



# Age of Criminal Responsibility (Scotland) Act 2019

2019 asp 7

## PART 4

### POLICE INVESTIGATORY AND OTHER POWERS

#### CHAPTER 4

##### TAKING OF PRINTS AND SAMPLES FROM CERTAIN CHILDREN

###### *Limitation on taking of prints and samples*

#### **58 Limitation on taking prints and samples from children under 12**

- (1) It is unlawful for a constable to take any relevant physical data or relevant sample from a child under 12 years of age except where authorised to do so—
  - (a) by an order under section 63,
  - (b) by virtue of section 69, or
  - (c) by or under any other enactment.
- (2) Subsection (1) does not apply where—
  - (a) an offence appears to have been committed against the child, or
  - (b) the child appears to have been harmed as a result of another child behaving, when under 12 years of age, in a way mentioned in section 63(2)(a),and the taking of relevant physical data or a relevant sample from the child is necessary to properly investigate that offence or, as the case may be, behaviour.
- (3) Relevant physical data or a relevant sample taken from a child in the circumstances and for the purpose mentioned in subsection (2), and any information derived from such a sample, may not be used for the purpose of investigating an incident of a type mentioned in subsection (4).
- (4) The incident is one—

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- (a) which occurred when the child was under 12 years of age, and
  - (b) in relation to which the constable has reasonable grounds to suspect that the child—
    - (i) by behaving in a violent or dangerous way, has caused or risked causing serious physical harm to another person, or
    - (ii) by behaving in a sexually violent or sexually coercive way, has caused or risked causing harm (whether physical or not) to another person.
- (5) But subsection (3) does not—
- (a) prohibit the use of the data, sample or information for the purpose of investigating the incident where the child is now 12 years of age or over and consents, or
  - (b) affect the ability of a constable—
    - (i) to apply for an order under section 63 authorising the taking of relevant physical data or a relevant sample from the child for the purpose of investigating the incident, or
    - (ii) to take such data or such a sample for that purpose by virtue of section 69.
- (6) In this Chapter—
- (a) references to taking relevant physical data and relevant samples from a child include references to requiring the child to provide relevant physical data and relevant samples,
  - (b) “child” has the same meaning as in Chapter 3.

## **59 Limitation on taking prints and samples from children aged 12 and over**

- (1) It is unlawful for a constable to take any relevant physical data or relevant sample from a child of 12 years of age or over for the purposes of investigating an incident of a type mentioned in subsection (2) except—
- (a) where authorised to do so—
    - (i) by an order under section 63, or
    - (ii) by virtue of section 69, or
  - (b) where the child consents.
- (2) The incident is one—
- (a) which occurred when the child was under 12 years of age, and
  - (b) in relation to which the constable has reasonable grounds to suspect that the child—
    - (i) by behaving in a violent or dangerous way, has caused or risked causing serious physical harm to another person, or
    - (ii) by behaving in a sexually violent or sexually coercive way, has caused or risked causing harm (whether physical or not) to another person.

## **60 Key definitions**

- (1) In this Chapter, the following expressions have the meanings given in this section.
- (2) “Relevant physical data” means any—
- (a) fingerprint,

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- (b) palm print,
  - (c) print or impression, other than those mentioned in paragraph (a) and (b), of an external part of the body,
  - (d) record of a person’s skin on an external part of the body created by an approved device,
  - (e) dental impression,
  - (f) photograph of a person.
- (3) “Relevant sample” means—
- (a) a sample of hair, including pubic hair, or other material from an external part of the body taken by means of cutting, combing or plucking,
  - (b) a sample of nail or other material from a fingernail or toenail or from under any such nail,
  - (c) a sample of saliva or other material taken by means of swabbing the inside of the mouth,
  - (d) a sample, other than those mentioned in paragraph (c), of blood or other body fluid, of urine, of body tissue or of other material taken by any means (including by swabbing a bodily orifice other than the mouth).
- (4) “Intimate sample” means—
- (a) a sample of blood, semen, or any other tissue fluid, urine or pubic hair,
  - (b) a dental impression,
  - (c) a sample of any material taken by means of swabbing any part of a person’s genitals (including pubic hair) or from a bodily orifice other than the mouth.
- (5) In subsection (2)(d), an “approved device” is a device approved by the Scottish Ministers by order under section 18(7B) of the Criminal Procedure (Scotland) Act 1995 for the purposes of section 18(7A)(d) of that Act.
- (6) The Scottish Ministers may by regulations modify the definitions of “relevant physical data”, “relevant sample” and “intimate sample”.

