

# **AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) ACT 2019**

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## **EXPLANATORY NOTES**

### **PART 4: POLICE INVESTIGATORY AND OTHER POWERS**

#### ***Chapter 3: Questioning of certain children***

##### ***Pre-existing law***

143. The statutory powers of police constables to detain and question criminal suspects are set out in Part 1 of the 2016 Act. Chapter 1 of that Act gives constables power to arrest a person without warrant where the constable has reasonable grounds for suspecting that the person has committed or is committing an offence. This power (and other powers in relation to arrested persons) extend (prior to implementation of this Act) to children aged eight to 11 (as such children can, until section 1 comes into force, commit an offence) but not to children aged under eight (who already cannot commit an offence).
144. **Section 34** of that Act empowers constables to question an arrested person in relation to the offence while in police custody<sup>1</sup> and also provides that the person is under no obligation to answer questions.<sup>2</sup> Arrested persons in police custody also have other rights under that Act, including the right to have intimation sent to another person (sections 38 and 39), a right to be given certain information (section 31) and a right to have a solicitor present (section 32). The last two of these rights also apply where a person is suspected of committing an offence but is attending for questioning (at a police station or other place) on a voluntary basis.
145. Police constables have a general ability to engage with members of the public on the basis of consent. As noted above, even where a person is suspected of committing an offence, the person may attend for interview voluntarily rather than being arrested. Where a child aged eight to 11 is suspected of committing an offence and is interviewed voluntarily, the rights conferred by sections 31 and 32 of the 2016 Act apply. By virtue of section 33 of the 2016 Act, such a child cannot consent to be interviewed (even voluntarily) without a solicitor being present. Children aged under eight cannot be suspected of committing an offence and so the powers in the 2016 Act do not apply, although such children can still be interviewed voluntarily<sup>3</sup>. The rights conferred by sections 31 and 32 of the 2016 Act do not apply in such cases.

##### ***Changes made by the Act: impact on pre-existing law of change in age of criminal responsibility***

146. The fact that children aged eight to 11 will no longer be able to commit an offence means that constables will no longer have statutory powers to arrest and question such children under the 2016 Act. In relation to questioning by the police, therefore, the

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<sup>1</sup> "Police custody" is defined in section 64 of the 2016 Act.

<sup>2</sup> Apart from providing their name, address, date of birth, place of birth and nationality.

<sup>3</sup> It is of course inherent in an interview taking place voluntarily that consent to the interview can be withdrawn at any time and that the child can refuse to answer questions.

change in the age of criminal responsibility places children aged eight to 11 in the same position as children aged under eight are in currently (as described above) – subject to the changes made by this Chapter of the Act.

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

#### ***Prohibition on questioning***

147. Although the general ability of constables to engage with members of the public (including children aged under 12) will persist, subsection (2) of section 39 introduces a prohibition on police questioning of children aged under 12<sup>4</sup> in the circumstances described in subsection (1), except where the questioning is authorised under one of paragraphs (a) to (c) of subsection (2). The circumstances set out in subsection (1) are that a constable reasonably suspects that the child (while aged under 12) has behaved, in a violent or dangerous way that caused (or risked causing) serious physical harm to another person or in a sexually violent or sexually coercive way that caused (or risked causing) harm (physical or otherwise (such as psychological harm)) to another person). The questioning prohibited by subsection (2) could include questioning at the scene of an incident or while the child is being transported somewhere, such as a police station or their home. But questioning is permitted (on a voluntary basis) until the constable forms a reasonable suspicion that the child has acted as mentioned in subsection (1).
148. Direct questioning by a police constable in any interview involving any degree of pre-planning, while subsection (1) applies, is also prohibited, and questioning by local authority officers (in practice, usually social workers) in a jointly planned interview is also prohibited (see the definition of “investigative interview” in subsection (3)). The powers of local authorities to plan and lead questioning of children in relation to this type of incident are otherwise not affected, although police questioning as part of such a local authority-led process is prohibited. The prohibition on police questioning includes a prohibition on any other person questioning the child on behalf of a police constable.
149. Police questioning is authorised in certain urgent situations (see section 39(2)(c) and sections 54 and 55). And investigative interviews of children are permitted if authorised by virtue of section 40(2) (that is, where the child and a parent of the child have agreed to the child being interviewed) or by a child interview order made under section 44. Sections 47 to 53 provide a number of safeguards in relation to the investigative interview of children (whether authorised by section 40 or by a child interview order).
150. Subsection (2) also means that if, while a child is initially being interviewed on a voluntary basis as either a victim or a witness in relation to an incident, a constable forms the suspicion that the child has behaved as mentioned in subsection (1) in that (or a different) incident, the constable (and any local authority officer present, if it is a jointly planned interview) cannot ask any further questions in relation to that behaviour. If a constable wishes to question a child once reasonable suspicion that the child has behaved as mentioned in section 39(1) exists, then (unless the situation is an emergency to which section 54 applies) the constable must obtain the agreement of the child and a parent of the child (in order to proceed under section 40) or apply to the sheriff<sup>5</sup> for a child interview order.

