EXPLANATORY MEMORANDUM TO

THE AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) ACT 2019 (CONSEQUENTIAL PROVISIONS AND MODIFICATIONS) ORDER 2021

2021 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Office of the Secretary of State for Scotland and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This Order makes provisions in consequence of the Age of Criminal Responsibility (Scotland) Act 2019[1] ("the 2019 Act"), which raised the age of criminal responsibility in Scotland from 8 to 12, to ensure effective and proper cross-border cooperation.

2.2 The 2019 Act created the post of independent reviewer, a position that oversees the disclosure of convictions (and other information) related to when a person was under the age of 12, and the section 104 Order is required to extend the powers of this post to the rest of the United Kingdom. The Order also extends relevant powers held by Police Scotland to constables of non-territorial forces operating in Scotland, and extends the offences created through Section 75 of the 2019 Act (which deems that a person obstructing a police investigation into a child under the age of 12 is committing an offence) to the rest of the United Kingdom. It provides for enforcement of court orders obtained under the 2019 Act in other parts of the United Kingdom.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Extent and Territorial Application

4.1 The territorial extent of this instrument is the United Kingdom except where otherwise specified.

4.2 The territorial application of this instrument is the United Kingdom except where otherwise specified.

5. European Convention on Human Rights

5.1 The Secretary of State for Scotland has made the following statement regarding Human Rights:

"In my view the provisions of the Age of Criminal Responsibility (Scotland) Act 2019 (Consequential Provisions and Modifications) Order 2021 are compatible with the Convention rights."

[1] 2019 asp 7. https://www.legislation.gov.uk/asp/2019/7/contents

6. Legislative Context

6.1 This Order is made in exercise of the powers conferred by sections 104, 112(1) and 113 (5), (9A), (9B) and (10) of the Scotland Act 1998 ("the 1998 Act"). Section 104 of the 1998 Act allows consequential modifications to be made where necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament.

6.2 This section 104 Order is required in consequence of the 2019 Act, which raised the age at which a person in Scotland could be considered capable of committing a crime from 8 to 12. To ensure the 2019 Act can be fully implemented, consequential amendments are required to legislation, the subject matter of which relates to reserved matters, including the Ministry of Defence Police Act 1987[2] ("the 1987 Act"), the Police Act 1997[3] ("the 1997 Act"), the Railways and Transport Safety Act 2003[4] ("the 2003 Act"), the Energy Act 2004 ("the 2004 Act")[5] and the Data Protection Act 2018[6] ("the 2018 Act").

6.3 Part 2 of the section 104 Order deals with the disclosure of convictions and other information which relate to a time when a person was under the age of 12.

6.4 Before issuing an enhanced criminal record certificate under the 1997 Act or a scheme record under the Protection of Vulnerable Groups (Scotland) Act 2007[7] ("the 2007 Act"), the Scottish Ministers can request certain information from chief officers, under section 113B(4) of the 1997 Act and section 75(2) of the 2007 Act, for inclusion on that certificate or scheme record. As a result of changes made by this Order, if such information relates to a time when the person was under the age of 12, the chief officer can only provide the information to the Scottish Ministers where the independent reviewer (a role established for Scotland by the 2019 Act) has determined that it ought to be included.

6.5 The Order also extends relevant provisions applying to Police Scotland to constables of non-territorial forces operating in Scotland. It does so by inserting provisions into the 1987 Act, the 2003 Act and the 2004 Act which ensure that limitations on the police powers contained in Part 4 of the 2019 Act, and regulations and guidance issued under that Part, apply to constables of the Ministry of Defence Police, British Transport Police and Civil Nuclear Constabulary as they apply to Police Scotland constables. (The legislation governing these non-territorial forces already confers on them the powers and privileges of a Police Scotland constable when exercising their functions in Scotland). Adjustments are also made which ensure that constables of these forces are treated as Police Scotland constables in certain other respects, for instance by extending the reference to a constable in the obstruction offence contained in section 75 of the 2019 Act to include these constables.

