

# AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) ACT 2019

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## EXPLANATORY NOTES

### PART 1: AGE OF CRIMINAL RESPONSIBILITY

#### *Pre-existing law*

7. Section 41 of the Criminal Procedure (Scotland) Act 1995 (the “1995 Act”), as in force up to commencement of section 1 of this Act, sets out the position on the age of criminal responsibility as follows:

““It shall be conclusively presumed that no child under the age of eight years can be guilty of any offence.”
8. This is understood to mean that a child aged under eight cannot commit an offence (and therefore cannot be prosecuted).<sup>1</sup> A child aged under eight who does something which would, if the child is aged eight or over, be an offence may be referred to the Principal Reporter for consideration of whether to arrange a children’s hearing in relation to the child.<sup>2</sup> But the child cannot be dealt with on the ground that they have committed an offence (“the offence ground” – as set out in section 67(2)(j) of the Children’s Hearings (Scotland) Act 2011 (the “2011 Act”). Rather, the child’s behaviour may indicate that one of the other grounds applies.<sup>3</sup>
9. Section 41A of the 1995 Act<sup>4</sup>, as in force prior to commencement of section 2 of this Act, makes provision about how children who commit an offence while aged eight to 11 are to be dealt with by the criminal justice system, as follows:
  - (1) “A child under the age of 12 years may not be prosecuted for an offence.
  - (2) A person aged 12 years or more may not be prosecuted for an offence which was committed at a time when the person was under the age of 12 years.”.
10. This means that, while a child aged eight to 11 is considered capable of committing an offence, an offence committed by a child of this age is not dealt with through the criminal courts. Instead, the child may be referred to the children’s hearing

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<sup>1</sup> The meaning of the concept of the age of criminal responsibility has been discussed in more detail by the Scottish Law Commission. See Discussion Paper 115 – Age of Criminal Responsibility (July 2011) and Report 185 on Age of Criminal Responsibility (January 2002) (both at [Scottish Law Commission: Reports: 2000 - 2009](#)). See also the case of *Merrin v S* (1987 SLT 193), in which it was stated, amongst other things, that “an offence at common law can only be committed if the accused has *mens rea*. A child under the age of eight years cannot have *mens rea*.”

<sup>2</sup> See Part 6 of the Children’s Hearing (Scotland) Act 2011 for more detail on how cases (in relation to children of all ages) are referred to the Principal Reporter and the determination that the Principal Reporter is required to make.

<sup>3</sup> The other grounds include, for example, that the child is likely to suffer unnecessarily, or the health and development of the child is likely to be seriously impaired, due to a lack of parental care (section 67(2)(a) of the 2011 Act) or that the child’s conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person (section 67(2)(m) of the 2011 Act).

<sup>4</sup> Section 41A was inserted into the 1995 Act by section 52 of the Criminal Justice and Licensing (Scotland) Act 2010 and came into force on 28 March 2011. Prior to this, children aged eight to 11 who committed an offence could be prosecuted in the courts (but only with the authorisation of the Lord Advocate under section 42 of the 1995 Act) or dealt with through the children’s hearings system. The latter was more common.

*These notes relate to the Age of Criminal Responsibility (Scotland)  
Act 2019 (asp 7) which received Royal Assent on 11 June 2019*

system, where he or she may be dealt with using the offence ground or, depending on the circumstances, another ground.<sup>5</sup> Regardless of the ground used, the child's welfare is the paramount consideration for the children's hearing in deciding whether a compulsory supervision order ought to be made in respect of the child and, if so, what measures the order should contain.<sup>6</sup> The measures that a compulsory supervision order can contain are also the same regardless of which ground is used.

11. If a case proceeds on the basis of the offence ground, the standard of proof that applies in the event of an application being made to the sheriff to determine whether the ground is established is the criminal standard of proof (that is "beyond reasonable doubt").<sup>7</sup> If a sheriff is required to determine whether any other ground mentioned in section 67(2) of the 2011 Act is established, then the civil standard of proof applies (that is, "on the balance of probabilities") and, in addition, sections 1 and 2 of the Civil Evidence (Scotland) Act 1988 apply.<sup>8</sup>
12. For completeness, it should be noted that section 42 of the 1995 Act provides that children aged 12 to 15 who commit an offence may only be prosecuted if the Lord Advocate authorises the prosecution. However, the majority of children in this age group who commit offences are dealt with either through the children's hearing system or through early and effective intervention.<sup>9</sup> Children aged 16 or over can be prosecuted, although a child of this age who offends while already subject to a compulsory supervision order may be referred back to a children's hearing. Compulsory supervision orders are subject to regular review, but any such order still in effect when a person turns 18 is terminated at that point.<sup>10</sup>

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<sup>5</sup> *Constanda v M* (1999 SC 348) held that the Principal Reporter has to use the offence ground as the basis of a referral if the sole factual basis of a referral is the commission of an offence (although one of the other grounds may be relied on in circumstances where the commission of an offence is simply part of a wider picture amounting to the ground).

<sup>6</sup> Except that a decision which is inconsistent with treating the need to promote and safeguard the welfare of the child throughout the child's childhood as the paramount consideration may be made if necessary for the purpose of protecting members of the public from serious harm (whether physical or not). In such a case, the child's welfare is instead a primary consideration. See sections 25 and 26 of the 2011 Act.

<sup>7</sup> See section 102(3) of the 2011 Act.

<sup>8</sup> This means that corroboration is not required and that hearsay is always admissible.

<sup>9</sup> Early and effective intervention is one element of the wider "whole system approach". The aim of the approach is to reduce offending by young people under the age of 18. See <http://www.gov.scot/Topics/Justice/policies/young-offending/whole-system-approach>.

<sup>10</sup> See section 199 of the 2011 Act.