

The Age of Criminal Responsibility (Scotland) Act 2019 (Places of Safety) Regulations 2021

Business and Regulatory Impact Assessment

December 2021



Scottish Government
Riaghaltas na h-Alba
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Title of Proposal: Age of Criminal Responsibility (Scotland) Act 2019 (Places of Safety) Regulations 2021

Background

1. As part of the Scottish Government's commitment to protecting and promoting the rights and interests of children and young people, it took forward a Bill to raise the age of criminal responsibility from 8 to 12 years old in 2018. The Age of Criminal Responsibility (Scotland) Act 2019 ("the Act") was passed unanimously by the Scottish Parliament in May 2019.

2. Part 4 of the Act makes provision for a bespoke package of police investigatory and other powers where a child under the age of criminal responsibility commits a harmful act, including the power in section 28 for police to take a child to a place of safety in certain limited circumstances ("the section 28 power").

3. The purpose of this power is to enable a child to be removed from a situation so as to protect others from coming to significant harm due to that child's behaviour. Due to that high bar, the Scottish Government does not expect this power to be frequently used.

4. The UK Government is progressing in the UK Parliament an Order¹ under section 104 of the Scotland Act 1998 which will make the reserved and cross-border provisions required as a consequence of the Act. That Order provides that the powers in Part 4 of the Act and any regulations made under powers in that Part will apply to non-territorial forces in Scotland (British Transport Police, Civil Nuclear Constabulary and the Ministry of Defence Police). This means that these police forces will also be able to use the section 28 power, although in practice the Scottish Government understands that Police Scotland will take the lead in dealing with any relevant incident.

Objectives

5. The Age of Criminal Responsibility (Scotland) Act 2019 (Places of Safety) Regulations 2021 ("the Regulations") are made under powers in section 30 of the Act. They will prescribe specific pieces of information to be recorded by Police Scotland when they use the power in section 28 of the Act to take a child to a place of safety. This obligation will also apply to the non-territorial forces, although – as stated above – the Scottish Government does not expect this obligation to be engaged in practice.

¹ [The Age of Criminal Responsibility \(Scotland\) Act 2019 \(Consequential Provisions and Modifications\) Order 2021 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

6. In turn, the information recorded pursuant to the Regulations will support delivery of the obligation on the Scottish Ministers in section 32 of the Act to lay reports² to Parliament on the use of the section 28 power.

Rationale for Government intervention

7. While the Scottish Government anticipates the power being used only infrequently, we note the need to ensure accountability and an audit trail for the times it is used. The purpose of the Age of Criminal Responsibility (Scotland) Act 2019 (Places of Safety) Regulations 2021 (“the Regulations”) is to deliver those intentions.

8. This is consistent with the Scottish Government’s prioritisation of the rights of the child and the principles which underpin the Act itself, and is aligned to the following National Outcomes:

- Children and Young People: the section 28 power is at heart about safeguarding a child by ensuring that an appropriate mechanism is in place to remove that child from certain harmful situations
- Human Rights: the Act itself is informed by the principles of the United Nations Convention on the Rights of the Child. The section 28 power strikes a balance between the rights of a child and the need for safeguarding, with the Regulations providing a mechanism for accountability and an audit trail should the power be used.

Consultation

9. As part of its work developing both the Act and these Regulations, the Scottish Government has consulted both internal and external partners. The Scottish Government consulted in 2016 on the age of criminal responsibility in Scotland, and has published an analysis³ of responses and those responses⁴ where permission was given to publish. Within Government this work has involved close collaboration between the Safer Communities Directorate and the Children and Families Directorate.

10. Externally, the Scottish Government has also worked with Police Scotland and the non-territorial forces to develop the Regulations, reflecting that the statutory obligations it creates will fall to these organisations. This collaborative approach ensures that the obligations under the Regulations are deliverable at the same time while making certain that the policy intentions which underpin the Regulations and the Act can be met.

Options

² The Data Protection Impact Assessment prepared for the Regulations contains information about the legal gateway to support sharing of data recorded pursuant to these regulations with the Scottish Government for the purposes of these reports.

³ [Minimum age of criminal responsibility: consultation analysis - gov.scot \(www.gov.scot\)](http://www.gov.scot)

⁴ [Published responses for Consultation on the Minimum Age of Criminal Responsibility - Scottish Government - Citizen Space](#)

Option 1: no Regulations

11. The Scottish Government has considered not progressing Regulations under the powers in section 30 of the Act, instead leaving Police Scotland with the discretion to decide which pieces of information to record when using the section 28 power.