#### ***Investigative interview by agreement***

151. Subsection (2) of section 40 authorises the conduct of an investigative interview (defined in section 39(3)) of a child (also defined in section 39(3)) if the tests described in subsection (1) of section 40 are met. The first test is that a constable has reasonable grounds to suspect that a child, while aged under 12, by behaving in a violent or

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<sup>4</sup> Questioning of children aged 12 to 15 (and of children aged 16 or 17 who are subject to a compulsory supervision order or an interim compulsory supervision order) in relation to behaviour that took place when the child was aged under 12 is also prohibited (see the definition of “child” in section 39(3)).

<sup>5</sup> By virtue of section 81 of the Act, summary sheriffs may also deal with applications for child interview orders.

dangerous way, caused or risked causing serious physical harm to another person or, by behaving in a sexually violent or sexually coercive way, caused or risked causing harm (whether physical or not – so including psychological harm) to another person.<sup>6</sup> The second test is that the constable considers that an investigative interview is necessary to fully investigate the incident which involved suspected harmful behaviour by the child.<sup>7</sup> The third test is that both the child and a parent of the child (defined in subsections (7) and (8) of section 40) agree to an investigative interview of the child being conducted (subsection (1)(c)).

152. **Section 40** only authorises an investigative interview of the child for as long as the agreement mentioned in subsection (1)(c) remains in place. Agreement can be withdrawn at any time by either the child or the parent (subsection (3)(a)). If the child withdraws agreement and police still wish to interview the child, then a constable must apply for a child interview order under section 42 (subsection (5)(a)). If a parent of the child withdraws agreement, then the agreement of another parent can be sought or a child interview order can be applied for (subsection (5)(b)).
153. The agreement of the child or, as the case may be, parent is treated as withdrawn if the child or parent fails to comply in a material respect with the interview plans drawn up under section 47 – see subsection (3)(b) of section 40. However, subsection (4) specifically provides that agreement is not to be treated as withdrawn by virtue of the child exercising their right under section 49 to not say anything during the interview.
154. **Section 50(11)** sets out a further circumstance where agreement is treated as withdrawn. Section 50(6)(a) requires that, in the case of an investigative interview by agreement, the child's supporter during the interview must be the parent who has given agreement under section 40. Section 50(7) requires that the child's supporter must be considered appropriate by the person conducting the interview. If the person conducting the interview considers that the parent who has given agreement to the interview is not an appropriate person to act as supporter, that parent's agreement is treated as withdrawn. Again, either the agreement of another parent must be obtained under section 40 or a child interview order made in order for the interview to proceed.
155. A constable may apply for a child interview order to be made in respect of the child at any time, even if agreement is in place (see subsection (40(6))).
156. **Section 41** provides for the child and the parent who has given agreement under section 40 to be given written notification of the matters listed in subsection (2) of section 41, including their right to withdraw agreement at any time and the fact that this will bring the interview to an end (while not preventing, for example, an application for a child interview order being made). The information must also be explained to the child (in an age-appropriate way) and the parent. The child's interview rights practitioner, once identified, will also be given a copy of the notice (see subsection (3)). Section 53(4) also provides for the information mentioned in section 41(2) to be provided to the child and the parent again before the start of the interview.

