

Age of Criminal Responsibility (Scotland) Bill

[As Amended at Stage 2]

Supplementary Delegated Powers Memorandum

Introduction

1. This memorandum has been prepared by the Scottish Government to assist the Delegated Powers and Law Reform Committee in its consideration of the Age of Criminal Responsibility (Scotland) Bill. This memorandum describes provisions in the Bill conferring power to make subordinate legislation which were introduced, amended or removed from the Bill at Stage 2. The memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

2. The content of this memorandum does not form part of the Bill, are entirely the responsibility of the Scottish Government and have not been endorsed by the Scottish Parliament.

Delegated Powers

Section 4B(4) – Disclosure of information about convictions etc relating to a time when person under 12.

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations made by Scottish Statutory Instrument
Parliamentary procedure:	Affirmative

Provision

3. The policy intention is that no person should have to disclose any information about pre-12 behaviour unless the independent reviewer has determined that it should be disclosed. The Bill, as introduced, did not provide for this because the protections under the Rehabilitation of Offenders Act 1974 (“the 1974 Act”) only apply to “spent” convictions. Therefore a person with an “unspent” pre-12 conviction does not have the protections under that Act. Additionally, as we move forwards, pre-12 behaviour dealt with under the Bill will never be considered a “conviction” and so similar protections against self-disclosure are needed for this. Amendments agreed at Stage 2 remove pre-12 behaviour from the scope of 1974 Act altogether and create bespoke protections in the Bill. In the future, a broader range of pre-12 behaviour, including spent and unspent convictions accrued before the increase in the age of criminal responsibility, will be protected. New

section 4B provides definitions for ‘relevant behaviour’ and ‘circumstances ancillary to relevant behaviour’ to which those protections will apply. These definitions cover convictions which occurred before the age of criminal responsibility was raised and behaviour which took place after it was raised. They are important in setting out the extent of protection from the need to self-disclose relevant behaviour in the future. Subsection (4) makes provision for Scottish Ministers to modify those definitions by way of regulations.

Reason for taking power

4. This regulation making power has been taken to allow for the fine tuning of what might be included in the definition of relevant behaviour, should that be necessary in the future. Having a regulation-making power will allow a quicker response than would be the case if the ability to amend the meaning of ‘relevant behaviour’ had to rely on a future Bill.

Choice of procedure

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

Section 17 – Guidance

Power conferred on:	The Scottish Ministers
Power exercisable by:	Guidance
Parliamentary procedure:	None

Provision

6. Section 17 of the Bill provides that Scottish Ministers must 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 as 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.

7. New subsection (2A) makes it clear that this guidance may not relate to a specific review being or to be carried out by the independent reviewer or the way in which the independent reviewer is carrying out (or is to carry

out) a specific review, with the effect that it makes it clear that this guidance cannot be used to direct the reviewer in any particular case.

Reason for taking power

8. New subsection (2A) makes it clear that the guidance which Scottish Ministers issue under section 17 cannot be used to influence any particular determination under section 13(4) and that Ministers may not use the guidance to direct the independent reviewer in the making of the determination in a particular case. This helps to address feedback from stakeholders to clarify the independence of the independent reviewer and limit the extent of Scottish Ministers' powers.

Choice of procedure

9. There is no parliamentary procedure.

Section 40 – Right to have advocacy worker present

Power conferred on: The Scottish Ministers
Power exercisable by: Regulations made by Scottish Statutory Instrument under section 122 of the Children's Hearings (Scotland) Act 2011
Parliamentary procedure: Affirmative

Provision

10. Section 40 has been amended primarily as a consequence of new section 31A which has been inserted to provide for (a) an investigative interview to take place with both the child and a parent subject to detailed conditions and (b) the withdrawal of agreement by either of the child or parent. The section has also been amended to widen the advocacy worker's discretion to question the conduct of any investigative interview, whether conducted by agreement or under a court order. Subsection (11)(a)(ii), which inserts a new subsection (7)(b) into section 122 of the Children's Hearings (Scotland) Act 2011, was also amended to include reference to section 31A.

Reason for taking power

11. No additional subordinate legislation making power is being taken but, as an advocacy worker under the Bill will be a person who provides children's advocacy services under section 122 of the 2011 Act, changes to the functions of advocacy workers flow through into the regulation-making power in section 122(4) of that Act.

This document relates to the Health and Care (Staffing) (Scotland) Bill as amended at Stage 2 (SP Bill 31A)

Choice of procedure

12. Regulations under section 122(4) are subject to the affirmative procedure.

Section 46 - Guidance

Power conferred on:	The Scottish Ministers
Power exercisable by:	Guidance
Parliamentary procedure:	None

Provision

13. Section 46 has been amended as a consequence of new section 31A and ensures the guidance to be issued by the Scottish Ministers will cover investigative interviews by agreement.

Reason for taking power

14. Section 46 already places a duty on the Scottish Ministers to issue guidance about applications for a child interview order including the planning and conduct of interviews. It is important that this guidance also covers the circumstances under which a child and his/her parent can give their consent and the procedure for obtaining such consent.

Choice of procedure

15. There is no parliamentary procedure.

Section 67 – Ancillary provision

Power conferred on:	The Scottish Ministers
Power exercisable by:	Regulations made by Scottish Statutory Instrument
Parliamentary procedure:	Affirmative, if textually amending primary legislation; otherwise negative

Provision

16. Section 67 has been amended to expand the regulation-making power in subsection (1) so that the Scottish Ministers may use the power to give full effect to the Bill or any provision made under it.

Reason for taking power

17. Including provision allowing ancillary provision to be made by regulations where Ministers consider it appropriate for giving full effect to an Act or any provision made under it is standard in sections such as this but was omitted from section 67 in the Bill as introduced. It was inserted by

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amendment so that the power in this section is the same as that in other Acts.

Choice of procedure

18. Regulations under this section are subject to the affirmative procedure (if they textually modify primary legislation – see section 66(3)(e)) or to the negative procedure (if they don't – see section 66(2)(e)).

This document relates to the Age of Criminal Responsibility (Scotland) Bill as amended at Stage 2 (SP Bill 29A)

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