

Equalities, Human Rights and Civil Justice Committee

12th Meeting, 2021 (Session 6), Tuesday 14 December 2021

Subordinate legislation

Note by the clerk

Purpose of the paper

1. This paper invites the Committee to consider the following negative instruments:
 - [The Age of Criminal Responsibility \(Scotland\) Act 2019 \(Supplementary Provision\) \(Jurisdiction\) Regulations 2021](#) (SSI 2021/420) [see page 3]
 - [The Age of Criminal Responsibility \(Scotland\) Act 2019 \(Places of Safety\) Regulations 2021](#) (SSI 2021/421) [see page 6]
2. **If the Committee agrees to report to the Parliament on the instruments, it is required to do so by 10 January 2022.**

Delegated Powers and Law Reform Committee Consideration

3. The Delegated Powers and Law Reform Committee (DPLR) considered both of the instruments at its meeting on [30 November 2021](#).
4. **The DPLR Committee agreed that it did not need to draw either of the instruments to the attention of the Parliament on any grounds within its remit.**

Procedure for negative instruments

5. Negative instruments are instruments that are “subject to annulment” by resolution of the Parliament for a period of 40 days after they are laid. This

means they become law unless they are annulled by the Parliament. The annulment process would require a motion to be agreed in the Chamber.

6. All negative instruments are considered by the Delegated Powers and Law Reform Committee (on various technical grounds) and by the relevant lead committee (on policy grounds).
7. Under Rule 10.4, any member (whether or not a member of the lead committee) may, within the 40-day period, lodge a motion for consideration by the lead committee recommending annulment of the instrument.
8. If the motion is agreed to by the lead committee, the Parliamentary Bureau must then lodge a motion to annul the instrument to be considered by the Parliament as a whole. If that motion is also agreed to, the Scottish Ministers must revoke the instrument.
9. If the Parliament resolves to annul an SSI then what has been done under authority of the instrument remains valid but it can have no further legal effect. Following a resolution to annul an SSI the Scottish Ministers (or other responsible authority) must revoke the SSI (make another SSI which removes the original SSI from the statute book). Ministers are not prevented from making another instrument in the same terms and seeking to persuade the Parliament that the second instrument should not be annulled.
10. Each negative instrument appears on the Equalities, Human Rights and Civil Justice Committee's agenda at the first opportunity after the Delegated Powers and Law Reform Committee has reported on it. This means that, if questions are asked or concerns raised, consideration of the instrument can usually be continued to a later meeting to allow the Committee to gather more information or to invite a Minister to give evidence on the instrument. Members should however note that, for scheduling reasons, it is not *always* possible to continue an instrument to the following week. For this reason, if any Member has significant concerns about a negative instrument, they are encouraged to make this known to the clerks in advance of the meeting.
11. In many cases, the Committee may be content simply to note the instrument and agree to make no recommendations on it.

Guidance on subordinate legislation

12. Further guidance on subordinate legislation is available on the Delegated Powers and Law Reform Committee's web page at:

<https://www.parliament.scot/chamber-and-committees/committees/current-and-previous-committees/session-6-delegated-powers-and-law-reform-committee>

13. The Committee is invited to consider the instruments.

Clerks to the Committee, December 2021

Policy Note

THE AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) ACT 2019 (SUPPLEMENTARY PROVISION) (JURISDICTION) REGULATIONS 2021

SSI 2021/420

The above instrument was made in exercise of the powers conferred by section 83 of the Age of Criminal Responsibility (Scotland) Act 2019 (“the Act”). The instrument is subject to negative procedure.

Purpose of the instrument

This instrument makes provision as to which court has jurisdiction to entertain applications for orders under Part 4 of the Act.

Background

The Act will raise the age of criminal responsibility in Scotland from eight to twelve years old. This will mean that children under twelve cannot commit an offence, and no child will have a criminal record because of any behaviour or act under that age.

