

Equalities, Human Rights and Civil Justice Committee

3rd Meeting, 2021 (Session 6), Tuesday, 14 September 2021

Subordinate legislation

Note by the clerk

Purpose of the paper

1. This paper invites the Committee to consider the following negative instrument:
 - [The Age of Criminal Responsibility \(Scotland\) Act 2019 \(Register of Child Interview Rights Practitioners\) Regulations 2021](#) (SSI 2021/233) [see page 3];
2. **If the Committee agrees to report to the Parliament on the instrument, it is required to do so by 20 September 2021.**

Delegated Powers and Law Reform Committee Consideration

3. The Delegated Powers and Law Reform Committee considered the instrument at its meeting on [31 August 2021](#) and agreed to draw this instrument to the attention of the Parliament on general reporting grounds.
4. These Regulations make provision for the establishment and maintenance of a register of ‘child interview rights practitioners’ (“ChIRPs”) to provide children with advice, support and assistance in relation to their involvement in investigative interviews.
5. The Committee noted that regulation 3(6)(a) provides that a person who is included in the register must comply with the Child Interview Rights Practitioners’ Code of Practice published by the Scottish Government on 4 June 2021. Regulation 4 provides that the Scottish Ministers may remove a person from the register if at any point they consider that the person no longer meets, or is no longer able to meet, the requirements for inclusion in the register as mentioned in regulation 3 (i.e. including compliance with the Code of Practice).

6. Regulation 3(7) of the instrument requires that a ChIRP must, as soon as practicable, notify the Scottish Ministers in writing if they are no longer entitled to provide children's legal assistance, are barred from regulated work with children, or become a member of, or employed by, various bodies such as Children's Hearings Scotland and the Scottish Children's Reporter Administration.
7. By way of contrast, paragraph 17 of the Code of Practice states that a registered ChIRP must notify the Scottish Government in advance or, which failing, within no more than twenty working days (or longer if special reason for exceeding twenty days can be shown) of any changes to information or documentation relevant to that person's registration as a ChIRP.
8. The Committee's correspondence with the Scottish Government on these Regulations is listed in Annex B. Among other things, the Scottish Government's position is that the Code of Practice and the Regulations will have to be read alongside each other and that, in the event of any perceived inconsistency between the two, it is the Regulations which will take precedence.
9. The Committee considered that regulation 3(7) of the instrument, when compared against the mandatory requirements contained in paragraph 17 of the Code of Practice, appear to provide differing notification timescales and requirements for ChIRPs, yet both must be complied with.
- 10. The Committee draws the instrument to the attention of the Parliament under reporting ground (h) – that its meaning or form could be clearer – on the basis that the meaning of regulation 3(7) could be clearer when compared against the mandatory requirements contained in paragraph 17 of the Code of Practice. It also calls on the Scottish Government to clarify this apparent misalignment as soon as possible.**
11. The Committee also considered that there appeared to be an unusual or unexpected use of the enabling powers conferred by the parent statute. As noted above, regulation 3(6)(a) requires compliance with the ChIRP Code of Practice, which is not provided for in the Age of Criminal Responsibility (Scotland) Act 2019. It would be more usual and expected for the Parliament to be given the opportunity to scrutinise the Code of Practice where there is a requirement in law to comply with it.
- 12. The Committee therefore also brings the instrument to the attention of the Parliament under reporting ground (g) on the basis that it has been made by Scottish Ministers by what appears to be an unusual and unexpected use of the enabling power.**

Procedure for negative instruments

13. 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.

14. 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).
15. 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.
16. 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.
17. 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.
18. 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.
19. 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

20. 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>

21. **The Committee is invited to consider the instrument.**

Clerks to the Committee, September 2021

Policy Note

THE AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) ACT 2019 (CHILD INTERVIEW RIGHTS PRACTITIONERS) REGULATIONS 2021

SSI 2021/233

1. The above instrument was made in exercise of the powers conferred on the Scottish Ministers by section 56(3) of the Age of Criminal Responsibility (Scotland) Act 2019 (the 2019 Act) and all other powers enabling them to do so. The instrument is subject to the negative procedure.

