section 53 of the 2003 Act are (1) the victim of the offence where committed by a child over 12 or the victim of the harmful behaviour where committed by a child under 12; (2) where the victim is a child, the relevant person in relation to that

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child; and (3) any other person or class of persons, subject to such conditions, as may be prescribed. The new section 179A(4) replicates this provision for the new disclosure regime and similarly empowers Ministers to prescribe other persons or classes of person who may access information under section 179A (subject to such conditions as may be prescribed).

Reason for taking power

21. Taking this power provides Ministers with flexibility to continue to be able to specify other persons who may request information from the Reporter under new section 179A. It provides Ministers with the ability to react to changing circumstances to ensure that, at any time, only appropriate persons can access such information.

Choice of procedure

22. An order under section 53 of the 2003 Act, to specify additional persons who can access information, is subject to negative procedure. It is considered appropriate for regulations made under new section 179A(4)(d) to also be subject to the same procedure. This will achieve the best balance of parliamentary time and resource against the nature of the content of the regulations. It is also worth noting that the power in section 179A(4) does not enable Ministers to amend primary legislation.

Section 24 – Section 23: regulations

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: negative

Provision

23. Section 23 of the Bill authorises a police constable to take a child aged under 12 to a place of safety in cases where the child is behaving, or is likely to behave, in a way that is causing or risks causing significant harm to another person and the child's removal is necessary to protect any other person from such harm. Section 23(4) places time limits on this power. Section 24(1) enables Scottish Ministers to make further provision by

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regulation about a child taken to and kept in a place of safety under section 23.

Reasons for taking the power

24. As section 24(2) indicates, this power may be used to set out detailed matters such as who must be notified when a child is taken to a place of safety, what information is to be given to the child and other duties of constables. A similar power was taken at section 57 of the 2011 Act in respect of an equivalent place of safety power.

Choice of procedure

25. Negative procedure is considered to be appropriate in view of the detailed and procedural nature of the provision to be made under this power. The power at section 57 of the 2011 Act is also subject to negative procedure.

Section 25 – Search of child under 12 without warrant

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish
statutory instrument

Parliamentary procedure: affirmative

Provision

26. Section 25 applies existing statutory powers of search to a child under 12 – despite the fact that the child cannot commit, and therefore cannot be suspected of committing an offence – where the child's behaviour would, if he or she were over 12, constitute the offence to which the statutory power applies. Section 25(3) provides that references in existing search powers to persons being arrested, a search warrant being sought from a court, or persons committing an offence if they obstruct or do not comply do not apply to children under 12.

27. Section 25(4)(a) provides Scottish Ministers with a regulation-making power to exclude existing statutory search powers from the application of section 25. Section 25(4)(b) provides a power to modify the section 25(3)

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list of aspects of existing search powers that do not apply to children under 12.

Reason for taking power

28. Section 25(4)(a) gives the Scottish Ministers flexibility to disapply an existing statutory search power if it becomes clear from developing police practice that it is unnecessary or inappropriate for the police to have that power in respect of children under 12. The section 23(4)(b) power is taken in case an existing search power, one not yet identified, comes to light that contains provisions that should not be applied to children under 12 – the power would enable a description of those provisions to be added to the list in section 25(3).

Choice of procedure

29. These regulations will be subject to the affirmative procedure, which is considered to be an appropriate level of parliamentary scrutiny for provisions that would amend the position as set out in primary legislation.

Section 40 – Right to have advocacy worker present

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

30. Section 122(4) of the 2011 Act provides Scottish Ministers with a power to make regulations for or in connection with the provision of children’s advocacy services in relation to a child’s involvement in a children’s hearing. In particular, section 122(4) enables Scottish Ministers to make provision in relation to the qualifications to be held by persons providing children’s advocacy services, the training of such persons, and the payment of expenses, fees and allowances to such persons.

31. Section 40(10) of the Bill amends the definition of “children’s advocacy services” in section 122 of the 2011 Act so that those regulations

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can cover services of advice and assistance provided by advocacy workers in investigative interviews authorised by a child interview order (under section 34 of the Bill) as well as in children's hearings proceedings. The amendment made by section 40(9) of the Bill ensures that, as well as being able to provide for the qualifications that a person providing children's advocacy services must hold, the Regulations can make provision for the experience required of such persons (whether in the context of children's hearings proceedings or investigative interviews under the Bill).

Reason for taking power

32. Expanding the power in section 122 of the 2011 Act is necessary to ensure that the Regulations making provision for children's advocacy services can cover the new functions of providing support and assistance at investigative interviews conducted under child interview orders (provided by section 40 of the Bill).

33. The power allows Scottish Ministers to put in place operational requirements which will allow for the effective running of the services, and ensures necessary flexibility about who can provide them. It is expected that, subject to consultation, Scottish Ministers will use the power in section 122(4)(b) of the 2011 Act (as amended by section 40(9) of the Bill) to require that all advocacy workers providing advice and assistance at investigative interviews be legally qualified. It is considered helpful to expand that power to cover experience, as well as qualifications, since it could be desirable to ensure that advocacy workers have relevant experience of working with children.

