

AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) ACT 2019

EXPLANATORY NOTES

PART 4: POLICE INVESTIGATORY AND OTHER POWERS

Chapter 2: Search of children under 12

Changes made by the Act: what this Chapter of the Act does

Application of existing powers to search without warrant

118. [Section 33\(1\)](#) describes, in general terms, the existing powers of search to which the section applies. An example of a power that would be covered by this description is section 48 of the Criminal Law (Consolidation) (Scotland) Act 1995, under which a constable may search a person suspected of carrying an offensive weapon in a public place.¹
119. The effect of subsection (2) is that the existing power will allow the search of a child under 12 – despite the fact the child cannot commit, and therefore cannot be suspected of committing, an offence – where the child’s behaviour would, were the child over 12, be capable of constituting the offence to which the statutory power applies.
120. Many of these existing search powers, however, also allow the constable to do things that, in relation to a child under 12, would not be appropriate. So section 33(3)(a) provides that the search powers do not apply in relation to the child to the extent that they contain a power of arrest that could otherwise be used, by virtue of section 33(2), in relation to the child. And to avoid any suggestion that section 33(2) would have the effect that an offence provision attached to a search power² would apply to a child under 12, subsection (3)(c) makes it clear that this is not the effect of subsection (2).
121. [Section 33\(3\)\(b\)](#) ensures that any existing powers to apply for and obtain search warrants that are contained in the enactments to which section 33 applies do not apply in relation to children under 12. This is so that all such searches of children under 12 take place under the authority of a court order under section 36 of this Act.
122. Subsection (4)(a) provides the Scottish Ministers with a regulation-making power to exclude existing statutory search powers from the application of section 33. By virtue of section 82(3)(e) of the Act, these regulations will be subject to the affirmative procedure. Subsection (4)(b) provides a similar power to modify subsection (3) so that how existing search powers are to apply in relation to children under 12 can be regulated further if necessary.³

¹ Which is an offence under section 47 of that Act.

² Generally, an offence of obstructing a constable in the exercise of his power to carry out the search.

³ This power is also subject to the affirmative procedure. By virtue of section 82(1), this power could be used to make provision in relation to a specific power of search or in relation to powers of search generally.