6.6 The Order provides for the cross-border enforcement of court orders made under the 2019 Act for the search, interview or taking of forensic samples from a child under the age of 12 in other parts of the United Kingdom. This may be required for example where a child has returned home to another part of the UK following a serious incident in Scotland. It also provides for the cross-border application of the emergency power to

[2] 1987 c. 4. https://www.legislation.gov.uk/ukpga/1987/4/contents
[3] 1997 c. 50. https://www.legislation.gov.uk/ukpga/1997/50/contents
[4] 2003 c. 20. https://www.legislation.gov.uk/ukpga/2003/20/contents
[5] 2004 c. 20 https://www.legislation.gov.uk/ukpga/2004/20/contents
[6] 2018 c. 12. https://www.legislation.gov.uk/ukpga/2018/12/contents
[7] 2007 asp 14. https://www.legislation.gov.uk/asp/2007/14/contents

take non-intimate forensic samples under section 69 of the 2019 Act, and for the destruction of samples where the child is not resident in Scotland and the criteria for destruction under the 2019 Act are linked to proceedings within the Scottish children's hearings system (which does not exercise jurisdiction over non-resident children).

6.7 Section 75 of the 2019 Act provides that a person in Scotland is committing an offence if they obstruct a person referred to in subsection (2) (a constable or other person acting pursuant to various sections of the Act) or otherwise interfere with a police investigation where a child, under the age of 12, is believed to have behaved in a way which meets the "seriousness" threshold set out in section 75(1)(b). While this is currently only an offence in Scotland, Article 16 of the section 104 Order will extend this offence to include any obstruction or interference which occurs elsewhere in the UK.

7. Policy background

What is being done and why?

7.1 Section 104 of the Scotland Act 1998[8] enables provisions to be made that are necessary or expedient in consequence of any provision made by or under an Act of the Scottish Parliament. This Order makes provisions that are necessary and expedient in consequence of the 2019 Act, amending the list of legislation outlined in 6.1 to ensure the Act can be fully implemented throughout the UK.

7.2 The 2019 Act raised the age of criminal responsibility in Scotland from 8 to 12, and this Order is intended to ensure effective and proper cross-border operation of its provisions. This is specifically in relation to the powers of the police to deal with harmful behaviour by children under the age of 12 and the disclosure of conviction and other information relating to when a person was under the age of 12.

7.3 The objective of raising the age of criminal responsibility in Scotland is to prevent behaviour that occurred while under 12 years of age being treated as criminal. This can cause difficulties in adolescence or in adult life, for example if an individual seeks to pursue certain career paths. This change means that such behaviour will not be treated as a conviction under the Rehabilitation of Offenders Act 1974[9] (as it applies in Scotland) with the consequence that Disclosure Scotland will no longer include such information automatically on any type of certificate issued.

7.4 There may, however, be certain circumstances when, for public protection reasons, information about pre-12 behaviour should be disclosed as "Other Relevant Information" (ORI). Article 4 of this Order means that a chief officer can provide information about pre-12 behaviour as ORI to Disclosure Scotland for inclusion in the enhanced criminal record certificate under the 1997 Act or the PVG scheme record under the 2007 Act, but only after the independent reviewer, established under the 2019 Act, has determined that it ought to be so included.

7.5 Article 5 applies when a chief officer has identified information which relates to a time when the person was under the age of 12, and the chief officer is of the opinion that it ought to be included in the enhanced criminal record certificate or scheme record. Article 5 places a requirement on that chief officer to refer the information to the independent reviewer, together with (a) where the information is for an enhanced criminal record certificate, information about the purpose in relation to which the

[8] 1998 c. 46. https://www.legislation.gov.uk/ukpga/1998/46/contents
[9] 1974 c. 53. https://www.legislation.gov.uk/ukpga/1974/53/contents

certificate is required (b) where the information is for a scheme record, information about the regulated work in relation to which the scheme member participates in the scheme (c) an explanation as to why the chief officer considers the information ought to be included and (d) any other information the chief officer considers to be relevant to the exercise of the independent reviewer's functions.

7.6 Article 6 of the Order places a requirement on chief officers to notify the Scottish Ministers when they have sent information to the independent reviewer.

