



## EXPLANATORY NOTES

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### **Age of Criminal Responsibility (Scotland) Act 2019 (asp 7)**

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

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## **EXPLANATORY NOTES**

### **INTRODUCTION**

1. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Age of Criminal Responsibility (Scotland) Act 2019. They do not form part of the Act and have not been endorsed by the Parliament.
2. These Notes should be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

### **THE ACT: AN OVERVIEW**

3. The Act changes the age of criminal responsibility in Scotland from eight to 12 (see Part 1). Harmful behaviour by children aged eight to 11 will never, following the Act's implementation, be treated as commission of an offence, but will be responded to in a different way. This is already the case in relation to behaviour by children aged under eight.
4. In addition, the Act makes provision in connection with this change in the areas of:
  - disclosure of conviction and other information (Part 2),
  - provision of information to persons affected by harmful behaviour by children (Part 3), and
  - the powers of the police to deal with harmful behaviour by children (more specifically, powers in relation to removing to a place of safety a child aged under 12 who is engaging in behaviour that is harmful to others, powers in relation to search of children aged under 12 and powers in relation to the questioning of and taking of forensic samples from children in respect of pre-12 behaviour) (Part 4).
5. Part 5 amends the Children's Hearings (Scotland) Act 2011 to ensure that the issue of whether any further reports are required is considered when a decision is being made on whether to defer a decision to a subsequent children's hearing.
6. Part 6 requires a review of the operation of the Act to be carried out during the 3 years following the age of criminal responsibility being raised to 12.

## **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 system, where he or she may be dealt with using the offence ground or, depending on the circumstances, another

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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.

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>

### **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.<sup>11</sup> 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

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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.

<sup>11</sup> 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.

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.<sup>12</sup>

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 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.<sup>13</sup>

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<sup>12</sup> In relation to which, as noted above, the standard of proof is “on the balance of probabilities” and the civil rules of evidence apply.

<sup>13</sup> 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](#))

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,<sup>14</sup> 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.<sup>15</sup>

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.

## **PART 2: DISCLOSURE OF CONVICTIONS AND OTHER INFORMATION RELATING TO TIME WHEN PERSON UNDER 12**

### **Pre-existing law**

23. The Rehabilitation of Offenders Act 1974 (the "1974 Act"), broadly speaking, provides for certain convictions to become "spent" after a specified rehabilitation period. A principal effect of a conviction being spent is that the convicted person no longer has to disclose information about the conviction (for example, if asked about previous convictions in connection with a job application or in judicial proceedings). Certain convictions never become spent and so require to be disclosed throughout a person's life.<sup>16</sup> The period after which other convictions become spent varies according to circumstances.<sup>17</sup> Similar provision is made in relation to certain alternatives to prosecution (which are not convictions).<sup>18</sup> Section 7 of the 1974 Act and the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013<sup>19</sup> also set out various circumstances in which the general protection against disclosure provided by the 1974 Act does not apply.

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[\(Scotland\) 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.

<sup>14</sup> Except where section 26 of the 2011 Act applies, in which case the child's welfare is a primary consideration.

<sup>15</sup> 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").

<sup>16</sup> For example, a conviction in respect of which a sentence of imprisonment for life was imposed.

<sup>17</sup> See section 5 of the 1974 Act.

<sup>18</sup> See section 8 of the 1974 Act.

<sup>19</sup> SSI 2013/50.

24. As already noted, children aged under eight cannot be convicted of an offence and so the 1974 Act has no application in relation to this age group. Prior to implementation of this Act, children aged eight to 11 could acquire convictions for the purposes of the 1974 Act, as the offence ground being accepted or established in or for the purposes of children's hearings proceedings counted as a conviction for these purposes.<sup>20</sup> Prior to the prosecution of children aged eight to 11 being prohibited by section 41A of the 1995 Act, children in this age group could also be convicted by the courts. Under the 1974 Act (prior to its amendment by this Act), both of these categories of conviction require to be disclosed at least until they become spent.