Summary

Section 51 of the 2019 Act provides for a child who is involved in an investigative interview to be appointed a child interview rights practitioner (“ChIRP”). A ChIRP must be appointed whether the child is being interviewed under a child interview order which has been granted under section 44 or by agreement under section 40. The role of a ChIRP is to provide children with advice, support and assistance in relation to their involvement in such interviews.

Section 56(1) requires the Scottish Ministers to establish and maintain a register of child interview rights practitioners

These regulations are made under sections 56(3) and (4) and make provision in relation to the appointment to the register (including period of appointment) potential disqualification of ChIRPs), training of ChIRPs and fees (including expenses and allowances).

Policy Objectives

2. Prior to implementation of the 2019 Act, where a child aged eight or over was behaving in a way that was causing or risks causing significant harm to another person, a police constable was able to arrest the child on suspicion that the child had committed an offence. Once section 1 of the 2019 Act (which raises the age of criminal responsibility from 8 to 12) comes into force, this power will not be available in relation to eight to 11 year olds. This is because children in this age group will no longer be considered as able to commit an offence, and therefore the police will not be able to arrest them on suspicion of committing an offence.

3. The 2019 Act provides the police with specific powers to question children who (i) by behaving in a violent or dangerous way are suspected of causing (or risked causing) serious physical harm to another person, or (ii) by behaving in a sexually violent or sexually coercive way, are suspected of causing (or risked causing) harm (whether physical or not) to another person.

4. Section 51 of the Act, provides for a child who is involved in an investigative interview to have a ChIRP appointed to them. The ChIRP will provide the child with

advice, support and assistance in connection with, and during an investigative interview.

5. The regulations will apply when the behaviour being investigated relates to when a child was under 12 years of age, and will apply to children who are under 16 years of age or who are 16 or 17 years of age and are subject to a compulsory supervision order or an interim compulsory supervision order at the time of the interview. A constable must have reasonable grounds to suspect that the child (while under the age of 12) either:

(a) behaved in a violent or dangerous way which caused or risked causing serious physical harm to another person, or

(b) behaved in a sexually violent or sexually coercive way which caused or risked causing harm (whether physical or not) to another person.

6. The ChIRP must be a solicitor registered with the Scottish Legal Aid Board's Children's Legal Assistance Scheme, thereby drawing on the skills and knowledge of a solicitor required to be registered with that scheme. The role of the ChIRP is to provide '*advice, support and assistance*' to a child under the age of criminal responsibility (ACR) during an investigative interview.

7. The provision of "advice, support and assistance" includes the ChIRP:-

(a) helping the child to understand:-

- (i) the purpose of the interview,
- (ii) the child's rights in relation to the interview (including the child's right to refuse to answer questions), and
- (iii) what may happen as a result of the interview.

(b) making recommendations to the child about the exercise of the child's rights in relation to the interview.

(c) being present with the child in the room in which the interview is being conducted.

(d) communicating on the child's behalf with the person conducting the interview or otherwise supporting the child in communicating with that person.

(e) questioning whether the interview is being conducted:-

- (i) in accordance with any child interview order authorising the interview or otherwise fairly,
- (ii) in a way that treats the need to safeguard and promote the wellbeing of the child as a primary consideration.

8. Due to the age of the children involved, and the potential impact of the investigation on the life of the child (despite the investigative interview being non-criminal in nature), the role requires a legal qualification and a degree of specialism in working with young children in an age-appropriate manner, to ensure

that a child's rights and their interests are protected and promoted in the best way possible for that child. The ChIRP will not receive instructions from the child, but must ascertain and have regard to the views of the child, taking into account the child's age and maturity. The ChIRP has a duty under section 72 of the 2019 Act to treat the well-being of the child as a primary consideration.

