



T: 0131-244 4521
E: paul.beaton@gov.scot

Andrew Proudfoot
Clerk to the Delegated Powers and Law Reform
Committee
Room T1.01
Scottish Parliament

Your ref:
Our ref:
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Dear Andrew

AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) BILL AT STAGE 1

I am writing in response to your letter dated 16 May 2018 asking for more information regarding the above Bill. The Committee's questions are in bold.

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.

Yours sincerely



PAUL BEATON
Bill Team Leader

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.