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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Age of Criminal Responsibility (Scotland) Bill: Stage 1



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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 the following (and any additional matter added under Rule 6.1.5A)—

- (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;
- (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.
- (i) any Consolidation Bill as defined in Rule 9.18.1 referred to it in accordance with Rule 9.18.3.



<http://www.parliament.scot/parliamentarybusiness/CurrentCommittees/delegated-powers-committee.aspx>



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Introduction

1. At its meetings on 15th May and 4th and 11th September, the Delegated Powers and Law Reform Committee considered the delegated powers in the Age of Criminal Responsibility (Scotland) Bill (“the Bill”).ⁱ The Committee submits this report to the lead Committee for the Bill (the Equalities and Human Rights Committee) under Rule 9.6.2 of Standing Orders.
2. The Bill was introduced by the Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney MSP, on 13th March 2018. The Scottish Government has produced a Delegated Powers Memorandum (“DPM”) on the delegated powers provisions in the Bill.ⁱⁱ

ⁱ The Bill as introduced is available [here](#).

ⁱⁱ The Delegated Powers Memorandum is available [here](#).

Bill overview

3. The Bill is divided into 5 Parts and 69 sections.
4. The main purpose of the Bill is to raise the minimum age of criminal responsibility ('MACR') in Scotland from 8 to 12, to align it with the current age of criminal prosecution. This is provided for in Part 1.
5. In consequence of the change to the MACR, the Bill also provides in Parts 2 to 4 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 disclosed on an enhanced disclosure certificate or Protection of Vulnerable Groups (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.
6. Part 5 of the Bill contains general and ancillary provisions

Consideration of the Bill

7. At its meeting on Tuesday 15th May, the Committee agreed to write to the Scottish Government to raise questions in relation to five of the delegated powers in the Bill. The Committee's questions, and the response received from the Scottish Government to them, are included in the Annex to this report.
8. The Committee reports as follows on the delegated powers in the Bill. The Committee is content with the remaining delegated powers.

Section 19– Modifications of the functions of the independent reviewer

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: Affirmative**

Provisions

9. Section 19(1) confers on 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.
10. Section 19(2) requires Ministers to consult such persons as they consider appropriate, before laying draft regulations.

Comments

11. The Committee notes that the reviewer's proposed functions follow upon the principal proposal to increase the MACR to age 12. Therefore, the independent reviewer has the main function set out in section 6 – to review information concerning behaviour of persons when under 12, before disclosure of such information in an enhanced disclosure certificate or a PVG scheme record.
12. The independent reviewer may also exercise other functions conferred by or under this Bill or other legislation, but the other functions specified in the Bill are incidental to those in section 6. The main incidental function is in section 16, which imposes a duty to prepare an annual report. The DPM contends that with future developments in the disclosure system, the independent reviewer's functions might require to be amended or expanded in future, and so this power gives flexibility.
13. The Committee sought an explanation of why is it considered appropriate that there should be a very broad power to modify the functions of the independent reviewer, and whether given that this power follows from the proposal to increase the MACR to age 12, this power could be drawn more narrowly.
14. The Scottish Government's response contends that this power does not require to be drawn more narrowly. As "the vires of this power will be considered within the

context of Part 2 of the Bill” (on disclosure of convictions and other information relating to time when a person is under 12), the Government claims that there will be some limitations on how the independent reviewer’s functions might be modified or enhanced (see the Annex).

Recommendations

15. **The Committee initially draws to the attention of the Equalities and Human Rights Committee that section 19(1) contains a general power to modify the functions of the independent reviewer. It appears that, in the absence of definition in the Bill, the power to “modify” functions falls to be construed in accordance with the definition in schedule 1 of the Interpretation and Legislative Reform (Scotland) Act 2010. Section 19(1) would therefore appear to enable the functions of the independent reviewer, as specified in Part 2 of the Bill, either to be amended or repealed by regulations.**
16. **The Committee also draws to the attention of the Equalities and Human Rights Committee that it is not normally the position that Acts of the Scottish Parliament which confer functions on an individual or body include a general power allowing for the modification or removal of the functions, without specified limits on the power. One example is section 4 of the Community Justice (Scotland) Act 2016, which allows regulations that add to or modify the functions of Community Justice Scotland, but only if the added or changed function relates to community justice.**
17. **The lead Committee might consider whether the power to amend or repeal the functions of the independent reviewer should be limited in some way, but what those limits should be appears to involve policy considerations.**

Section 67 – Ancillary provision

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: Affirmative if Regulations textually amend an Act, otherwise negative**

Provisions

18. Section 67(1) provides for ancillary powers to make incidental, supplementary, consequential, transitional, transitory or saving provisions for the purposes of the Bill.