9. The 2019 Act sets out that a ChIRP will be a solicitor enrolled in the roll of solicitors kept under section 7 of the Solicitors (Scotland) Act 1980 and will be drawn from the Children's Legal Assistance Scheme, which means - where appropriate - they may also represent the child at any subsequent children's hearing as a legal representative rather than a ChIRP. This recognises and respects the fundamental importance of relationships for young children navigating these processes.

Consultation

10. In developing the policy for ChIRPs, we have consulted and engaged with representatives of the legal profession in Scotland, including: the Scottish Legal Aid Board, Clan Childlaw, the Law Society of Scotland, Millard Law, the Child Law Centre, Livingstone Brown, the Faculty of Advocates, Keegan Smith, and McCarry's Solicitors. We have engaged with the Children's Legal Assistance Scheme peer review group, and have consulted with children and young people in relation to their expectations from ChIRPs.

11. Since the ChIRP role is new, feedback from children and young people has been more general in nature, focusing on the need for ChIRPs to demonstrate empathy, and be skilled in building rapport and trust, helping the child being interviewed to feel comfortable and reassured. We will continue to engage with children and young people as the policy is implemented, learning from their experience of investigative interviews.

12. We held a wider consultation exercise on the policy (1 December 2020-19 January 2021) and received responses from Police Scotland, COSLA, Social Work Scotland, Aberdeen City Council, Argyll & Bute Council, Dumfries & Galloway Council, City of Edinburgh Council, South Lanarkshire Council, West Lothian Council, Edinburgh Child Protection Committee, CELCIS, Scottish Courts and Tribunals Service, SCRA, Together Scotland, Victim Support Scotland.

Impact Assessments

13. An Equality Impact Assessment, a Privacy Impact Assessment, and a Children's Rights and Wellbeing Impact Assessment were completed in relation to the Bill for the Act. No impact issues were identified. The following links show the relevant documentation:

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

- Equalities Impact Assessment: [Age of Criminal Responsibility \(Scotland\) Bill: children's rights and wellbeing impact assessment - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/impact-assessments/childrens-rights-and-wellbeing-impact-assessment-2021-2022/pages/1-introduction.aspx)
- Privacy Impact Assessment: [Age of Criminal Responsibility \(Scotland\) Bill: privacy impact assessment - gov.scot \(www.gov.scot\)](https://www.gov.scot/publications/impact-assessments/childrens-rights-and-wellbeing-impact-assessment-2021-2022/pages/2-privacy-impact-assessment.aspx)

14. For the purpose of these regulations, screening exercises have been undertaken for Fairer Scotland Duty, Strategic Environmental, Equality and Children's Rights Impact Assessments, and have concluded that full impact assessments are not required.

15. Work is ongoing to establish whether an Island Communities Impact Assessment is required.

16. A Data Protection Impact Assessment has not been undertaken, as the original policy intention was for the register to be held and maintained on Ministers' behalf by an external organisation. However, the 2019 Act does not contain provision to allow that. Instead, the register will be held within the Youth Justice Unit of the Scottish Government. As specific individuals within the Unit will be acting as data controllers for the data collected as a result of establishing the register, an operational DPIA covering the collection and use of data will be required. Work on this is underway.

Financial Effects

17. The Minister for Children and Young People confirmed that a BRIA is unnecessary as the instrument has no financial effects on the Scottish Government, local government or on business.

18. The expected costs associated with ChIRPs were detailed in the Financial Memorandum to the Age of Criminal Responsibility (Scotland) Bill, introduced to the Scottish Parliament in March 2018: [SPBill29FMS052018.pdf \(parliament.scot\)](https://www.parliament.scot/parliamentary-publications/financial-memorandum-to-the-age-of-criminal-responsibility-scotland-bill-2018)

19. At the time of introduction, reference in the Bill was for advocacy workers; the nomenclature was changed at Stage 3 to child interview rights practitioners, with no change in policy intention).