The Act recognises that, in certain limited situations, it will be necessary to investigate an alleged harmful act carried out by a child under twelve years old. This will ensure that the right support can be put in place for the child who has carried out the act, and the victim. Part 4 of the Act provides Police Scotland with investigative and other powers so as to enable such investigations to take place, and requires Police Scotland to apply to the court for an order to carry out specific investigative actions in relation to a child under the age of criminal responsibility, as follows:

- A search of a child (section 36) (where there is no existing power of search without warrant- see section 33)
- An investigative interview of a child (section 44)
- To take prints and samples from a child (section 63)

Policy Objectives

The policy objective of this instrument is to establish jurisdiction to entertain applications for orders under sections 36, 44 and 63 of the Act, given that the Act itself does not contain specific provision on jurisdiction for these applications. This clarity on jurisdiction is necessary to enable applications for orders under the said sections of the Act to be heard without question as to the court’s competence to entertain these applications.

The instrument provides that applications for orders under sections 36, 44 and 63 of the Act can be made to a sheriff of the sheriffdom:

- Where the child is habitually resident, but only where the suspected behaviour of the child on which the application for the order is based took place in Scotland; or
- The sheriffdom where that behaviour is suspected to have taken place.

Consultation

The Scottish Government has worked closely with Police Scotland and the Scottish Courts and Tribunals Service (SCTS) on implementation of the Act through the establishment of a programme board, working groups, regular liaison and a collaborative approach to implementation tasks. On the particular subject matter of this instrument, the Scottish Government has ensured that colleagues in Police Scotland and SCTS were involved in discussions about the content of this instrument as it underwent development.

Impact Assessments

The following impact assessments were published on the Scottish Government website for the Age of Criminal Responsibility (Scotland) Bill:

- Equality Impact Assessment - [Age of Criminal Responsibility \(Scotland\) Bill: equality impact assessment - gov.scot \(www.gov.scot\)](#)
- Privacy Impact Assessment - [Age of Criminal Responsibility \(Scotland\) Bill: privacy impact assessment - gov.scot \(www.gov.scot\)](#)
- Children's Rights and Wellbeing Impact Assessment - [Age of Criminal Responsibility \(Scotland\) Bill: children's rights and wellbeing impact assessment - gov.scot \(www.gov.scot\)](#)

After careful consideration, the Scottish Government has concluded that further impact assessments are not required to accompany this instrument, for the following reasons:

- **Business and Regulatory Impact Assessment:** The Scottish Government considered that this instrument will result in little to no business or regulatory impact. It simply establishes a mechanism for determining the jurisdiction to entertain an application for a court order under the Act, with the Act itself containing the provisions that enable such orders to be made.
- **Children's Rights and Wellbeing Impact Assessment:** The Scottish Government notes that while the ability to obtain an order under the Act may affect a child under 12, the jurisdiction provisions in this instrument are likely to have only a nominal and very indirect impact on a child in that age group, in that they will determine the court where an application will be processed.

Given that the primary impact stems from the Act, the Scottish Government has concluded that this impact assessment is not needed. In line with usual practice, the Scottish Government is publishing the Stage 1 screening document for this impact assessment on its website.

- **Data Protection Impact Assessment:** Given that no new data processing requirements or new data processing mechanism will be required as a consequence of this instrument, the Scottish Government has concluded that this impact assessment is not needed.
- **Equality Impact Assessment, Fairer Scotland Duty Assessment and Island Communities Impact Assessment:** The Scottish Government considers that provisions establishing jurisdiction to entertain applications for court orders under the Act will not have a differential impact on island communities or based on any protected characteristic or socio-economic factors. Accordingly the Scottish Government has concluded that these impact assessments are not required for this instrument.
- **Strategic Environment Assessment:** The Scottish Government considers that the provisions on jurisdiction will have no or exceptionally minimal environmental effects, either directly or indirectly. These provisions enable a determination to be made as to the appropriate court to entertain an application for a court order under the Act, and that determination can be made on the basis of the facts of a particular case without the need to engage any decision-making process or mechanism with environmental implications.