### ***Child interview orders***

157. **Section 42** sets out the process for applying for an order to interview a child (as defined in section 39(3)) in relation to suspected behaviour by the child that falls within section 39(1). Interviews authorised by a child interview order must be jointly planned by the police and the relevant local authority in relation to the child<sup>8</sup> (see section 47). Section 42(3) therefore requires the constable to identify the relevant local authority

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<sup>6</sup> This test matches the circumstances described in section 39(1), which prohibits police questioning or an investigative interview of the child, except if authorised in certain ways – including by section 40. It also matches one of the matters as to which a sheriff has to be satisfied for a child interview order to be granted (section 44(2)(a)).

<sup>7</sup> This test matches the other matter as to which a sheriff has to be satisfied for a child interview order (section 44(2)(b)).

<sup>8</sup> "Relevant local authority in relation to a child" has the same meaning as in section 201 of the 2011 Act (where it means, broadly speaking, the local authority in whose area the child predominantly resides or, if there is no such authority, the local authority with whose area the child has the closest connection).

and, if practicable, consult that authority about the provisional plans for the interview to be submitted with the application for the child interview order. The application must also state the grounds on which the application is made (that is, explain the behaviour to which the application relates and the reasons why the questioning of the child is necessary) and contain supporting evidence.

158. [Section 43](#) governs the procedure the sheriff must follow when considering an application under section 42. The sheriff has discretion as to whether to hold a hearing or to determine the application without hearing from the constable or anyone else. The sheriff also has discretion over whether to consider the application in open court or in the sheriff chambers (which would provide a degree of privacy to the proceedings).
159. Subsection (3) requires the sheriff, before deciding the application, to consider whether the constable, the child, a parent of the child,<sup>9</sup> or anyone else the sheriff thinks has an interest, should be given an opportunity to make representations to the sheriff on the application and whether an order should be made.
160. The matters as to which the sheriff must be satisfied before making an order, and what the order authorises, are set out in section 44. The sheriff must be satisfied that there are reasonable grounds to suspect that the child in relation to whom the application is made, by behaving in a violent or dangerous way, has caused or could have caused serious physical harm to another person or, by behaving in a sexually violent or sexually coercive way, caused or could have caused harm (physical or psychological) to another person. In addition, the sheriff must be satisfied that questioning of the child is necessary to fully investigate the incident to which the application relates. The factors to be taken into account in this consideration are set out in subsection (3).
161. If the sheriff is satisfied as mentioned in subsection (2)(a), but considers that the circumstances surrounding the incident are clear from information that is already available, then the making of a child interview order may not be necessary. In this type of case, a local authority interview of the child to consider the child's welfare may be appropriate. Police questioning will continue to be prohibited under section 39(2). In contrast, if the sheriff refuses to make a child interview order because he or she is not satisfied as mentioned in subsection (2)(a) (either because there are no reasonable grounds to suspect that the behaviour involved in the incident falls within subsection (2) (a) or that such behaviour was involved but there are no reasonable grounds on which to suspect that it was the child who behaved in this way) then the police may seek to question the child in relation to the incident on a voluntary basis.
162. A child interview order authorises an investigative interview of the child. It may also authorise other things (such as transportation of the child to and from the interview location). In addition, the sheriff can give directions as to how the interview should be conducted (and any other authorised actions carried out).
163. In particular, the sheriff can specify a period over which the interview should be conducted – as is made clear in the definition of “investigative interview” in section 39, an interview may take place over a number of meetings. Depending on the child's circumstances, it may be necessary for the interview to take place over a number of days. The maximum period over which the interview can be conducted is 7 days, although the sheriff can specify a shorter period for the conduct of the interview. The sheriff can specify that the 7 day (or shorter) period for the conduct of the interview is not to start on the day after the order is made but on a specified later day (for example, if there is a need for the planning of the interview to be completed once the order is made). The interview does not have to start on the day on which the specified period begins (unless a direction to this effect is included in the order under section 44(6)(a)), but if it doesn't, the number of days available to conduct the interview will reduce accordingly. Once the order ceases to have effect, further questioning of the child is prohibited by section 39(2).