12. Given the benefits of accountability and consistency of audit trail for use of the section 28 power, the Scottish Government concluded that it would not be appropriate to take up this option. While Police Scotland have in place robust mechanisms for recording information, alongside guidance to support officers in use of the section 28 power, ultimately the Scottish Government concluded that the twin purposes of accountability and the creation of an audit trail would be better served by establishing certainty around recording requirements.

13. There would be few to no costs involved in this option, but the Scottish Government considers that the benefits of these potential savings are not offset by the loss of the scope for accountability and an audit trail for use of the section 28 power.

Option 2: the Regulations +

14. This option would involve Regulations being progressed that make provisions to the fullest extent possible permitted by the power in section 30 of the Act. On balance the Scottish Government considers that such an approach would not be proportionate and would place Police Scotland under obligations to record information that would not necessarily be needed in order to ensure accountability and an audit trail for use of the section 28 power.

15. The Scottish Government does however note the benefits of adherence to the principles that inform the regulation-making powers in section 30. It notes that Police Scotland will be able to put in place as needed guidance for officers that speaks to the subject matter of section 30(2)(a) and (b) (respectively, giving notice that the section 28 power has been used to a third party and a constable's duties to a child, including in relation to the provision of information).

16. This will ensure that the approach taken by Police Scotland on giving notice about the use of the section 28 power can be flexible and open to amendment based on real-world experience and the realities of how this can impact a child or another person. Provision in this area might in practice be limiting, and create barriers to ensuring that notice is provided to the relevant parties in a meaning, timely and sensitive way.

17. In terms of a constable's duties to a child, Police Scotland will be able to rapidly reflect in guidance any change in the legislative framework of human rights without the need for secondary legislation to be taken forward, reflecting their commitment to embedding rights into the heart of operational practice on the Act.

18. Furthermore, the Scottish Government notes that section 72 of the Act will require a constable who is exercising the section 28 power to treat the need to

safeguard and promote the wellbeing of the child as a primary consideration. It considers that this establishes a solid and robust legislative requirement for a constable to place wellbeing considerations at the core of the section 28 power.

19. In addition, the Scottish Government notes that Police Scotland are preparing a suite of child-friendly materials to be used when a police power under the Act is exercised, including the section 28 power. Prescribed requiring in this area could inhibit the ability to adapt or enhance those materials to meet changing needs.

20. On costs, the Scottish Government notes that existing systems and processes would for the most part be capable of use for the purposes of recording information under this option. Prescribing requirements for the notice to be given when the section 28 power was used would also involve costs in producing that notice, and in the event of a review that investment might not be realised should a change in materials be required.

Option 3: the proportionate Regulations

21. This option involves Regulations being taken forward which strike a balance between proportionality and accountability by making provision for information to be recorded only where it will contribute to accountability for the use of the power and to the creation of an audit trail, and where the information recorded will ultimately be that which supports the most meaningful reports to Parliament on the use of the section 28 powers.

22. The Scottish Government has concluded that this is the right option for the Regulations, noting the scope for Police Scotland guidance to cover points not touched on in the Regulations as set out in the paragraphs above. The Scottish Government further notes that section 78 of the Act requires the Scottish Ministers to review the operation of the Act with a view to considering the future age of criminal responsibility within three year of the Act fully commencing, and that such a review would present an opportunity to consider the operation of these Regulations and whether amendment was needed.

23. Costs to this option are limited, given the ability to rely on existing systems and processes to deliver the obligations under the Regulations. There are costs to Police Scotland to developing training and guidance on the Act generally, including in relation to the use of the section 28 power for officers and to ensure good understanding of the need to record certain pieces of information when the section 28 power is used. However, that aspect of the training and guidance which is solely a consequence of the Regulations is relatively limited, in turn meaning that this option is generally low cost.

Sectors and groups affected

24. Police Scotland and the non-territorial forces are, in principle, directly affected by the Regulations. However, the Scottish Government notes that non-territorial forces are highly unlikely to ever exercise the power, meaning little or no practical effect is expected. Other bodies that could be indirectly affected are those which have a role to play in operating a place of safety, as a constable may wish to liaise

with the operators in order to ensure that the recording requirements are met. However, in those cases the Scottish Government notes that the indirect effect will be nominal.