*Order authorising taking of prints and samples*

**61 Application for order authorising taking of prints and samples from child**

- (1) A constable may apply to the sheriff for an order under section 63 authorising the taking of relevant physical data or relevant samples from a child.
- (2) An application for an order under section 63 must—
- (a) identify the applicant,
  - (b) in so far as is practicable, identify the child in respect of whom the order is sought,
  - (c) in so far as is practicable, identify a parent of the child,
  - (d) state the grounds on which the application is made,
  - (e) specify the relevant physical data and relevant samples in relation to which authority to take is sought (including whether authority is sought to take an intimate sample),
  - (f) be accompanied by supporting evidence, whether documentary or otherwise, sufficient to enable the sheriff to determine the application.

## **62 Consideration by sheriff of application for order under section 63**

- (1) This section applies where a constable makes an application under section 61 in respect of a child.
- (2) The sheriff may determine the application in court or in chambers after such enquiry or hearing (if any) as the sheriff considers appropriate.
- (3) Before determining the application, the sheriff must consider whether any of the following persons should be given an opportunity to make representations—
  - (a) the applicant,
  - (b) the child in respect of whom the application is made,
  - (c) a parent of the child,
  - (d) any other person the sheriff considers to have an interest in the application.

## **63 Order authorising taking of prints and samples from child**

- (1) This section applies where a constable makes an application under section 61 in respect of a child.
- (2) The sheriff may make an order authorising the taking of relevant physical data and relevant samples from the child only if satisfied that—
  - (a) there are reasonable grounds to suspect that the child—
    - (i) by behaving in a violent or dangerous way, has caused or risked causing serious physical harm to another person, or
    - (ii) by behaving in a sexually violent or sexually coercive way, has caused or risked causing harm (whether physical or not) to another person, and
  - (b) the taking of relevant physical data or a relevant sample from the child is necessary to properly investigate the child's behaviour and the circumstances surrounding it (including whether a person other than the child has committed an offence).
- (3) In considering the matters mentioned in subsection (2), the sheriff must have regard to—
  - (a) the nature and seriousness of the child's behaviour,
  - (b) whether the taking of relevant physical data or relevant samples is appropriate given the child's circumstances (including the child's age and any matter related to the child's behaviour).
- (4) An order under this section authorises—
  - (a) the taking of the relevant physical data or relevant samples specified,
  - (b) the period, beginning with day on which the order is made, within which that data and those samples may be taken, being—
    - (i) no more than 7 days, or
    - (ii) such longer period as may be specified on cause shown,
  - (c) the taking of steps in relation to that data and those samples,
  - (d) the removal of the child to the place at which the data and samples are to be taken and the keeping of the child in that place for the purposes of the taking of that data and those samples.

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- (5) Subsection (4)(b) does not apply where the application for the order relates to relevant physical data or a relevant sample taken by virtue of section 69.
- (6) An order under this section may also require any person in a position to do so to produce the child to a constable.
- (7) In this section, “specified” means specified in the order.

#### **64 Notification of order under section 63**

- (1) This section applies where an order is made under section 63 authorising the taking of relevant physical data or a relevant sample from a child.
- (2) The constable must, as soon as reasonably practicable after the order is made, provide—
  - (a) the child, and
  - (b) in so far as practicable, a parent of the child,with a copy of the order.
- (3) The constable must at the same time explain the order to the child in a way that is appropriate to the child’s age and maturity.

#### **65 Taking of intimate samples**

- (1) This section applies where an order under section 63 authorises the taking of intimate samples from a child.
- (2) An intimate sample may be taken from the child—
  - (a) where the sample is a dental impression, only by a registered dentist,
  - (b) in any other case, only by a—
    - (i) registered medical practitioner,
    - (ii) registered health care professional, or
    - (iii) another type of individual of a type prescribed (by reference to skills, qualifications, experience or otherwise) by the Scottish Ministers by regulations.
- (3) In this section—

“registered dentist” has the meaning given by section 53(1) of the Dentists Act 1984,

“registered health care professional” means—

  - (a) a registered nurse, or
  - (b) a registered member of a health care profession designated for the purposes of this section by the Scottish Ministers by regulations.

