

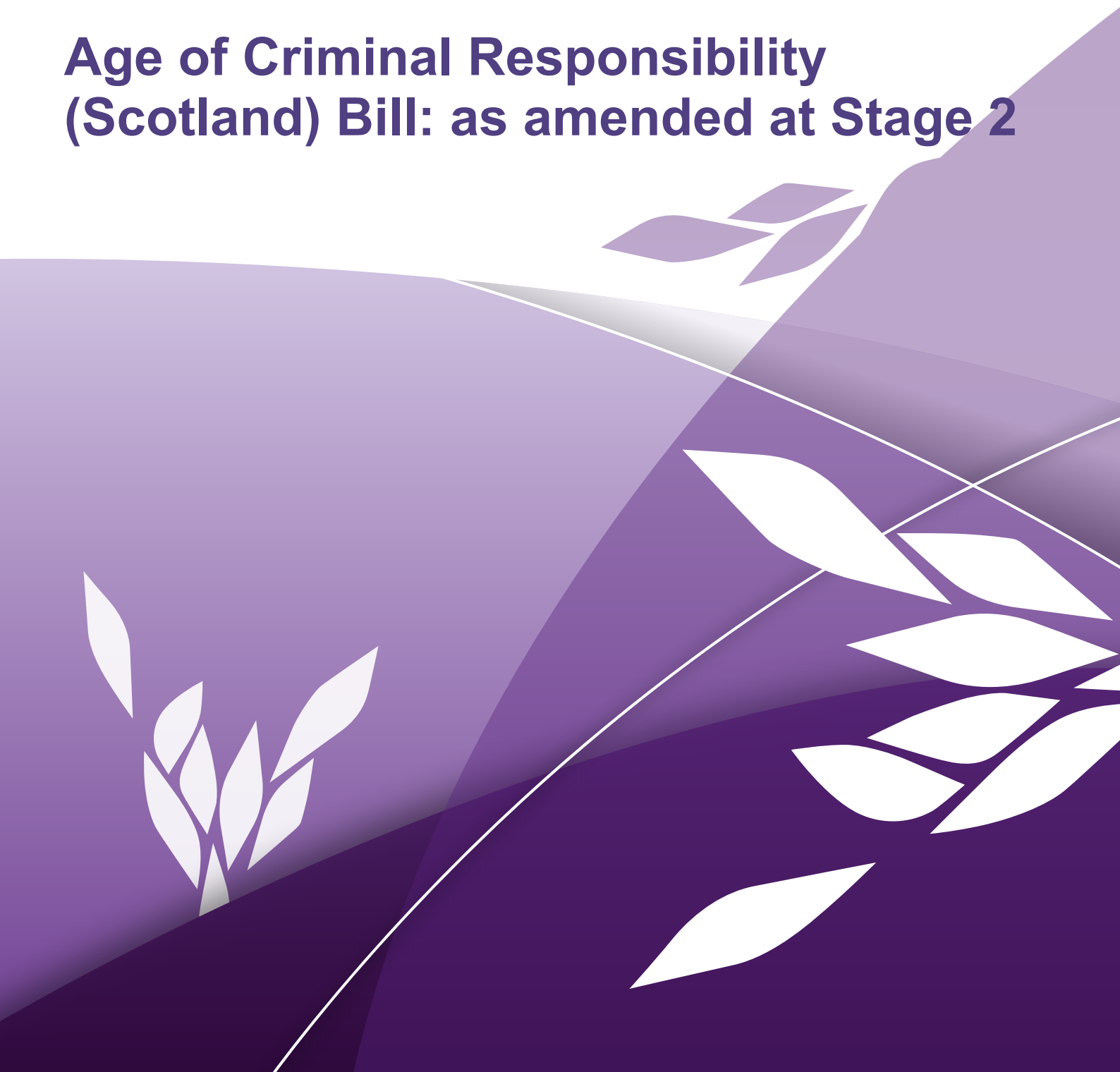


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Delegated Powers and Law Reform Committee Comataidh Cumhachdan Tiomnaichte is Ath-leasachadh Lagh

Age of Criminal Responsibility (Scotland) Bill: as amended at Stage 2



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Contents

Introduction and Background to the Bill	1
Bill Overview	2
Delegated Powers Provisions	3
Section 4B(4) – Disclosure of information about convictions etc. relating to time when person under 12	3
Annex	5

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 and Background to the Bill

1. At its meetings on 26 March and 23 April 2019, the Delegated Powers and Law Reform Committee considered the delegated powers provisions in the Age of Criminal Responsibility (Scotland) Bill (“the Bill”) as amended at Stage 2.ⁱ
2. The Committee submits this report to the Parliament under Rule 9.7.9 of the Standing Orders.
3. This Scottish Government Bill was introduced by the Deputy First Minister and Cabinet Secretary for Education and Skills, John Swinney MSP on 13 March 2018. The lead Committee is the Equalities and Human Rights Committee. The Delegated Powers and Law Reform Committee published its Stage 1 Report on the Bill on 11 September 2018.ⁱⁱ
4. The Bill completed Stage 2 on 7 February 2019 and some amendments were made to the Bill at Stage 2. The Government lodged a Supplementary Delegated Powers Memorandum (“SDPM”) after Stage 2.ⁱⁱⁱ The Committee reports on the delegated powers provisions in the Bill as amended as follows.

ⁱ The Bill as amended at Stage 2 is available [here](#).

ⁱⁱ 37th Report, 2018 (Session 5) available [here](#).

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

Bill Overview

5. 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.
6. In consequence of the change to the MACR in Part 1, 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 12 being disclosed on an enhanced disclosure certificate or Protection of Vulnerable Groups 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.