Benefits

25. The Scottish Government considers that the Regulations will deliver the following benefits:

- accountability and an audit trail for use of the section 28 power
- the creation of a robust but proportionate body of evidence which can be used to support the delivery of meaningful reports to Parliament on the use of the section 28 power in due course

Costs

26. The Scottish Government published a Financial Memorandum⁵ to accompany the Age of Criminal Responsibility (Scotland) Bill. The costs of the Bill generally to Police Scotland are set out in paragraphs 37 to 43, but these did not take into account the terms of the Regulations (the power to make these Regulations having been added to the Bill at Stage 3).

27. The Scottish Government has now explored with Police Scotland the cost implications of the Regulations, noting that they are not expected to have practical implications for non-territorial forces and so no costs are expected to arise as a consequence of the Regulations for those forces.

28. Largely the costs for Police Scotland turn on whether the changes required to deliver the obligations under the regulations can be achieved through the new crime recording system. The need to consider functionality for delivering the obligations under the Regulations has been factored into the wider package of work required to deliver functionality for Police Scotland in relation to the whole package of police powers contained in the Act. This will delivered automated recording of the information required under the Regulations.

29. As stated above, the Financial Memorandum published to accompany the Bill set out initial thinking on what those costs would be at Table 4. However, given the timescales for development and implementation of the new crime recording system, Police Scotland have advised that initially a manual recording system will need to be implemented in order to deliver the recording requirements under the Regulations. This would be delivered by a dedicated team in Police Scotland, with costs informed by the salaries of the officers involved. However, the officers in question would not be doing this as their sole job, and the Scottish Government's expectation is that the staffing costs would be borne by Police Scotland. For reference, the salaries of the officers involved are set out below.

⁵ [SPBill29FMS052018.pdf \(parliament.scot\)](https://www.parliament.scot/-/media/files/legislation/bills/previous-bills/age-of-criminal-responsibility-scotland-bill/stage-2/supplementary-financial-memorandum-age-of-criminal-responsibility-scotland-bill.pdf). A supplementary Financial Memorandum was also prepared to reflect the amendments made to the Bill at Stage 2. This is available on the Scottish Parliament website at: <https://www.parliament.scot/-/media/files/legislation/bills/previous-bills/age-of-criminal-responsibility-scotland-bill/stage-2/supplementary-financial-memorandum-age-of-criminal-responsibility-scotland-bill.pdf>, but this does not contain material relevant to the Regulations.

Rank	Number of officers required	Salary range ⁶
Chief Inspector	1	59,133 – 62,001
Inspector	1	52,374 – 58,164
Sergeant	2	42,966 – 47,298
Constable	3	26,037 – 42,234

30. The Scottish Government notes that ultimately the cost implications of delivering a manual recording system on an interim basis would ultimately be driven by the extent to which the recording was required. That will be driven by the number of incidents in which police decide to use the section 28 power.

31. The Financial Memorandum for the Bill sought to determine the impact of the Bill on delivery partners. This was primarily done by drawing from research by the Scottish Children's Reporter Administration (SCRA) that illustrates the number of offence ground referrals relating to children aged eight to 11. Analysis of that data showed that, in the four years to March 2017, 130 referrals would potentially be of sufficient seriousness to engage the police powers in the Act. A breakdown of SCRA figures for referring on offence grounds is below

Year	2013/14	2014/15	2015/16	2016/17
Number of offence ground referrals for children aged eight to 11	212	213	210	204
Number of referrals for offences engaging police powers	30	31	39	30

32. The Scottish Government notes that this indicates there could be, on average, 33 incidents per year which engage the police powers under the Act, including the section 28 power. The other police powers in the Act are:

- To search a child (Part 4, Chapter 2)
- To interview a child (Part 4, Chapter 3)
- To take physical data and samples from a child (Part 4, Chapter 4)

33. Based on the average number of incidents which the Scottish Government expects to engage the police powers (33), and in the context of that broader package of powers, the Scottish Government considers that it is likely that the section 28 power will only be engaged on very rare occasions (noting as well the high bar that must be met for the power to be capable of use: that someone is at risk of significant harm).

34. For example, if it is assumed that the use of the different powers will be split fairly evenly, the section 28 power might only be used between 8 and 9 times per year. In line with that, the Scottish Government has concluded that the costs of

⁶ <https://www.scotland.police.uk/about-us/finance/pay-and-grading-structure/>

dedicating staff time to a manual recording system until the new crime recording system is in place should be minor.