#### **66 Destruction of prints and samples taken under section 63**

- (1) This section applies where an order under section 63 authorises the taking of any relevant physical data or relevant sample from a child.
- (2) The constable who applied for the order must ensure that all record of any data taken, all samples taken, and all information derived from any samples are destroyed as soon as possible following—

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- (a) a decision not to pass information about the child to the Principal Reporter under section 61 of the 2011 Act, or
  - (b) where information is so passed, the conclusion of proceedings in relation to the child under that Act in so far as arising from that information.
- (3) For the purposes of subsection (2)(b), such proceedings are concluded when an event mentioned in subsection (4) or (6) occurs.
- (4) The event referred to in subsection (3) is the determination by the Principal Reporter under section 66(2) of the 2011 Act—
- (a) that the behaviour of the child, to which the information mentioned in subsection (2)(b) relates, does not give rise to a ground in section 67 of that Act applying in relation to the child (whether or not such a ground applies for any other reason), or
  - (b) that, as a result of that behaviour, such a ground does apply but it is not necessary for a compulsory supervision order to be made in respect of the child.
- (5) Subsection (6) applies where the Principal Reporter determines under section 69(1) of that Act that—
- (a) as a result of the behaviour of the child referred to in subsection (4)(a), a ground in section 67 of that Act does apply, and
  - (b) it is necessary for a compulsory supervision order to be made in respect of the child.
- (6) The event referred to in subsection (3) is whichever of the following occurs first—
- (a) the discharge of the referral to the children’s hearing,
  - (b) the withdrawal under section 107(2) of the 2011 Act of an application to the sheriff,
  - (c) the making of a compulsory supervision order in respect of the child, or
  - (d) where a compulsory supervision order is already in force in respect of the child, the termination, variation or continuation of the order.
- (7) An event mentioned in subsection (6) is not treated as having occurred for the purposes of subsection (3) until—
- (a) the end of the period for any appeal under the 2011 Act with no appeal or further appeal, as the case may be, having been taken, or
  - (b) if an appeal or a further appeal, as the case may be, is taken, the conclusion of that appeal or further appeal.
- (8) Subsection (2) does not apply where the destruction of a sample, or the information derived from it, could have the effect of destroying any sample, or any information derived from it, lawfully held in relation to a person other than the child from whom the sample was taken.
- (9) The Scottish Ministers may by regulations modify subsection (6) so as to add to, vary, or remove an event for the time being mentioned in that subsection.
- (10) In this section, “children’s hearing” and “compulsory supervision order” have the same meanings as in the 2011 Act.

## **67 Appeal against decision under section 63**

- (1) An appeal taken to the Sheriff Appeal Court under section 110 of the Courts Reform (Scotland) Act 2014 against a decision of the sheriff under section 63 may be taken only where the sheriff, on an application made by a constable or by or on behalf of the child to whom the decision relates, gives permission.
- (2) Permission to appeal against such a decision must be applied for—
  - (a) where an order under section 63 is made, before the end of the period of 3 working days beginning with the day after the day on which the child is provided with a copy of the order under section 64,
  - (b) where the sheriff refuses to make such an order, before the end of the period of 3 working days beginning with the day after the day on which the decision is made.
- (3) An appeal against the decision of the sheriff under section 63 must be taken before the end of the period of 3 working days beginning with the day on which permission to appeal is given.
- (4) A decision of the Sheriff Appeal Court on an appeal against the sheriff's decision is final.
- (5) Subsection (6) applies where—
  - (a) the Sheriff Appeal Court upholds or varies the order appealed against,
  - (b) the order as upheld or varied authorises the taking of relevant physical data or relevant samples which, at the time the appeal is determined, have not been taken.
- (6) The Sheriff Appeal Court may, in substitution for the period mentioned in subsection (4)(b)(i) of section 63 (or any period specified by virtue of subsection (4)(b)(ii) of that section), specify the period within which that data or those samples may be taken.
- (7) Any period specified by virtue of subsection (6) must not, except on cause shown, exceed 7 days beginning with the day on which the appeal is determined.

## **68 Treatment of prints and samples where appeal taken against making of order under section 63**

- (1) This section applies where—
  - (a) an appeal is taken against a decision of the sheriff to make an order under section 63,
  - (b) before the constable who applied for the order was notified of the appeal, relevant physical data or a relevant sample was taken from the child by virtue of the order.
- (2) No steps or, as the case may be, no further steps may be taken in relation to the relevant physical data or relevant sample (other than holding or preserving the data or sample) before the conclusion of the appeal.
- (3) Where the decision of the sheriff is recalled and the order quashed, the constable who applied for the order must ensure that all record of any data taken, all samples taken, and all information derived from any samples taken are destroyed as soon as possible.
- (4) Where—

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- (a) the decision of the sheriff is varied so that the order authorises the taking of different relevant physical data or relevant samples to those originally specified in the order by virtue of section 63(4)(a), and
  - (b) as a result the taking of some or all of the data or samples mentioned in subsection (1)(b) would no longer be authorised by the order,
- the constable who applied for the order must ensure that all record of any such data taken, all such samples taken, and all information derived from any such samples taken are destroyed as soon as possible.