Financial Effects

The Scottish Government has concluded that this instrument has nominal or no financial effects. Provisions on jurisdiction provide a mechanism for determining which court should entertain an application for an order under the Act: they are essentially a zero-financial impact decision making tool which involves no new mechanism or process to be put in place in order to deliver the policy that underpins the instrument.

Scottish Government
Safer Communities Directorate

November 2021

Policy Note

THE AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) ACT 2019 (PLACES OF SAFETY) REGULATIONS 2021

SSI 2021/421

The above instrument was made in exercise of the powers conferred by section 30(1) of the Age of Criminal Responsibility (Scotland) Act 2019 (“the Act”). The instrument is subject to the negative Parliamentary procedure.

Purpose of the instrument

The purpose of this instrument is to prescribe certain pieces of information to be recorded by Police Scotland when they make use of the power in section 28 of the Act to take a child to a place of safety in certain circumstances.

Background

The Act will raise the age of criminal responsibility in Scotland from eight to twelve years old. This will mean that children under twelve cannot commit an offence, and no child will have a criminal record because of any behaviour or act under that age.

The Act recognises that, in certain limited situations, it will be necessary for police to have the power to intervene to prevent a child under twelve from harming others. The Act does this by providing Police Scotland with the power to take certain actions when children under twelve are involved in exceptionally serious incidents. These measures will ensure that harmful acts remain capable of triggering an intervention.

Among the powers afforded to Police Scotland in the Act is the power under section 28, which enables a constable to take a child to a place of safety where they have reasonable grounds to believe the child is behaving or is likely to behave in a way that is causing or risks causing significant harm to another person.

In those circumstances, the constable may take the child to a place of safety and keep the child there for a short period (24 hours upper limit) if the constable is satisfied that it is necessary to do so to protect any other person from an immediate risk of significant harm or further such harm.

Policy Objectives

This instrument will prescribe particular types of information to be recorded by Police Scotland when they exercise their power to take a child to a place of safety under section 28 of the Act.

The policy objective of the instrument is to require Police Scotland to keep robust and comprehensive records when they use the section 28 power. This information can then be used for audit purposes and drawn on in the preparation of reports to be laid in the Scottish Parliament by the Scottish Ministers under section 32 of the Act.

With the sensitivity of the information to be collected by police pursuant to this instrument, the Scottish Government has considered the legal gateway that will permit Police Scotland to share information with Ministers so as to support the development of reports under section 32. Section 84 of the Police and Fire Reform (Scotland) Act 2012 ([Police and Fire Reform \(Scotland\) Act 2012 \(legislation.gov.uk\)](https://www.legislation.gov.uk/ukpga/2012/12/section/84)) contains provision which will enable the relevant information to be shared with the Scottish Ministers by Police Scotland. This is explored in further detail in the Data Protection Impact Assessment which is being published on the Scottish Government website to accompany this instrument.

Taking a child to a place of safety has immediate implications for the rights of that child and their wellbeing. There are also immediate implications for the safety and wellbeing of those around that child, given the criteria which must be met for the section 28 power to be engaged. This instrument will support accurate records of the use of the power being kept, facilitating accountability and upholding the principles of the Act.

This instrument will ensure that Police Scotland keep a record of the following factors relating to the use of the section 28 power (noting that all these factors may not require to be noted in each use of this power: the specifics of each use will determine the factors to be recorded):

- the nature and circumstances of the incident which has led to the section 28 power being used (regulation 2(a))
- the nature of the evidence that a constable considered when determining that the child was behaving or was likely to behave in a way that caused, or risked causing, significant harm to another person (regulation 2(b))
- the nature and location of each place of safety used (regulation 2(c))
- the dates and times at which the child arrived at each place of safety (regulation (2)(d))
- the dates and times at which the child left each place of safety, except where the place of safety was the home of a family member or friend of the child (regulation 2(e)). This exception reflects that, where the place of safety used was the home of a family member or friend, there will be limited or no ability to require that family member or friend to advise police of the date and time when the child left, and indeed it is possible (for instance where the child's own home is the place of safety used) that the child remains there long-term.
- if a child was kept in a place of safety which was a police station for any period, the reasons why it was not considered reasonably practicable to keep the child in another place of safety at the time in question (regulation 2(f))

- if the child was kept at any time in a cell in a police station,
 - the reasons why the child could not be kept elsewhere in the police station
 - the length of time the child was kept in the cell (regulation 2(g)).