25. The 1974 Act largely deals with "self-disclosure" (that is, situations in which the convicted person is or is not themselves required to disclose information about spent convictions). The Police Act 1997 (the "1997 Act") and the Protection of Vulnerable Groups (Scotland) Act 2007 (the "2007 Act") established systems of "state disclosure", whereby certain information about a person is made available to other persons by the state (in Scotland, in the form of Disclosure Scotland – see paragraph 36). Information that will be disclosed by Disclosure Scotland is, generally speaking, not protected under the 1974 Act – that is, a person is not protected against failure to self-disclose information that will be disclosed by Disclosure Scotland under the 1997 Act or the 2007 Act.

26. The 1997 Act established a system for the state disclosure of information about a person's criminal record. The system is used, for example, to assist consideration of a person's suitability to undertake certain kinds of employment or voluntary work.<sup>21</sup> There are three levels of disclosure under the 1997 Act.

27. A basic disclosure under section 112 of the 1997 Act gives "prescribed details" of any unspent convictions held in "central records", or states that there are no such convictions. "Conviction" is defined in section 112(3) to mean a conviction within the meaning of the 1974 Act, other than a spent conviction. As already noted, the offence ground being accepted or established in or for the purposes of children's hearings proceedings counts as a conviction for this purpose.

28. A standard disclosure under section 113A of the 1997 Act:

- gives "prescribed details" of any "relevant matter" held in "central records" (or states that there are no such matters), and
- states whether the person to whom the disclosure relates is subject to notification requirements under Part 2 of the Sexual Offences Act 2003.

29. An enhanced disclosure under section 113B of the 1997 Act:

- gives "prescribed details" of any "relevant matter" held in "central records" (or states that there are no such matters),

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<sup>20</sup> See section 3 of the 1974 Act. See also footnote 13 – determinations finding that the offence ground applied in relation to children aged eight to 11 ceased to be made on 29 November 2019.

<sup>21</sup> Other contexts in which information about a person's criminal record may be required include adoption applications and applications for certain types of licence.



- gives information which the chief officer of any relevant police force<sup>22</sup> reasonably believes is relevant to the purpose for which the disclosure is sought and which the chief officer considers ought to be disclosed (or states that there is no such information), and
- states whether the person to whom the disclosure relates is subject to notification requirements under Part 2 of the Sexual Offences Act 2003.

30. A “relevant matter” is defined for the purposes of sections 113A and 113B of the 1997 Act as a “conviction” which is not a “protected conviction”, a caution which is not spent by virtue of schedule 3 of the Rehabilitation of Offenders Act 1974 and a prescribed court order.<sup>23</sup> The convictions covered by this definition include certain spent convictions as well as unspent convictions.<sup>24</sup> Again, the offence ground being accepted or established in or for the purposes of children’s hearings proceedings counts as a conviction for these purposes.<sup>25</sup>

31. The 2007 Act provides for additional checks on people doing regulated work with children or protected adults.<sup>26</sup> A person wishing to undertake such work is able to become a scheme member under the 2007 Act. Persons barred from certain types of regulated work under Part 1 of the 2007 Act are not permitted to become scheme members in relation to that type of work. When a person first joins the scheme, and periodically thereafter, a search for vetting information in relation to the person is undertaken. Vetting information is defined in section 49 of the 2007 Act as follows:

- the information referred to in section 113A(3)(a) of the 1997 Act (which is the information mentioned in the first bullet-point of paragraph 28 above – that is, “prescribed details” of any “relevant matter” held in “central records” (or a statement that there is no such information)),
- information as to whether the scheme member is subject to notification requirements under Part 2 of the Sexual Offences Act 2003,
- information which the chief officer of a relevant police force<sup>27</sup> reasonably believes to be relevant in relation to the type of work in relation to which the scheme member participates in the scheme and which the chief officer considers ought to be included in the member’s scheme record,

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<sup>22</sup> “Relevant police force” is defined in [the Police Act 1997 \(Criminal Records\) \(Scotland\) Regulations 2010 \(SSI 2010/168\)](#). The definition includes, as well as the Police Service of Scotland, certain other police forces. So, for example, if a person is seeking an enhanced disclosure in Scotland having just moved from England, the information in the disclosure could include information provided by the chief constable of the English police force for the area where the person previously lived.