*Taking of prints and samples in urgent cases*

**69 Taking of prints and samples in urgent cases**

- (1) A constable may, subject to subsection (4), take relevant physical data or a relevant sample from a child if authorised to do so by a relevant senior officer under subsection (2).
- (2) The relevant senior officer may authorise the constable to take relevant physical data or a relevant sample from the child only if that officer is satisfied that—
  - (a) there are reasonable grounds to suspect that the child—
    - (i) by behaving in a violent or dangerous way, has caused or risked causing serious physical harm to another person, or
    - (ii) by behaving in a sexually violent or sexually coercive way, has caused or risked causing harm (whether physical or not) to another person,
  - (b) the taking of relevant physical data or a relevant sample from the child is necessary to properly investigate the child’s behaviour and the circumstances surrounding it (including whether a person other than the child has committed an offence), and
  - (c) that it is not practicable to apply for an order under section 63 authorising the taking of that data or sample because of the risk that, if the data or sample is not taken immediately, evidence derived from the data or sample, or the sample, would be lost or destroyed.
- (3) In considering the matters mentioned in subsection (2), the relevant senior officer must have regard to—
  - (a) the nature and seriousness of the child’s behaviour,
  - (b) whether the taking of relevant physical data or relevant samples is appropriate given the child’s circumstances (including the child’s age and any matter related to the child’s behaviour).
- (4) Intimate samples may not be taken from a child under this section.
- (5) In this section, a “relevant senior officer” is an officer—
  - (a) of the rank of superintendent or above,
  - (b) who has not been involved in the investigation in connection with which the taking of the relevant physical data or relevant sample is sought.

**70 Procedure following taking of prints and samples under section 69**

- (1) This section applies where any relevant physical data or relevant sample has been taken from a child by virtue of section 69.



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- (2) No steps may be taken in relation to the relevant physical data or relevant sample (other than holding and preserving the data or sample) unless and until an order under section 63 authorising the taking of the data or sample is obtained.
- (3) An application for an order under section 63 authorising the taking of the relevant physical data or relevant sample must be made before the end of the period of 7 days beginning with the day on which the data or sample was taken.
- (4) Such an application must, in addition to the matters mentioned in section 61(2), specify the data or sample taken by virtue of section 69.
- (5) The relevant senior officer who authorised the taking of the relevant physical data or relevant samples under section 69(2) must ensure that all record of any data taken and all samples taken are destroyed as soon as reasonably practicable after the earliest of the following events—
  - (a) a decision by the constable who took the data or sample not to apply for an order under section 63,
  - (b) the end of the period mentioned in subsection (3), no application having been made,
  - (c) where such an application is made but the sheriff refuses the application—
    - (i) the end of the period for an appeal against the sheriff’s decision, no appeal having been taken, or
    - (ii) if an appeal is taken and the sheriff’s decision is upheld, the conclusion of the appeal.

*Destruction of prints and samples taken with consent*

**71 Destruction of prints and samples taken from children aged 12 and over with consent**

- (1) This section applies where relevant physical data or a relevant sample has been taken from a child with consent by virtue of section 59(1)(b).
- (2) The relevant constable must ensure that all record of any data taken, all samples taken, and all information derived from any samples are destroyed as soon as possible following—
  - (a) a decision not to pass information about the child to the Principal Reporter under section 61 of the 2011 Act, or
  - (b) where information is so passed, the conclusion of proceedings in relation to the child under that Act in so far as arising from that information.
- (3) For the purposes of subsection (2)(b), such proceedings are concluded when an event mentioned in section 66(4) or (6) occurs.
- (4) Subsection (2) does not apply where the destruction of a sample, or the information derived from it, could have the effect of destroying a sample, or any information derived from it, lawfully held in relation to a person other than the child from whom the sample was taken.
- (5) In subsection (2), the “relevant constable” is the constable investigating the child’s behaviour and the circumstances surrounding it (including whether a person other than the child has committed an offence).