Consultation

The Scottish Government consulted in 2016 on the minimum age of criminal responsibility. This consultation flowed from a Report to the Scottish Ministers of an Advisory Group on the minimum age of criminal responsibility ([The Report of the Advisory Group on the Minimum Age of Criminal Responsibility \(consult.gov.scot\)](#)). The Report recommended (see page 37) that a power similar to a Child Assessment Order be created to enable a child to be taken to a place of safety in exceptional circumstances.

The Scottish Government has published an analysis of the responses received to that consultation, which includes outcomes from engagement with children and young people ([Minimum age of criminal responsibility: consultation analysis - gov.scot \(www.gov.scot\)](#)). Page 6 of the analysis document sets out comments received in response to the question “*What safeguards should be put in place for children aged under 12 in relation to the use of these [police] powers [including the power to take a child to a place of safety]?*”

The Scottish Government has regularly engaged with Police Scotland on the implementation of the Act, including in relation to the power in section 28 to take a child to a place of safety. As part of this broader engagement, the Scottish Government has collaborated with Police Scotland on the development of this instrument to ensure that its terms are appropriate, deliverable, proportionate and underpinned by the principles of the Act.

Impact Assessments

The following impact assessments were published on the Scottish Government website for the Age of Criminal Responsibility (Scotland) Bill:

- Equality Impact Assessment - [Age of Criminal Responsibility \(Scotland\) Bill: equality impact assessment - gov.scot \(www.gov.scot\)](#)
- Privacy Impact Assessment - [Age of Criminal Responsibility \(Scotland\) Bill: privacy impact assessment - gov.scot \(www.gov.scot\)](#)
- Children’s Rights and Wellbeing Impact Assessment - [Age of Criminal Responsibility \(Scotland\) Bill: children's rights and wellbeing impact assessment - gov.scot \(www.gov.scot\)](#)

The following impact assessments have been completed as part of the development of this instrument. These will be published on the Scottish Government website:

- Business and Regulatory Impact Assessment
- Children's Rights and Wellbeing Impact Assessment
- Equality Impact Assessment
- Data Protection Impact Assessment

After careful consideration, we have concluded that there are no Fairer Scotland Duty, Island Community or Strategic Environment impact issues inherent to this instrument, for the following reasons:

- **Fairer Scotland Duty:** The aim of the Fairer Scotland Duty is to help the public sector make better policy decisions and deliver fairer outcomes. The duty focuses on socio-economic inequality issues such as low income, low wealth, and area deprivation. This is because the only legal and practical implications of this instrument are for Police Scotland in terms of recording certain pieces of information when they use the power in section 28 of the Act to take a child to a place of safety.
- **Islands Community:** The purpose of an Islands Community Impact assessment is to consider how a policy might impact on an islands community. As with the Fairer Scotland Duty, we consider that such issues do not arise, because the legal and practical implications of this instrument fall on Police Scotland only. We note Police Scotland will have representatives in island communities in Scotland, but the same obligations on officers under this instrument in terms of recording information will apply regardless of geographic location, and thus there is no differential impact.
- **Strategic Environment:** The aim of this impact assessment is to ensure that planners and policy makers consider the likely significant environmental effects of plans, programmes and strategies. Given that Police Scotland will be able to perform their obligations under this instrument with existing processes, systems and mechanisms we have concluded that there will be little or no impact on the environment.

Financial Effects

As stated above a Business and Regulatory Impact Assessment (BRIA) has been completed and is being published on the Scottish Government website. This BRIA explores the cost implications of placing police under a statutory obligation to record certain pieces of information when they use the power to take a child to a place of safety. The Scottish Government has concluded that this statutory obligation has only nominal financial implications for police.

Scottish Government
Safer Communities Directorate
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