Scottish Government
Children and Families Directorate

June 2021

Annex B

Correspondence with the Scottish Government on negative instruments

Age of Criminal Responsibility (Scotland) Act 2019 (Register of Child Interview Rights Practitioners) Regulations 2021 (SSI 2021/233)

The Scottish Government was asked:

(a) Regulation 2 (recruitment and selection of child interview rights practitioners) states that the Scottish Ministers may invite applications from, or nominate, potential child interview rights practitioners. Regulation 3 then outlines the criteria that will apply to this role. Please explain why it is considered appropriate that no provision is made for notification of the decision (c.f. regulation 4 – see below), and the reasons for such a decision, to be included or not be included in the register.

(b) Further, regulation 4(3) (removal from the register) provides “if the Scottish Ministers decide to remove a person from the register in accordance with paragraph (1) or (2), they must give the person notice in writing of that decision”. Please explain—

why it is considered appropriate that no provision is made requiring reasons to be provided with the notice.

Regulation 3(6) provides that a “person who is included in the register must comply with—(a) the Code of Practice, and (b) any condition of registration as notified in writing to that person by the Scottish Ministers”. Regulation 3(7) provides that “a person who is included in the register must, as soon as practicable, notify the Scottish Ministers in writing if they—(a) are no longer entitled to provide children’s legal assistance under section 28M of the Legal Aid (Scotland) Act 1986(b), (b) are barred from regulated work with children by virtue of the Protection of Vulnerable Groups (Scotland) Act 2007, or (c) become a person as described in paragraph (5)”.

The Code of Practice referred to in the Regulations* that ChIRP’s must comply with states at paragraph 17 “a registered ChIRP must notify the Scottish Government in advance or, which failing, within no more than twenty working days (or longer if special reason for exceeding twenty days can be shown) of any changes to information or documentation relevant to that person’s registration as a ChIRP”.

* We note the link at footnote (d) on page 2 appears to be broken.

Please explain whether and why it is considered that the Code of Practice and the Regulations are sufficiently clearly aligned in terms of time frames for notification of a change in information/circumstances in relation to the requirements in regulation 3(7)?

Please explain why it is considered that the 2019 Act confers vires to make the provision in regulation 3(6) requiring compliance with the Code of Practice (which does not appear to be provided for in the 2019 Act) where no such authorisation appears to be explicitly provided for in section 56.

Regulation 8(4) provides that the Scottish Ministers must establish and publish procedures for complaints in relation to- (a) the operation and management of the register, (b) persons included in the register in the performance of their functions. The enabling power in section 56(3) of the 2019 Act is for the Scottish Minister by regulations to make further provision in connection with the register and child interview rights practitioners.

Please explain whether and why it is considered that the provision in regulation 8(4) is sub-delegation of the power in section 56(3), whether this is authorised in that enabling power, and why it is considered the provision is within the scope of the enabling power.

Is any corrective action proposed, and if so, please confirm what action and when?

The Scottish Government responded:

(a) The Scottish Government agrees that giving notification of a decision is an essential component of the decision-making process: it is a natural consequence of making a decision that the person(s) affected by it should be notified. Whilst there is no general rule requiring that reasons should be given for all decisions, in most cases fairness requires that they should.

The intention of the Scottish Ministers is that management of the register will primarily be done administratively. Specific provision is not needed in the regulations to govern every detail of the processes to be followed. The fact that there is no express provision in the regulations for the notification of a decision not to include a person on the register, and the giving of reasons for that decision, does not preclude Ministers from doing so. Indeed, Ministers are mindful of their common law and statutory obligations such as those to act fairly and reasonably and in a manner which is compatible with Convention rights so far as engaged. The Scottish Government does not consider that the absence of an express power of this nature will cut across the need to act in accordance with those obligations – see, for example, *South Lanarkshire Council v McKenna* 2013 S.C. 212.