<sup>23</sup> See section 113A(6) of the 1997 Act for definitions of “relevant matter” and “conviction”. This section also defines “central records” (but see also [the Police Act 1997 \(Criminal Records\) \(Scotland\) Regulations 2010 \(SSI 2010/168\)](#)). Those regulations also set out what is meant by “prescribed details”. The meaning of “protected conviction” is set out in section 126ZA of the 1997 Act.

<sup>24</sup> See section 126ZA of the 1997 Act.

<sup>25</sup> Again, by virtue of section 3 of the Rehabilitation of Offenders Act 1974.

<sup>26</sup> See Part 6 of the 2007 Act for definitions of terms such as “protected adult” and “regulated work”.

<sup>27</sup> By virtue of section 97(5) of the 2007 Act, “relevant police force” has the same meaning in that Act as it has in the 1997 Act – see footnote 22. But see also [The Protection of Vulnerable Groups \(Scotland\) Act 2007 \(Consequential Provisions\) Order 2010 \(SI 2010/2660\)](#) (an order made under section 104 of the Scotland Act 1998), which requires chief constables of relevant police forces outside Scotland to comply with requests for vetting information.

- any other information prescribed by the Scottish Ministers.<sup>28</sup>

32. There are three types of disclosure under the 2007 Act:

- a statement of scheme membership (section 54 of the 2007 Act): this is a document stating that a person is a scheme member,
- a short scheme record (section 53 of the 2007 Act): this is a document stating that a person is a scheme member and that the person's scheme record does not include any vetting information,
- a scheme record (section 52 of the 2007 Act): this is a document stating that a person is a scheme member and giving, in accordance with the provisions of the 2007 Act, details of the vetting information included in the person's scheme record.

33. The information described in the second bullet-point of paragraph 29 and the third bullet-point of paragraph 31 is referred to as "other relevant information" ("ORI").

34. Due to the fact that children aged under eight already cannot be convicted of an offence, no conviction information in relation to pre-eight behaviour exists to be disclosed in later life under the 1997 Act or the 2007 Act.

35. As children aged eight to 11 could acquire convictions (by virtue of the offence ground being accepted or established for children's hearings purposes) up to 28 November 2019, and could also be convicted by the courts in the past, information about things done while aged eight to 11 can fall to be disclosed as convictions under the 1997 Act and the 2007 Act.<sup>29</sup> Information about things done by children in this age group may also be disclosed as ORI.

36. The disclosure schemes under the 1997 Act and 2007 Act are both operated in Scotland by Disclosure Scotland.<sup>30</sup> Individuals apply to Disclosure Scotland for the type of disclosure they require. Disclosure Scotland then gathers information from police records of convictions prior to the disclosure information being provided in accordance with the 1997 Act or the 2007 Act. When the application is for an enhanced disclosure or a scheme record, Disclosure Scotland ask the chief officer of any relevant police force to provide information about the applicant for inclusion on the disclosure as ORI (as described in paragraphs 29, 31 and 33 above).

## **Changes made by the Act**

### ***Impact on pre-existing law of change in age of criminal responsibility***

37. Once Part 1 of the Act comes into force, it will no longer be possible for a person to acquire a criminal conviction on the basis of behaviour that occurred when they were aged under 12. In the future, therefore, there will not be any conviction information relating to this period in a person's life to disclose in later life. But nothing in Part 1 of the Act impacts on the ability of the police to hold information, relating to a time when a person was aged eight

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<sup>28</sup> See [The Protection of Vulnerable Groups \(Scotland\) Act 2007 \(Vetting Information\) Regulations 2010 \(SSI 2010/189\)](#).

<sup>29</sup> And, as mentioned in paragraph 25, once disclosed in this way, the protections against self-disclosure provided by the 1974 Act cease to apply.

<sup>30</sup> Which is an executive agency of the Scottish Government.

to 11, which might, in the absence of any provision to the contrary, be able to be disclosed as ORI.

38. Convictions acquired prior to the change in the age of criminal responsibility in respect of behaviour that occurred when a person was aged eight to 11 are not affected by Part 1 of the Act – that is, such convictions will still exist after the Act comes into force. Some of those convictions will by now be spent, but others may not be. So, depending on the circumstances, information about such convictions might, in the absence of any provision to the contrary, sometimes fall to be disclosed. And, again, nothing in the Act affects the ability of the police to continue to hold information, acquired prior to the change in the age of criminal responsibility and relating to a time when a person was aged eight to 11, which might, in the absence of any provision to the contrary, be able to be disclosed as ORI.