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<sup>9</sup> “Parent” is defined in section 76 of the Act as including the guardian of a child and any person who has care of the child.

164. **Section 45** requires that the child and, if practicable, a parent of the child be notified of the making of a child interview order and that the order be explained to the child in a way that is appropriate to that particular child. Once the individuals who will act as the child's supporter (see section 50) and as the child's interview rights practitioner (see section 51) during the interview are known they must also be provided with a copy of the order.

### ***Appeals***

165. As already noted, section 110 of the 2014 Act provides generally that any decision of the sheriff may be appealed to the Sheriff Appeal Court. That section will apply to a decision of the sheriff under section 44 to make or to refuse to make a child interview order. Sections 111 and 116 of the 2014 Act apply to appeals under section 110 and the rules of court relating to section 110 appeals also apply. Section 111, for instance, provides that the Sheriff Appeal Court may uphold the sheriff's decision or reverse or vary it.
166. **Section 46** provides for a number of aspects of the appeal process as it applies in relation to child interview orders (or applications for such orders). It sets out that either a constable or the child (or another person acting on the child's behalf) must, within the time-limits specified in subsection (2), apply to the sheriff for permission to appeal. The appeal may proceed only where the sheriff gives permission. If permission to appeal is given, the appeal must be made on the day on which that permission is granted or during the following two working days (subsection (3)). Where an appeal is made, the decision of the Sheriff Appeal Court is final (subsection (4)).
167. The making of an appeal suspends the effect of any child interview order originally made by the sheriff. Such an order only authorises the interview of the child during a certain period (see paragraph 163). By the time an appeal is made and determined, that period may have expired. Section 46 therefore also allows the Sheriff Appeal Court, in a case where the interview authorised by the original order has not been completed at the time where that order is upheld or varied, to specify a new period within which the child interview order is to have effect.

### ***Planning and conduct of investigative interviews authorised by agreement under section 40 or by child interview order***

168. **Section 47** requires that an investigative interview authorised by agreement under section 40 or by a child interview order must be jointly planned by the police and the relevant local authority. In the case of a child interview order, depending on the amount of detail contained in the provisional plans submitted with the application for the order (and the relevant local authority's involvement in drawing up those plans), the plans may only require finalisation at this point. Subsection (3) sets out the information to be included in the plans. Once finalised, the plans are to be provided to the child and, in the case of interview by agreement, to the parent who has given agreement (and in the case of a child interview order, to a parent if practicable). The plans must also be explained to the child in an appropriate way and, once the supporter and child interview rights practitioner are identified, provided to those individuals.
169. **Section 48** provides that the interview cannot start unless the child has been given a copy of the interview plans. The interview must be carried out in accordance with the plans and also, where the interview is authorised by a child interview order, in accordance with any directions given by the sheriff in the order. These points also apply to any other actions authorised by the order. Sections 49, 50 and 51 set out the child's rights in relation to the interview, which are as follows:
- the right not to say anything,
  - the right to have a supporter present: in the case of interview by agreement, the supporter must be the parent who has agreed to the interview under section 40



– unless that parent is not considered appropriate to act as supporter under section 50(7). In that circumstance, that parent’s agreement to the interview is treated as withdrawn and the interview may not proceed unless another parent of the child gives agreement under section 40 or a child interview order is applied for and granted. In the case of an interview authorised by a child interview order, the supporter may be any person aged over 18. The supporter may, but need not, be a parent of the child. The child’s views will be taken into account in identifying the supporter, but again a person can only act as a supporter if they are considered appropriate by the person conducting the interview (this issue may also be covered in guidance under section 57). In both cases, the supporter is not required to be in the room where the child is being questioned at all times – they may be absent if the child is content with this or if their absence is considered (by a police sergeant who has not had any previous involvement with the case and a local authority officer) necessary for the child’s wellbeing or some other reason (see section 50(4)). But to ensure that the supporter can be in the interview room when the child wants this (or where the supporter considers that they should be present (subject to section 50(4)) the supporter must be present at the location where the interview is taking place at all times (section 52(2)(a)). The interview may not continue if the child is alone in the interview room with the person or persons conducting the interview – at least one of the supporter or the child interview rights practitioner must be present at all times (section 52(2)(b)).