34. Taking a power also ensures that the requirements can be quickly adapted to changing service requirements or new types of training or qualifications.

Choice of procedure

35. The regulation-making power in section 122 is subject to affirmative procedure (section 122(6) of the 2011 Act) as it allows for a more detailed level of parliamentary scrutiny which is considered appropriate for a provision of this nature. The Bill does not change the level of procedure in the 2011 Act.

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Section 46 – Guidance

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: none

Provision

36. Section 46 places a duty on the Scottish Ministers to issue guidance about applications for a child interview order (under section 32), the planning and conduct of interviews of children that are carried out under child interview orders, and the questioning of children in urgent cases (where there is a risk of loss of life) by virtue of section 44. Section 46(3) requires a person exercising functions to which the guidance relates to have regard to the guidance in doing so.

37. Section 46(2) provides for certain matters that the guidance may cover. Before the guidance is issued, or revised, Ministers must consult the Chief Constable and local authorities, along with any other people they consider appropriate.

Reason for taking power

38. It is considered helpful for Ministers to issue guidance to those conducting interviews of children under the Bill which can set out best practice, examples, case studies, and take into account a wide range of possible practical scenarios and circumstances. Guidance is considered appropriate in these circumstances, where the content is operational and practical in nature. The level of detail that is required in the guidance is beyond that which would normally be contained in primary legislation.

39. Best practice in interviews can vary greatly depending on the age, stage and circumstances of the child, and guidance provides the necessary flexibility in these circumstances. It also provides flexibility to allow the guidance to be updated regularly (e.g. to reflect developments in interviewing techniques, and updated research) – ensuring that it is a more responsive and valuable support to those conducting interviews and that the Parliament's time is not wasted on regular operational updates.

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40. The guidance is expected to follow similar principles to that of the existing national guidance for Joint Investigative Interviews (JIIs)¹ and will be prepared alongside a review of that guidance.

Choice of procedure

41. There is no parliamentary procedure.

Section 49 – Key definitions

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

42. Section 49(2) to (4) define the physical data and samples that may (subject to the necessary authorisation) be taken from a child under 12, or from an older child in relation to behaviour when the child was under 12, in order to investigate seriously harmful behaviour. Subsection (6) allows Ministers to modify these definitions by regulations.

Reason for taking power

43. Biometric technology is constantly developing, and these key definitions may have to be modified to take account of new methods of forensic sampling. Taking a power to amend the list of samples and physical data that may be taken ensures that the legislation can reflect the most up-to-date position.

Choice of procedure

¹ When the JII guidance is reissued, it will be placed on a statutory footing under section 4(2) of the Victims and Witnesses (Scotland) Act 2014. The current JII guidance, currently subject of review, can be found at:

<http://www.gov.scot/Resource/Doc/365398/0124263.pdf>

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44. Affirmative procedure is felt to be appropriate as regulations made under this power would amend key definitions in primary legislation.

Section 54– Taking of intimate samples

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: negative

Provision

45. Section 54(2) prescribes the people who may take an intimate sample from a child. Dental impressions may only be taken by a registered dentist, and other intimate samples may only be taken by a registered medical practitioner or healthcare professional. Section 54(2)(b)(iii) allows the Scottish Ministers to add to the list of those permitted to take intimate samples, specifying any skills, qualifications or experience they must have or other criteria they must meet. Section 54(3) includes a power for the Scottish Ministers to amend the definition of “registered health care professional” to include, in addition to registered nurses, a registered member of a health care profession designated for these purposes by the Scottish Ministers.

Reason for taking power

46. This power provides flexibility for the provisions to be adapted to take account of new types of forensic sampling and the emergence of new cohorts of professionals who may be suitably qualified to take those samples from children under 12.

Choice of procedure

47. Section 54 sets the scene by specifying the healthcare professionals, such as doctors, dentists and nurses, who may take intimate samples. This power provides the Scottish Ministers with flexibility at the margins to specify other skilled, qualified or experienced people who can perform this role. Negative procedure is considered to provide an appropriate balance between the nature and content of regulations that would be made under

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this power and the availability of parliamentary time and resource to scrutinise such regulations.

Section 55 – Destruction of prints and samples taken under section 52

Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative

Provision

48. Section 55 provides for any relevant physical data or relevant sample taken from a child as authorised by an order under section 52 of the Bill to be destroyed as soon as possible following either a decision not to pass information about the child to the Principal Reporter or, where information is so passed, the conclusion of proceedings (defined as when an event mentioned in section 55(4) or (6) of the Bill occurs) in so far as arising from that information. Section 55(9) enables Scottish Ministers to modify the list of events in section 55(6) which signify the conclusion of proceedings by the children's hearing.