Delegated Powers Provisions

7. At its meeting on 26 March 2019, the Committee considered each of the delegated powers provisions in the Bill as amended at Stage 2.
8. At that meeting, the Committee agreed that it did not need to draw the Parliament's attention to the delegated powers in the following provisions-
 - Section 17 – Guidance
 - Section 40(11) – Right to have advocacy worker present
 - Section 46 - Guidance
 - Section 67 – Ancillary provision.
9. In addition, the Committee agreed to write to the Scottish Government with questions on section 4B(4) – Disclosure of information about convictions etc. relating to time when person under 12. The Scottish Government responded in writing on 9 April 2019. This correspondence is reproduced in the Annex to this Report.^{iv}

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

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

Provision

10. At Stage 2 new sections 4A to 4E have been added, to provide in general that convictions and other disposals in relation to the behaviour of a child when under 12 are not to be treated as convictions, for the purposes of the Rehabilitation of Offenders Act 1974 ("the 1974 Act"). The SDPM explains that 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.
11. The Stage 2 amendments have removed pre-12 behaviour from the scope of the 1974 Act provisions which relate to "spent" convictions, and created bespoke protections in the Bill. So 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.
12. The new section 4B provides definitions for "relevant behaviour" and "circumstances ancillary to relevant behaviour", to which those protections will

^{iv} The Committee's correspondence in relation to this Bill can be found [here](#).

apply. These definitions cover convictions occurring before the age of criminal responsibility would be raised, and behaviour taking place after it is raised. Subsection (4) contains the power to modify those definitions by way of regulations.

Committee Consideration

13. As detailed in the annexed correspondence, the Committee sought clarification from the Scottish Government in relation to the power in subsection (4) of section 4B to modify the meaning of “relevant behaviour” in subsection (1). The Government’s response confirms that it is intended that this power is to be used if a change is needed in the future to the matters which are listed in subsection (1)(a) or (b), or subsection (2)(a) or (b) of section 4B. Those are disposals and actions which may result from behaviour. It is not intended that the power should enable a change of the age of 12 as mentioned in the second line of section 4B(1), being the age when the behaviour occurred. The Government’s response contends that principles of statutory interpretation can be employed which limit the power in section 4B(4) to what is intended.
14. The power is expressly that the Scottish Ministers may, by regulations, modify the meaning in subsection (1) of “relevant behaviour”. The first line of the subsection defines behaviour as “relevant behaviour”, and that meaning may be modified, using the power. It appears therefore that the power is capable of being used in future to limit “behaviour” to certain types of behaviour, even though this does not appear to be the Government’s intention.
15. The Committee does not dispute the Government’s view that principles of statutory interpretation might be used to interpret the provision in the way the Government intends. However, it considers that the power could be made clearer, by expressly indicating what parts of the provision may be modified using the power, and not otherwise.

Recommendation

16. **The Committee considers therefore that the power in subsection (4) of section 4B could more clearly express that it is to be exercised to make a change to those disposals and actions which may result from behaviour, as listed in subsection (1)(a) or (b), or subsection (2)(a) or (b) of the section.**
17. **Accordingly, the Committee recommends that the Scottish Government consider this further, in advance of Stage 3 of the Bill.**

Annex

CORRESPONDENCE FROM THE SCOTTISH GOVERNMENT DATED 9 APRIL 2019

AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) BILL AS AMENDED AT STAGE 2

I am writing in response to your letter dated 26 March 2019 asking for more information regarding the above Bill. The Committee's questions are in bold.

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

Power conferred on: the Scottish Ministers

Power exercisable by: Regulations

Parliamentary procedure: Affirmative

In relation to the power in subsection (4) of section 4B to modify the meaning of “relevant behaviour” in subsection (1), the Committee asks:

(a) for clarification whether it is intended that this power would enable the modification of:

- **“behaviour”, presumably by limiting it to certain types of behaviour,**
- **the child’s age of 12 when the behaviour occurred, and**
- **the matters stated in paragraphs (a) and (b) of section 4B(1), which set out results of behaviour and actions arising from behaviour;**

(b) whether, if it is intended that the power should enable a change of the age of 12 and/or of any of those matters specified in paragraphs (a) and (b), this power could be more clearly expressed; and

(c) if the power to change the age of 12 is intended, why is this considered to be appropriate?

With regard to your points at (a), the power in subsection 4B(4) of the Age of Criminal Responsibility (Scotland) Bill is to be used to modify the meaning of “relevant behaviour” in subsection 4B(1) and those “circumstances ancillary to relevant behaviour” in subsection 4B(2).

Whilst an integral part of “relevant behaviour” is that the person is under the age of 12, what constitutes “relevant behaviour” is behaviour which resulted in those things which are mentioned in subsection (1)(a) or in relation to which the matters listed at subsection (1)(b) have occurred. With reference to subsection (1)(b) in particular, the outcomes listed can be taken forward only in relation to a person who is under the age of 12. The relevant age for the purposes of those outcomes is determined elsewhere in the Bill (e.g. section 23).

It is also relevant to say that section 4B(4) would be read in context. Section 4B is concerned with disclosure of information which relates to a time when a person was under the age of 12 and the Bill as a whole is concerned with raising the age of criminal

responsibility to 12. The principles of statutory interpretation will therefore limit the power at subsection 4B(4) to things which occurred when the person was under 12.

On your point (b), as explained above, the power is to be used should a change be needed in the future to the matters listed at 4B(1)(a) or (b) or 4B(2)(a) or (b). For the above reasons, we are content that the power is clearly expressed.

Finally, as it is not intended that the power should enable a change of the age of 12, the question at point (c) is not applicable.

