

Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill

[As Amended at Stage 2]

Supplementary Delegated Powers Memorandum

Introduction

1. This Memorandum has been prepared by the Scottish Government in accordance with Rule 9.7.10 of the Parliament's Standing Orders to assist the Delegated Powers and Law Reform Committee in its consideration of the Forensic Medical Services (Victims of Sexual Offences) (Scotland) Bill. This Memorandum describes provisions in the Bill conferring power to make subordinate legislation which were introduced at Stage 2. The Memorandum supplements the Delegated Powers Memorandum on the Bill as introduced.

2. The contents of the Memorandum do not form part of the Bill, are entirely the responsibility of the Scottish Government and have not been endorsed by the Parliament.

Delegated Powers

Section 2(3a) – Power to Vary Self-Referral Age

Power Conferred On: The Scottish Ministers

Power Exercisable By: Regulations Made by Scottish Statutory Instrument

Parliamentary Procedure: Affirmative

Provision

3. New section 2(3A) is a new delegated power to change the minimum age for accessing self-referral by regulations. The new power is subject to the limits set out in new subsection (3B) so the age cannot be changed to an age lower than 13 or higher than 18. 13 is the age under which the Sexual Offences (Scotland) Act 2009 provides that any sex with a child is rape, meaning that a child of that age is taken to lack any capacity to consent to sexual activity. 18 is the age at which the UN Convention on the Rights of the Child (as proposed to be incorporated in the United Nations

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Convention on the Rights of the Child (Incorporation) (Scotland) Bill) provides that a child becomes an adult.

4. The power, if exercised, would lead to the textual amendment of the Act and as, in accordance with usual practice, any reader of the updated text on legislation.gov.uk should see the substituted age there and not have to look to the regulations.

5. New section 2(3C) provides that regulations may make appropriate ancillary provision, namely transitional, transitory or saving provision, that might be required if the self-referral age changes. The Scottish Government does not consider that power to make incidental, supplementary or consequential provision is necessary.

Reason for Taking Power

6. The new provision addresses the Health and Sport Committee's recommendation at paragraph 49 of their Stage 1 report⁽¹⁾ ("we consider the age limit of self-referral requires to be kept under close review. We suggest the Bill be amended to allow the age to be altered in future using super-affirmative procedure."), but with the relevant parliamentary procedure being the standard affirmative procedure. The Scottish Government indicated in its response to that report⁽²⁾ that it was persuaded that there is a case for introducing a new delegated power as proposed by the Committee. The Government noted that there had been a wide range of written and oral evidence scrutinised at Stage 1 on what the appropriate minimum age should be. Whilst the Government remains of the view that the predominance of the evidence continues to support age 16, which was included in the Bill for reasons outlined in the original Policy Memorandum and Child Rights and Wellbeing Impact Assessment (linked to from that Memorandum), the Government wishes to acknowledge that principled and strong arguments have been made for different ages. Whilst the Government is not minded to change the minimum age during the Bill process, and notes the Committee rejected at Stage 2 amendment changing the age to 13 now, the Government recognises that circumstances could change in future as other law and guidance evolves.

¹<https://digitalpublications.parliament.scot/Committees/Report/HS/2020/9/7/Stage-1-Report-on-the-Forensic-Medical-Services--Victims-of-Sexual-Offences---Scotland-Bill#Introduction>

²https://www.parliament.scot/S5_HealthandSportCommittee/Reports/20200925_Ltr_IN_from_CabSecHS_response_to_FMS_Stage_1_Report.pdf

Choice of Procedure

7. In the Government response referred to above the Government agreed that an affirmative procedure was appropriate for the new delegated power, and indicated that it did not agree that the “super-affirmative” procedure was proportionate to the circumstances. The Scottish Government considers that super-affirmative procedure is not a routine procedure and should only be used for the most sensitive or significant of policy areas.

8. The Government considers that the standard affirmative procedure – the procedure applicable to the setting of the statutory retention period for self-referral evidence in section 8 of the Bill - is the most appropriate procedure for the new delegated power. The standard affirmative procedure will allow the lead Committee scrutinising any regulations to consider the adequacy of the Government's consultation preceding any future regulations and take evidence from the Government - in addition of course to appropriate scrutiny of any regulations by the Delegated Powers and Law Reform Committee.

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