Comments

19. The Committee noted at its meeting on 15th May that there is an omission from the wording, and further difference in wording, when this section is compared with the ancillary powers contained in other recent Bills considered by the Parliament.

20. The Committee noted that, in comparison with for example section 15 of the Historical Sexual Offences (Pardons and Disregards) (Scotland) Act 2018 and section 22 of the Islands (Scotland) Act 2018, the ancillary powers in section 67 have certain differences.
21. Reference to the power “to give full effect to” the Act is not included. Reference to “any provision made under” the Act is included. Section 67(2) does not include a power to make different provision for different purposes.
22. The Committee sought an explanation from the Scottish Government on these matters. The Government response undertakes to add the words “give full effect to” by amendment at Stage 2, so that the power is consistent with other ancillary provisions of this type. The other differences in the drafting were intentional for this Bill, and are further explained in the Government’s response (see the Annex).

Recommendation

23. **The Committee reports that the Scottish Government has undertaken to bring forward an amendment of section 67 at Stage 2, so that the drafting of the ancillary powers would be made consistent with other ancillary provisions of this type. The Committee will return to consider this section after Stage 2.**

Annex

Letter from the Scottish Government responding to the Committee's questions

Age of Criminal Responsibility (Scotland) Bill at Stage 1

The Delegated Powers and Law Reform Committee considered the above Bill on Tuesday 15 May and sought an explanation of the following matters. The Government responded as follows:

Section 17 – Guidance

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: guidance**
- **Parliamentary procedure: none**

Section 17 provides for the issue by the Scottish Ministers of guidance to the independent reviewer about the exercise of the reviewer's functions.

The Committee asks the Scottish Government to explain why there is no further provision in section 17 similar to that contained in section 28(4) of the current Planning (Scotland) Bill (as introduced). That subsection (4) provides that the issued guidance which is the subject of that section must be made publicly available by the Scottish Ministers.

The same question was asked in relation to section 46 so this answer covers both questions.

The question as to whether to publish guidance is a matter of policy for each Bill. What will be appropriate and necessary in one Bill may not be considered to be similarly needed in another Bill. There are a number of examples of recent Acts which make provision for guidance to be issued by the Scottish Ministers without a requirement that this guidance also be published (e.g. section 11 of the Islands (Scotland) Act 2018, section 44 of the Burial and Cremation (Scotland) Act 2016, and section 44 of the Land Reform (Scotland) Act 2016.

Unlike the guidance to be issued under section 28(1) of the Planning (Scotland) Bill, which will potentially be used by a wide range of people and organisations, the guidance under section 17 of the Age of Criminal Responsibility (Scotland) Bill will be issued only to the independent reviewer about the exercise of the reviewer's functions. We did not therefore consider it necessary for Scottish Ministers to be under a legal duty to publish the guidance given that it is guidance to the reviewer. However, it is the Scottish Government's intention that the guidance would be published as we believe there would be benefits in doing so.

Similarly, although the guidance on interviews provided for by section 46 is specifically for the use of the police and social work, it is the Scottish Government's intention that the guidance would be made available, in the same way that the existing guidance on Joint Investigative Interviews is publicly available.

Section 19 – Modifications of the functions of the independent reviewer

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: Affirmative**

The main function of the independent reviewer is stated in section 6 as, in short, to review information concerning behaviour of persons when under 12, before disclosure of such information in an enhanced disclosure certificate or a PVG scheme record. The reviewer's other functions stated in the Bill are incidental to that function.

The Committee asks the Scottish Government to explain:

(1) Why is it considered appropriate that there should be a very broad power to modify (including to enhance) the functions of the independent reviewer? Given that this power follows from the proposal to increase the minimum age of criminal responsibility to age 12, should this power be drawn more narrowly?

For example, could the power be drawn so as to permit the modification of functions provided that they relate to the review of information concerning behaviour of persons when they are under 12 years of age?

We do not consider that the power requires to be drawn more narrowly. The vires of this power will be considered within the context of Part 2 of the Bill.

While the independent reviewer's main function is set out in section 6, the Bill confers a number of other functions on the independent reviewer. Ministers do not wish to restrict the use of the section 19 power in the way suggested by the Committee as it may be considered necessary for the reviewer's functions other than the section 6 review function to be modified in the future.