7.7 In order to make the decision about whether a chief officer's decision to disclose ORI is appropriate, it will likely be necessary for the independent reviewer to obtain additional information from another person. Article 7 of this Order makes provision which allows the independent reviewer to do this. These other persons include:

- a chief officer,
- a local authority,
- Her Majesty's Courts and Tribunals Service,
- the Disclosure and Barring Service,
- the Department of Justice in Northern Ireland,

8. European Union Withdrawal and Future Relationship

8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act

9. Consolidation

9.1 Though the Order amends primary legislation, the modifications are minor and no consolidation is required.

10. Consultation outcome

10.1 No formal consultation was undertaken about the independent reviewer provisions for the purpose of this order. An overview of Part 2 of the 2019 Act and the independent reviewer's functions was given by Disclosure Scotland to the National Disclosure Forum in March 2021. There had been earlier consultation ahead of the legislation for the 2019 Act being introduced into the Scottish Parliament. There was support for disclosure of pre-12 behaviour following independent review.

10.2 The Policy Memorandum for the Bill that became the 2019 Act noted:

> "103. While the vast majority of respondents felt that there should be a strong presumption against the release of information about a child's harmful behaviour when an incident occurred before the age of 12 (62 "yes" (88.6%) seven "no" (10%), one "don't know" (1.4%)), there was a recognition that there will be circumstances where disclosure is required and there should, in such circumstances, be an independent review process. Such circumstances were likely to relate to the seriousness of the earlier behaviour and the current presenting risk, years later, to the public or individuals."[10]

[10] Age of Criminal Responsibility (Scotland) Bill Policy Memorandum (parliament.scot)

10.3 This Order stands alone and guidance is not necessary. Appropriate stakeholders across the United Kingdom have been engaged and are fully aware of the provisions of the Order and their practical inferences.

11. Guidance

11.1 No guidance will be made available on the use of these powers as they are consequential on the 2019 Act, and will be used only to give this Act full effect.

12. Impact

12.1 There is no, or no significant, impact on business, charities or voluntary bodies.

12.2 The impact on the public sector regarding the disclosure provisions in this order is likely to be minimal as the number of cases expected on an annual basis is projected as being under five.

12.3 An Impact Assessment has not been prepared for this instrument because a Justice Impact Test (JIT) was carried out. In consequence of this JIT, it was deemed relevant to make a separate assessment of the new burdens on relevant authorities as a result of this policy. The assessment of any new burden is based on the information contained in the Financial Memorandum (FM) which accompanied the 2019 Act. The FM for the 2019 Act stated (in relation to local authorities in Scotland): "The Disclosure System's independent reviewer will also be able to request relevant information from local authorities. This will result in a minimal burden across all 32 local authorities, and the financial impact will be negligible."

12.4 The New Burden Assessment Pro Forma has been completed and provides the necessary reassurance that the requirements of the Cabinet are being met. This Assessment confirms that the costs to a local authority will be minimal, and that the Scottish Government will reimburse any additional costs incurred by a local authority in England.

13. Regulating small business

13.1 The legislation does not apply to activities that are undertaken by small businesses.

14. Monitoring & review

14.1 The Order is consequential upon the 2019 Act. No formal monitoring or review is considered necessary.

14.2 The instrument does not include a statutory review clause and, in line with the requirements of the Small Business, Enterprise and Employment Act 2015 the Secretary of State for Scotland has made the following statement: "There is no need for review or monitoring as the Order does not regulate businesses."

15. Contact

15.1 Arthur Halfhide at the Office of the Secretary of State for Scotland (Telephone: 07557896644 or email: arthur.halfhide@ukgovscotland.gov.uk) can be contacted with any queries regarding the instrument.

15.2 Rachel Irvine, Deputy Director for Constitutional Policy, at the Office of the Secretary of State for Scotland can confirm that this Explanatory Memorandum meets the required standard.

15.3 The Secretary of State for Scotland at the Office of the Secretary of State for Scotland can confirm that this Explanatory Memorandum meets the required standard.