Additionally, the lack of express provision would not in itself preclude an individual from challenging the actions of the Scottish Ministers, if they had not been notified of a decision, or the reasons for it.

Accordingly, the Scottish Government does not consider it to be essential that the regulations contain such provision.

(b) For the same reasons, the Scottish Government does not consider it to be essential for regulation 4(3) to make express provision for the giving of reasons. Nevertheless, it was considered appropriate to include a requirement to notify in regulation 4(3) as it is essential that a person is made aware of any decision to remove them from the register, as it would have a direct bearing on their capacity to continue or take on work as a child interview rights practitioner. It will be necessary for the effective operation of the scheme that individuals who have been removed from the register are aware of this, so they know that they are no longer able to act.

The Scottish Government is mindful of its obligations to give reasons for a decision and fully intends to meet those obligations in its management of the register. This will particularly be the case given the importance of a decision to remove a person from the register. The lack of an express requirement to do so does not change that.

Paragraph 17 of the Code of Practice is a general requirement, which will place an obligation to notify the Scottish Government of a wide range of changes which may be relevant to a person's registration. For example, this could be a change in the firm at which a solicitor is employed or a change of contact details. The fact that the Code of Practice contains this general requirement does not mean that different requirements cannot be set out for different circumstances. Regulation 3(7) creates more stringent notification requirements in respect of specific changes in circumstances which have the potential to seriously affect the lawful, safe and appropriate delivery of child interview rights practitioners to children. As such, it was felt that these particular changes in circumstances merit separate notification requirements on the face of the regulations.

The Scottish Government's position is that the Code of Practice and the Regulations will have to be read alongside each other. In the event of any perceived inconsistency between the two, it is the Regulations which will take precedence.

The Scottish Government considers that the power in section 56(3) of the Act is sufficiently broad and inclusive to permit the provision in regulation 3(6), requiring compliance with the Code of Practice. This power allows the Scottish Ministers to make provision in connection with "the register (including the establishment and maintenance of the register)" and with "child interview rights practitioners...".

The Scottish Government is satisfied that this is sufficiently broad enough to enable provisions requiring compliance with a Code of Practice.

The Scottish Ministers have consulted on the Code of Practice and reference is made in the regulations to a specific version of that Code. It is therefore clear that, should the Scottish Ministers wish to update the Code of Practice, the Regulations would also require to be updated to reflect the most up to date version of that Code. The standards to be met by those on the register are therefore published and transparent and are sufficiently linked to the requirements as set out in the Regulations themselves.

The Scottish Ministers have an obligation under section 56(1) of the Act to establish and maintain a register of persons who are authorised to provide advice, support and

assistance to children in relation to their involvement in investigative interviews. As noted above, the power in section 56(3) to make further provision in connection with the register of child interview rights practitioners is sufficiently broad to include a general provision along the lines of regulation 8(4). This signposts the intention to establish, under administrative arrangements, procedures to deal with complaints. The power in section 56(3) does not prevent other things from being set up administratively. There is nothing specifically within that power that suggests an intention on the part of the Parliament that such procedures, or indeed the detail of them, would require to be set out in detail in the Regulations.

As discussed in relation to question 1 above, the Scottish Government is mindful of its wider obligations to act compatibly with administrative law. Appropriate complaints mechanisms in relation to the operation of the register, and those registered under it, will help ensure that members of the public, and those registered, have an understanding of how such the register will be managed and how complaints will be dealt with administratively. The Scottish Government does not consider that it is necessary, however, for detailed provisions to be set out in the Regulations or that regulation 8(4) amounts to unauthorised sub-delegation of the power in section 56(3) of the Act.

The Scottish Government is grateful to the Committee's legal advisers for raising these points but does not consider there to be any requirements for corrective action.