Reason for taking power

49. The Scottish Government has made every effort to identify the appropriate ways in which the consideration of a child's behaviour by the children's hearings system can be said to have concluded for the purposes of destroying samples. However it cannot be guaranteed that all the relevant concluding events have been captured in section 55(6) and a power has therefore been taken to modify that subsection.

Choice of procedure

50. Affirmative procedure is felt to be appropriate here because the use of this power would result in a change to the position regarding destruction of forensic samples as set out in the Bill.

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Section 60 – Children’s legal aid for proceedings under this Part

Power conferred on: the Scottish Ministers
Power exercisable by: regulations made by Scottish statutory instrument
Parliamentary procedure: affirmative

Provision

51. Section 60(3) inserts section 28LB into the Legal Aid (Scotland) Act 1986 (“the 1986 Act”). Section 28LB contains a regulation-making power enabling the Scottish Ministers to modify Part 5A of the 1986 Act so as to provide for children’s legal aid to be available to a child and others in connection with proceedings before a sheriff and appeals from the sheriff under Part 4 of the Bill.

Reason for taking power

52. Many of the police investigatory powers in Part 4 have to be authorised by a sheriff, and children and their parents may be invited to make representations to the sheriff. It is possible to appeal the sheriff’s decision. This power enables the Scottish Government to make provision for children’s legal aid to be available in connection with these proceedings.

Choice of procedure

53. The regulations will be subject to affirmative procedure, consistent with the approach taken elsewhere in the 1986 Act in relation to powers to modify the availability of, and the eligibility criteria for, legal aid.

Section 67 – Ancillary provision

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Power conferred on: the Scottish Ministers

Power exercisable by: regulations made by Scottish statutory instrument

Parliamentary procedure: affirmative if amends primary legislation, otherwise negative

Provision

54. Section 67(1) of the Bill provides that the Scottish Ministers may by regulations make such incidental, supplementary, consequential, transitional, transitory or saving provision as they consider appropriate for the purposes of, or in consequence of, or for giving full effect to, any provision made by or under the Bill. Section 67(2) allows regulations under section 67(1) to modify any enactment, including this Bill.

Reason for taking power

55. As with any new body of law, this Bill may give rise to a need for a range of ancillary provisions. For example, consequential provision may be required to make necessary changes to related legislation. Without the power to make supplementary, incidental and consequential provision, it may be necessary to return to the Parliament, through subsequent primary legislation, to deal with technical, operational or implementation matters clearly within the scope and policy intentions of the original Bill.

56. That would not be an efficient use of resources by the Parliament or the Scottish Government. The power whilst potentially wide, is limited to the extent that it can only be used if the Scottish Ministers consider it appropriate to do so, for the purposes of, or in connection with, or for the purposes of giving full effect to any provision made by, or by virtue of, the Bill.

57. It is considered that the power is necessary for the above reasons, and consider that the power should extend to the modification of enactments.

Choice of procedure

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58. Section 66(3)(e) of the Bill provides that Regulations made under section 67 which modify an Act will be subject to the affirmative procedure. This is the appropriate procedure when making textual amendments to primary legislation. Section 66(2)(e) of the Bill provides that, in all other cases, Regulations made under section 67 are subject to the negative procedure. These procedures are typical for ancillary powers.

Section 68 – Commencement

Power conferred on: the Scottish Ministers

Power exercisable by: regulations

Parliamentary procedure: laid, no procedure

Provision

59. Section 68(2) enables the Scottish Ministers to commence the Bill by conferring a power on Ministers, by regulations, to bring the provisions of the Bill into force on such day as the Scottish Ministers appoint. Section 68(3) provides that such regulations may include transitional, transitory, or saving provision and make different provision for different purposes.

Reason for taking power

60. It is standard for Ministers to have powers over the commencement of Bills. It is considered appropriate for the substantive provisions of the Bill to be commenced at such time as the Scottish Ministers consider to be suitable.

61. Section 68(3)(a) is necessary to ensure that commencement regulations can also make provision for effective transitional arrangements when provisions of the Bill are brought into force. For example, it could be used to commence section 3 of the Bill (with the exception of paragraph (a)) for a limited period prior to new section 41 of the 1995 Act coming into force. This may be desirable as a transitional arrangement to facilitate effective early case management in preparation for the change in the age of criminal responsibility. It would ensure that referrals to a children's hearing on the offence ground in relation to pre-12 behaviour cease to be made in advance of the Bill coming into force so that, by the time the age of criminal responsibility is changed, there are no pending sheriff court

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proceedings which would require a sheriff to determine whether an offence ground applies to a child under 12.

62. Section 69(3)(b) is necessary to ensure provisions of the Bill can be commenced for different purposes. For example, it may be necessary to initially commence a provision only for the purpose of making Regulations.

Choice of procedure

63. As is usual for commencement regulations, the power is subject only to the default laying requirement under section 30 of the Interpretation and Legislation Reform (Scotland) Act 2010.

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