- the right to have a child interview rights practitioner present: section 51(7) sets out some examples of the type of advice, support and assistance that may be provided by such a practitioner. As with the supporter, the child interview rights practitioner need not be present in the interview room all of the time if the child is content with this. But if the child wishes the practitioner to be present or the practitioner wishes to be present, then access cannot be denied – there is no basis on which a child interview rights practitioner can be excluded from the interview room. As already noted, section 52(2)(b) requires at least one of the supporter or the child interview rights practitioner to be present in the interview room at all times. See paragraph 173 for more detail on child interview rights practitioners.

170. **Section 53** also requires the person conducting the interview to ensure, before starting the interview, that the child is given certain information about the interview (in particular, information about the child’s rights) in an appropriate format and that the information is explained to the child. If the interview is taking place by agreement, the child and the parent who has given agreement must also be reminded at this point of their rights to withdraw agreement and of other related matters (see section 41(2)).

### ***Questioning in urgent cases***

171. **Sections 54 and 55** make provision about the questioning of children (as defined in section 39(3)) in certain emergency situations. A senior officer (superintendent or above) may authorise the questioning of the child if satisfied that there are reasonable grounds to suspect that the child has, by behaving violently or dangerously, caused or risked causing serious physical harm to another person, that the questioning is necessary to investigate the circumstances and that the risk of loss of life makes it impracticable for an application for a child interview order to be made.
172. If authorisation for questioning is granted, the child is not required to answer questions (and the child must be informed of this right prior to the questioning taking place). A parent of the child must, if practicable, be informed that authorisation for the questioning has been granted (although this duty need not be complied with if informing the parent would exacerbate the risk of loss of life). An application for a child interview order must be made as soon as practicable after the authorisation for emergency questioning is granted and a child interview rights practitioner must also be informed (even though the child has no specific right to a child interview rights practitioner in relation to the emergency questioning).

***Register of child interview rights practitioners***

173. **Section 56** requires the Scottish Ministers to establish and maintain a register of child interview rights practitioners (that is, persons who are authorised to provide advice, support and assistance to children in the context of investigative interviews authorised by section 40 or by a child interview order). Child interview rights practitioners must be solicitors and must in addition be entitled to provide children's legal assistance under section 28M of the Legal Aid (Scotland) Act 1986. The Scottish Ministers may make regulations (subject to the negative procedure – see section 82(2)(c)) containing further provision about the register and about child interview rights practitioners. The provision made about child interview rights practitioners might include, for example, provision about the payment of fees to them and about how individual practitioners are appointed to particular cases (including requiring the views of the child involved to be ascertained).

***Effect of provisions of general application on this Chapter***

174. Any person exercising functions under this Chapter (for example, a constable making an application for a child interview order, a local authority participating in the planning of an investigative interview authorised by agreement or by a child interview order, a constable or social worker conducting such an interview or a constable questioning a child in urgent circumstances under section 54, or a child interview rights practitioner) must treat the need to safeguard and promote the wellbeing of the child as a primary consideration (section 72). The sheriff, in deciding whether to grant an application for a child interview order, is subject to the same duty. Section 74 authorises a constable who is authorised by virtue of a child interview order to carry out an investigative interview, or to question a child under section 54, to use reasonable force (for example, to ensure that the child attends the interview), subject to the limitations set out in subsections (4) to (6) of that section. Force cannot be used if the interview is taking place by agreement. Any person who obstructs a constable acting under a child interview order (or section 54) or otherwise interferes with the investigation into the child's behaviour (for example, by intimidating the child into giving false answers) is guilty of an offence (section 75). Of course, no child aged under 12 (including the child being questioned) can commit this offence (by virtue of new section 41 of the 1995 Act as inserted by section 1 of the Act).

***Guidance***

175. **Section 57** requires the Scottish Ministers to issue guidance about the obtaining and withdrawal of consent for the purposes of section 40, applications for child interview orders, and the planning and conduct of investigative interviews authorised by virtue of agreement being given under section 40 or by such an order. The guidance must also cover questioning in an emergency situation under section 54. Persons exercising functions to which the guidance relates must have regard to that guidance in exercising those functions.