Scottish Firms Impact Test

35. Given the nature of the Regulations and the affected organisations as set out above, the Scottish Government has concluded that the Regulations will have no impact on Scottish Firms and has therefore conducted no consultation with these organisations.

Competition Assessment

36. The Scottish Government considers that no competition assessment is required because businesses that compete to deliver services and products to consumers will not be affected by the Regulations.

Consumer Assessment

37. The Scottish Government does not consider that consumers will be affected by the Regulations because they will not affect anyone who buys goods or digital content, or uses goods or services either in the private or public sector, now or in the future.

Test run of business forms

38. The Regulations will not require the introduction of any new business forms. Rather, the existing recording processes and systems can be used to deliver the statutory obligations under the Regulations.

Digital Impact Test

39. As part of its work developing the Regulations, the Scottish Government has taken into account the IT systems used by Police Scotland so as to ensure that the Regulations will remain deliverable in the future. The Regulations are framed in such a way to be fully capable of functioning in a digital context and in the event of system change in the future.

Legal Aid Impact Test

40. The Scottish Government considers that the Regulations will not give rise to increased use of legal processes or create new rights or responsibilities which might have an impact on the legal aid fund.

Enforcement, sanctions and monitoring

41. In 2019, the then Minister for Children and Young People announced that an advisory group⁷ was to be formed to review the operation of the Act and to consider future potential ages of criminal responsibility in Scotland. The group includes the

⁷ [Age of Criminal Responsibility Advisory Group - gov.scot \(www.gov.scot\)](http://www.gov.scot)

Action for Children, the Crown Office and Procurator Fiscal Service, Police Scotland and Social Work Scotland. The Scottish Government anticipates that the future work of the group could consider the section 28 power, and as part of that, the operation of the Regulations.

42. The Scottish Government chairs a Programme Board⁸ comprised of key stakeholders which is overseeing implementation of the Act generally. That Board will be able to consider the Regulations as part of its ongoing work overseeing the implementation programme.

43. As explained above, section 32 of the Act places a statutory duty on Ministers to report to Parliament on use of the section 28 power. These reports will support Parliamentary monitoring of the power, as well as enhancing public awareness and understanding about how it is used. The Scottish Government does however note that, in line with its expectation that the power will be infrequently used, such reports will need to safeguard the data rights of any child in relation to whom the section 28 power has been used.

Implementation and delivery plan

44. As stated above, existing systems and processes can be used to deliver the recording obligations under the Regulations. Police Scotland are developing training and guidance for officers in relation to use of the section 28 power, and this will include information about the details to be recorded when this power is used. This training and guidance is being developed to align to timescales for full commencement of the Act, including the coming into force of the section 28 power.

45. The Scottish Government notes that the power is not expected to be frequently used, but will liaise closely with Police Scotland after full commencement of the Act to explore the details of any situation where the power has been used, or its use was considered. Those discussions can involve consideration of the practicalities of delivering the recording obligations under the Regulations as necessary.

Summary and recommendation

Option	Total benefit per annum – economic, environmental, social	Total cost per annum: - economic, environmental, social - policy and administrative
Option 1: no regulations	There could be savings for police in terms of not having to deliver a statutory information recording obligation. That could limit the need to develop new training and	There would be a loss of a robust mechanism for accountability and an audit trail for the use of the section 28 power. That could undermine

⁸ [Age of Criminal Responsibility Programme Board - gov.scot \(www.gov.scot\)](http://gov.scot)

	guidance for officers in relation to the obligation.	public confidence in how the power is being used.
Option 2: the Regulations +	There could be presentational benefits in making Regulations to the fullest extent possible permitted by the powers in the Act, and this would provide accountability and an audit trail for use of the section 28 power.	There would be costs to police for delivering the recording obligations, as well as in relation to developing materials for use as part of the power. The statistical evidence available does not support a robust estimation of these costs.. On the materials, if underpinned by a statutory obligation there could be limited scope for flexibility to amend based on experience.
Option 3: the proportionate Regulations	This option strikes a balance between delivering accountability and an audit trail for use of the powers while delivering flexibility for police as regards communications.	There would be costs to police for delivering the recording obligations. The statistical evidence available does not support a robust estimation of these costs, but they are expected to be low.

Declaration and publication

I have read the Business and Regulatory Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading options. I am satisfied that business impact has been assessed with the support of businesses in Scotland.

Signed: **Claire Haughey**

Date: 24 November 2021

Minister's name: Claire Haughey

Minister's title: Minister for Children and Young People

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