(2) In what circumstances might the Scottish Government exercise the power to enhance the functions of the independent reviewer?

The Scottish Government considers that the section 19 power could be used to modify section 16, for example to place additional requirements on the independent reviewer in connection with the annual report. Another example could be adding the reviewer as a statutory consultee in other legislation regarding children or criminal justice.

Section 67 - Ancillary provision

- **Power conferred on: Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: affirmative if amends primary legislation, otherwise negative**

The Committee notes that, in comparison with for example with section 15 of the Historical Sexual Offences (Pardons and Disregards) (Scotland) Bill and section 22 of the Islands (Scotland) Bill currently being considered by the Parliament, the ancillary powers in section 67 have certain differences.

Reference to the power "to give full effect to" the Act is not included. Reference to "any provision made under" the Act is included. Section 67(2) does not include a power to make different provision for different purposes.

The Committee asks the Scottish Government to explain why the drafting is different in section 67, or whether it is intended that the drafting should be consistent with the ancillary powers provisions in those Bills.

Thank you for drawing our attention to the omission of "give full effect to" from section 67. It is the Scottish Government's intention to add these words by amendment at Stage 2 so that the power is consistent with other ancillary provisions of this type and to ensure the power provides Scottish Ministers with the necessary flexibility to give full effect to the Bill and provisions made under it. The other differences in the drafting of the ancillary provision are intentional and explained below.

Section 67 does not reference a power to make different provision for different purposes because this provision is instead made in section 66(1)(a) for all regulation-making powers in the Bill (apart from the commencement regulations under section 68). So separate provision for this in section 67 is unnecessary.

Reference to "any provision made under" the Act is an optional element of the standard ancillary provision section and is included so that, if need be, regulations under section 67 can make ancillary provision in connection with provision made by other regulations under the Bill. Recent examples of ancillary provisions that include this element can be found in section 25 of the Human Tissue (Authorisation) (Scotland) Bill (as introduced), section 73 of the Transport (Scotland) Bill (as introduced), section 25 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.

Section 25 - Search of child under 12 without warrant

- **Power conferred on: the Scottish Ministers**
- **Power exercisable by: Regulations**
- **Parliamentary procedure: Affirmative**

In relation to the power in subsection (4) of section 25, the Committee asks the Scottish Government to explain in what circumstances it could be necessary or appropriate to exercise this power to omit or modify provision in subparagraphs (a) to (c) of subsection (3), rather than adding further provision.

Section 25 seeks to preserve existing search powers that could currently apply to children under 12, so that the powers could still apply - with modifications - even though these children will no longer be capable of committing an offence. Statutory powers to search a person without a warrant are spread across a wide range of legislation, both Scottish and United Kingdom. While every effort was made during the Bill's development to identify the legislation that section 25 will apply to, it is possible that some seldom-used powers have not been identified, and so the modifications in subsection (3) may not necessarily be the appropriate modifications in all cases. This means that although the power to modify subsection (3) could take the form of adding further provision, as suggested by the Committee, it could also take the form of adjusting one of subsections (3)(a) to (3)(c) in relation to a specific search power. For example, if there were an existing provision that included a power of arrest, it might be better to modify that power so that the child could instead be taken to a place of safety for their own protection, rather than simply disapply

the power of arrest. This is why the power in section 25(4)(b) is a power to modify section 25(3), rather than simply to add to it.

Section 46 - Guidance

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

The Committee asks the Scottish Government to explain why it is considered appropriate that there is no further provision in section 46 similar to that in section 28(4) of the current Planning (Scotland) Bill (as introduced). That subsection (4) provides that the issued guidance which is the subject of that section must be made publicly available by the Scottish Ministers.

While the guidance on interviews provided for by section 46 is primarily for the use of the police and social work, the Bill does not limit who the guidance be issued to. It is the Scottish Government's intention that the guidance would be made publically available, in the same way that the existing guidance on Joint Investigative Interviews is publically available.

However, we do not think it is necessary for Ministers to be under a legal duty to do so - the approach of placing a general requirement on Ministers to issue guidance without separately requiring that guidance to be published is in line with other Scottish Parliament legislation and, most relevantly, the approach to guidance on Joint Investigate Interviews of children under s 7 of the Victims and Witnesses (Scotland) Act 2014. A legal duty to publish could be unduly onerous in some circumstances, e.g. where guidance is subject to very minor revisions.

