

AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) ACT 2019

EXPLANATORY NOTES

PART 1: AGE OF CRIMINAL RESPONSIBILITY

Changes made by the Act

13. **Section 1** of the Act replaces the pre-existing version of section 41 of the 1995 Act with a new version of that section. The new section 41 uses updated language to provide that a child aged under 12 cannot commit an offence.¹ So, on the day new section 41 comes into force, the age of criminal responsibility changes from eight to 12.
14. Children aged eight to 11, of course, already cannot be prosecuted for an offence by virtue of section 41A(1) of the 1995 Act. But one of the significant, practical effects of new section 41 is that things done by children aged eight to 11 after new section 41 comes into force will no longer be able to be dealt with through the children's hearings system on the basis of the offence ground. All behaviour by children in this age group who are referred to the Principal Reporter will in future be dealt with on a non-offence ground.²
15. New section 41 means that section 41A will not be required in the future - -- if children aged eight to 11 cannot commit offences, there is no need to prohibit their prosecution through the criminal courts. Section 41A is therefore repealed by section 2(1) of the Act.
16. But new section 41 is not retrospective - it only applies in relation to things done after it comes into force. This has two consequences. First, it means that actions taken prior to the change in the age of criminal responsibility, in respect of things done by children aged eight to 11, stand. So, for example, a child aged 11 who is, on the date new section 41 comes into force, subject to a compulsory supervision order, following the offence ground having been accepted or established, remains subject to that order.
17. It also means that things done by children aged eight to 11 prior to new section 41 coming into force but which, for example, have not yet come to light may still constitute an offence. Section 2(2) of the Act therefore maintains the current prohibition on the prosecution in such cases (by providing that section 41A continues to have effect in relation to such offences).
18. The prohibition on the prosecution of children aged under 12 contained in subsection (1) of section 41A obviously has effect only in relation to children aged eight to 11 at the time at which (but for that section) any prosecution would take place. If something done by a child when aged under 12 comes to light after the child has turned 12, it is subsection (2) of section 41A which prevents prosecution. This means that

1 This does not mean that things done by children aged eight to 11 which would previously have been an offence are lawful as such, just that such things are not treated as criminal acts. For example, many acts which constitute offences are also delicts and can be actioned as such in the civil courts (although such actions are rare). Nothing in the Act necessarily prevents such action being taken in relation to things done by children aged eight to 11.

2 In relation to which, as noted above, the standard of proof is "on the balance of probabilities" and the civil rules of evidence apply.

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

subsection (1) of section 41A will cease to have any effect 4 years after the change in the age of criminal responsibility – by that point, all children aged eight to 11 at the time new section 41 comes into force will have turned 12. From that point on, subsection (2) of section 41A will be sufficient to ensure that no-one can be prosecuted for something done, while aged under 12, prior to the change in the age of criminal responsibility. That subsection will continue to operate, by virtue of section 2(2) of the Act, for as long as is necessary.

19. [Section 2](#) maintains the current position in relation to prosecution of children for things done while aged eight to 11 for as long as necessary. Fully maintaining the current position in relation to dealing with things done by a child aged eight to 11 prior to the change in the age of criminal responsibility would mean allowing such cases to be dealt with by a children’s hearing, on the basis of the offence ground, after the date of that change. However, the Act does not maintain the current position in this respect. Instead, section 3 provides that, from the date new section 41 comes into force, new cases involving behaviour that occurred prior to that date, and while the child was aged eight to 11, cannot be dealt with on the basis of the offence ground (even though such behaviour may still, in strict legal terms, be an offence). It does this by prohibiting the Principal Reporter from determining that the offence ground applies in such circumstances. However, any determination that the offence ground applies made prior to the date of new section 41 coming into force is not affected.³
20. In summary, section 1 raises the age of criminal responsibility to 12. It, together with sections 2 and 3, ensures that, from the date new section 41 comes into force, no child will be prosecuted, or referred to a children’s hearing on the basis of the offence ground, in relation to pre-12 behaviour. This applies regardless of whether the child’s behaviour occurred before or after the change in the age of criminal responsibility.
21. A child who is referred to a children’s hearing, after new section 41 comes into force, in respect of behaviour that occurred while the child was aged eight to 11 and which would previously have constituted an offence will not necessarily be dealt with any differently in terms of whether a compulsory supervision order is made (and, if so, the measures authorised by the order). This is because, as already noted, the child’s welfare is already the paramount consideration in determining what action should be taken in response to the child’s behaviour,⁴ not the ground on which the child is referred. The same behaviour can therefore be expected to produce the same results in this particular respect.⁵
22. The effects of the change in the age of criminal responsibility in other respects are discussed in more detail throughout the remainder of these Notes.

³ At the time of publication of these Notes, section 3 is already in force (but with paragraph (a) being read with the words “before the day on which section 1 came into force” omitted) ([the Age of Criminal Responsibility \(Scotland\) Act 2019 \(Commencement No. 1 and Transitory Provision\) Regulations 2019 \(SSI 2019/349\)](#)). This means that the Principal Reporter ceased to be able (from 29 November 2019) to make determinations finding that the offence ground applies in relation to pre-12 behaviour (with the Principal Reporter instead considering whether the behaviour means that one of the other grounds listed in section 67(2) of the 2011 Act applies). Determinations made prior to 29 November 2019 that the offence ground applies in relation to pre-12 behaviour are unaffected.

⁴ Except where section 26 of the 2011 Act applies, in which case the child’s welfare is a primary consideration.

⁵ Although, again as already noted, the standard of proof in relation to non-offence grounds is lower and the civil rules of evidence apply – so, in theory at least, the option of making a compulsory supervision order may be open to children’s hearings in slightly more cases (for example, those cases where the offence ground would have been found not to be established because of the need to prove matters “beyond reasonable doubt”, but where matters can be proved “on the balance of probabilities”).