### ***What this Part of the Act does***

#### *Amendment and replacement of the 1974 Act in relation to pre-12 behaviour*

39. Section 4 of the Act makes various amendments to the 1974 Act. In particular, it provides that “conviction”, when used in the 1974 Act, no longer applies to convictions for offences committed when the convicted person was aged under 12. It also provides that the offence ground having been accepted or established in or for the purposes of children’s hearing proceedings, in relation to behaviour which occurred when a person was aged under 12, no longer counts as a conviction for the purposes of that Act.

40. The effect of the amendments made by section 4 is that the 1974 Act no longer applies in relation to behaviour that occurred, prior to the change in the age of criminal responsibility, when a person was aged eight to 11. In addition, the 1974 Act will not apply to behaviour which occurs, after section 1 of the Act comes into force, when a person is aged eight to 11 (as there will be no conviction to become spent in such cases in future). Following the change in the age of criminal responsibility, therefore, the 1974 Act will not apply at all to pre-12 behaviour.

41. One of the effects of this is that the protection against self-disclosure of certain information provided by the 1974 Act falls away in relation to all previously covered pre-12 behaviour. This would mean that if, when applying for a job, a person did not disclose information about a conviction for an offence that they committed when under 12, and prior to section 1 of the Act coming into force, the employer might be able to dismiss them on this ground if the information subsequently came to light.

42. Sections 5 to 9 of the Act therefore make new provision about self-disclosure of information in relation to pre-12 behaviour. Sections 6 and 7, broadly speaking, provide protection against having to self-disclose certain information in certain circumstances.<sup>31</sup>

43. The information that is protected is information in relation to “relevant behaviour” and “circumstances ancillary to relevant behaviour”. Section 5 defines these terms. Subsection (1)(a) defines “relevant behaviour” in relation to situations arising prior to the change in the age of criminal responsibility (that is, a person being convicted of, or being given an alternative to prosecution in respect of, an offence which was committed when the person was aged under 12). Subsection (3) provides that the acceptance or establishment of

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<sup>31</sup> The provision made in sections 6 and 7 is broadly equivalent to the provision made in section 4(1) to (3) of the 1974 Act.

the offence ground in or for the purposes of children's hearings proceedings counts as a conviction for this purpose. Subsection (1)(b) defines "relevant behaviour" in relation to situations, arising after the change in the age of criminal responsibility, where suspected harmful behaviour by the child leads to various provisions in Part 4 of the Act being used. Subsection (2) provides some examples of "circumstances ancillary to relevant behaviour". The purpose of defining "circumstances ancillary to relevant behaviour" is to extend the protection against self-disclosure to questions that don't directly ask, for example, whether a person has a conviction, but relate to the wider circumstances of an offence and the answers to which would indirectly reveal the existence of the conviction.

44. Subsection (4) allows the Scottish Ministers to make regulations modifying the definitions of "relevant behaviour" and "circumstances ancillary to relevant behaviour" in subsection (1). For example, if a new power was created in relation to harmful behaviour by children aged under 12 in future, this power could be used to protect a child from having to subsequently disclose the fact that that power had been used in relation to them. Regulations modifying subsection (1) are subject to the affirmative procedure (see section 82(3)(a)).

45. Section 6 makes provision in relation to the disclosure of information about relevant behaviour and circumstances ancillary to relevant behaviour in judicial proceedings (which is defined in subsection (3)). By virtue of subsection (1), evidence proving such behaviour or circumstances is inadmissible in judicial proceedings. Under subsection (2), a person cannot be asked any question in judicial proceedings which they would be unable to answer without revealing relevant behaviour or circumstances ancillary to such behaviour. If the person is asked such a question, they are not obliged to answer.

46. Section 7 provides protections in relation to non-judicial proceedings (including, for example, job applications). So, if a person who, prior to the change in the age of criminal responsibility, was convicted of an offence committed while they were under 12 is asked in a job application or interview if they have any convictions, they are not obliged to mention that conviction (subsection (1)(a)). And a person cannot be dismissed from a job by reason of such a conviction or for failing to disclose such a conviction (subsection (3)). Subsection (2) provides that legal requirements to disclose information do not extend to information about relevant behaviour or circumstances ancillary to such behaviour from legal requirements to disclose information (the effect being that such information need not be disclosed).

47. Section 8 sets out certain exceptions to the protections provided by sections 6 and 7 in connection with disclosure under the 1997 and 2007 Acts, including the review process established by sections 14 to 20 of this Act. In the specified circumstances, a person is not protected from having to, for example, answer questions about relevant behaviour and circumstances ancillary to such behaviour. See paragraphs 61, 68 and 70 for more detail on these exceptions.

48. Further, more general, exceptions to the protections provided by sections 6 and 7 are set out in section 9.

49. Subsection (1) of section 9 provides that section 6 does not apply in the types of judicial proceedings listed in subsection (2). These include, for example, criminal proceedings. Evidence relating to relevant behaviour and circumstances ancillary to such behaviour can therefore be admitted in such proceedings (and a person can be asked, and

required to answer, questions about such behaviour or circumstances in such proceedings). Subsection (3) allows evidence about such behaviour or circumstances to be admitted in judicial proceedings not listed in subsection (2) provided that justice cannot otherwise be done.<sup>32</sup>

50. Subsection (4) of section 9 gives the Scottish Ministers power to make regulations adjusting the list of proceedings set out in subsection (2) (paragraph (a)) or otherwise providing that section 6 does not apply in proceedings specified in the regulations to the extent and for the purposes set out in the regulations (paragraph (b)).

51. Regulations under subsection (4) may also include provision setting out exceptions to the protection provided by section 7 (paragraphs (c) and (d)). Again, the effect of any such provision would be to allow questions to be asked, and require answers to be given, in relation to relevant behaviour and circumstances ancillary to such behaviour in non-judicial contexts listed in the regulations.<sup>33</sup>

52. Regulations under section 9(4) are subject to the affirmative procedure (see section 82(3)(b)).

*Effect of amendments of 1974 Act on 1997 and 2007 Acts*

53. The amendments made to the 1974 Act by section 4 also have effects in relation to state disclosure of information under the 1997 Act and the 2007 Act. This is because, as already noted, the 1997 Act defines “conviction” with reference to the 1974 Act, and that definition also carries through to the 2007 Act. By virtue of the 1974 Act no longer applying in relation to convictions acquired, prior to the change in the age of criminal responsibility, for offences committed when a person was aged under 12, information about such offences will no longer be automatically disclosed as part of a basic disclosure, a standard disclosure or an enhanced disclosure under the 1997 Act. And, by virtue of the change in the age of criminal responsibility, pre-12 behaviour will not in the future result in a conviction, again meaning that such behaviour will not fall to be automatically disclosed in any of these types of disclosure. In addition, information about such convictions or behaviour will no longer be disclosed as vetting information as part of a scheme record under the 2007 Act. The existence of such a conviction or behaviour will also not automatically prevent a short scheme record stating that no vetting information exists.

54. But, as noted in paragraph 33, enhanced disclosures under the 1997 Act and scheme records under the 2007 Act may also include ORI – which may, as this Act does not include any provision to the contrary, include information about pre-12 behaviour. Subsections (2) and (3) of section 10 amend the 1997 Act and the 2007 Act respectively to make clear that ORI can include information about relevant behaviour within the meaning of section 5(1)(a) – that is, pre-12 behaviour which, prior to the implementation of this Act, resulted in a conviction (including the offence ground being accepted or established for children’s hearings purposes) or an alternative to prosecution. So, although information about pre-12 convictions will no longer be automatically disclosed under the 1997 and 2007 Acts, such information may be disclosed as ORI.

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<sup>32</sup> These exceptions are broadly equivalent to the provision made in section 7(2) and (3) of the 1974 Act.

<sup>33</sup> The power conferred by section 9(4) is broadly equivalent to the powers conferred by sections 4(4) and 7(4) of the 1974 – these are the sections under which the Rehabilitation of Offenders Act 1974 (Exclusions and Exceptions) (Scotland) Order 2013 is made.

*Prohibition on provision of ORI unless approved by independent reviewer*

55. Section 10(1) of the Act changes the operation of section 113B of the 1997 Act (via an amendment of section 119 of that Act) and of section 75 of the 2007 Act in relation to the inclusion of ORI that relates to pre-12 behaviour in an enhanced disclosure or scheme record. These amendments apply in relation to both information about things done by children aged under 12 already held by the police when the age of criminal responsibility changes and information about things done by children in this age group acquired after that change. The effect of these amendments is that, following the change in the age of criminal responsibility, ORI which relates to behaviour while a person was aged under 12 will only be able to be provided by the police<sup>34</sup> to Disclosure Scotland for inclusion in an enhanced disclosure or a scheme record if the outcome of the review process set out in sections 14 to 20 of the Act is that the information ought to be included in the disclosure.

*The independent reviewer*

56. Section 11 of the Act creates the position of independent reviewer. The principal function conferred on the independent reviewer by the Act is reviewing information proposed to be included in enhanced disclosures or scheme records as ORI. Other functions include the preparation of an annual report, which may include recommendations, for example, about changes to how the review system works (see section 21). Section 24 allows the independent reviewer's functions to be modified by regulations (subject to the affirmative procedure – see section 82(3)(c)).

57. The independent reviewer will be appointed by the Scottish Ministers (section 12(1)). The rest of section 12 makes self-explanatory provision about various other matters to do with appointment (including disqualification from appointment and removal from office). The reviewer is likely to require administrative support and section 13 allows this to be provided by the Scottish Ministers, following consultation with the reviewer. If support is not directly provided by the Scottish Ministers, they must ensure that the necessary support is provided.

*Review process*

58. Sections 14 to 20 set out the process to be followed where the chief constable of Police Scotland has identified, and wishes to disclose, ORI that relates to a person's behaviour while aged under 12.

59. The initial part of the process is unchanged: when a person (the “applicant”) applies for an enhanced disclosure or a scheme record, Disclosure Scotland will ask the chief constable whether Police Scotland holds any information which the chief constable reasonably believes to be relevant to the purpose for which the disclosure or record is required and which the chief constable considers ought to be disclosed. If no relevant information is identified, or if information is identified but the chief constable does not consider that it ought to be disclosed, then the chief constable will advise Disclosure Scotland of this and Disclosure Scotland will proceed to issue the disclosure or record accordingly. If,

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<sup>34</sup> The provision being inserted into the 1997 Act by section 10 of the Act refers only to the chief constable of the Police Service of Scotland. In the 2007 Act, “chief constable” is defined to mean the chief constable of the Police Service of Scotland, so the reference in the provision inserted into that Act by section 10 of the Act also refers only to the chief constable of the Police Service of Scotland. Section 26 of the Act defines “chief constable” in the same way – so the review process set out in the Act only applies in relation to information held by the Police Service of Scotland.

however, the chief constable identifies ORI and considers that it ought to be disclosed then, if the information relates to a time when the person was aged under 12, the process in sections 14 to 20 will be followed.

60. The chief constable sends the information which the chief constable considers ought to be disclosed to the independent reviewer, along with information about the purpose for which the disclosure is being applied for, an explanation of the chief constable's reasons for considering that the information ought to be disclosed, and any other information that the chief constable thinks is relevant (section 14). The chief constable will also, under section 15, notify the Scottish Ministers that information has been referred to the independent reviewer – so Disclosure Scotland will be aware that a review is taking place.

61. On receipt of the information, the independent reviewer notifies the applicant about the review in accordance with section 16. In particular, the applicant will be given details of the information referred for review and told that they can make representations, within a specified period,<sup>35</sup> to the reviewer about whether the information should be disclosed or not. If the reviewer thinks that the applicant may have further information, the reviewer can also ask the applicant to provide it. The protection against self-disclosure provided by sections 6 and 7 of the Act does not apply in relation to the independent reviewer's consideration of the case (see section 8(1) and (2)). That is, the applicant has no right not to answer questions asked by the independent reviewer about the pre-12 behaviour that is the subject of the review.

62. The independent reviewer also has power, under section 17, to require other persons to provide the reviewer with information which the reviewer thinks is necessary to carry out the review.

63. The independent reviewer must then proceed to review whether the information identified by the chief constable ought to be disclosed. Section 18(3) requires the independent reviewer to take account of the explanation and any other information originally provided by the chief constable and also of any representations made by the applicant or information received in response to a request under section 17. It is implicit, therefore, that the review cannot take place until the time periods within which such representations can be made, or such information provided, have expired.

64. The issues that the independent reviewer is required to consider in reviewing information (see section 18(1) and (2)) are very similar to the tests that the chief constable is required to apply under section 113B(4) of the 1997 Act (see paragraph 59 above). In this case, the issues are whether the information is relevant in relation to the purpose for which the enhanced disclosure or scheme record is sought and whether the information ought to be included. The independent reviewer may, however, be in possession of information that was not known to the chief constable (for example, as a result of representations made by the applicant).

65. In carrying out a review, the independent reviewer is also required to have regard to any guidance issued by the Scottish Ministers under section 22.

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<sup>35</sup> This period (and other periods within which certain things that form part of the review process must happen) may be specified in regulations made under section 23.

66. The independent reviewer must, in the course of the seven days following the day on which the reviewer reached a decision about whether or not the information ought to be disclosed, notify the chief constable, the applicant and the Scottish Ministers (that is, Disclosure Scotland) of their decision (section 19). Under section 20, the applicant or chief constable can, within 28 days of that notification, appeal against the decision. But the appeal can only be on a point of law (for example, that the independent reviewer applied an incorrect test in making their decision). The appeal is to the sheriff,<sup>36</sup> who can confirm the independent reviewer's decision or substitute their own decision. No further appeals are possible once that route is exhausted. In addition, the procedure in the 1997 Act for the raising of disputes about the accuracy of information contained in an enhanced disclosure and the procedure in the 2007 Act for the correction of inaccurate scheme records do not apply in relation to information that has been subject to review by the independent reviewer (section 25).

67. Applications for enhanced disclosures and scheme records are made for specific purposes. For example, a person may require an enhanced disclosure for the purposes of a particular job application. If they then made a further application for a different job that also required an enhanced disclosure, they would require to obtain a new disclosure for the specific purpose of the second application. Each application for an enhanced disclosure would, if ORI about pre-12 behaviour existed that was potentially relevant to both jobs, require to be referred to the independent reviewer. Section 20(5) makes clear that, if an appeal is made in relation to the review in the first case, section 20(4) (which provides for the appeal decision to be final) does not prevent an appeal being made in relation to the separate, second case, even though the cases may relate to the same information.

68. The protection against self-disclosure provided by sections 6 and 7 of the Act also does not apply in relation to appeal proceedings under section 20 (see section 8(1) and (2)). That is, the applicant could be asked, and if asked would be required to answer, questions about the pre-12 behaviour to which the appeal relates during the appeal proceedings.

69. Although Disclosure Scotland is notified of the independent reviewer's decision, the chief constable still has to formally comply with the duty to provide information in response to the original request made by Disclosure Scotland. The changes made to the 1997 Act and the 2007 Act by section 10 prohibit the chief constable from providing information until such time as the independent reviewer has determined that the information may be disclosed (and the period for appealing has expired or the sheriff has confirmed the decision on appeal) or the sheriff has decided on an appeal that the information may be disclosed.

*Effect of decision to include information about pre-12 behaviour as ORI on self-disclosure rules*

70. Once information about pre-12 behaviour is included (as ORI) in an enhanced disclosure or a scheme record, the protection against self-disclosure of such information falls away (see section 8(3) and (4)). So, for example, a potential employer to whom such an enhanced disclosure or scheme record is provided is then entitled to ask questions in relation to the pre-12 behaviour disclosed, and the applicant has no right not to answer those questions. Section 8(6) and (7) provide additional clarification that the protection against self-disclosure remains in place until the enhanced disclosure or scheme record is actually

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<sup>36</sup> By virtue of the change made to the Courts Reform (Scotland) Act 2014 by section 81 of the Act, summary sheriffs can also deal with such appeals (with their determination also being final).



issued – if the person fails to disclose the pre-12 behaviour to a potential employer at an earlier stage, the person cannot be excluded from a job solely by reason of that failure to disclose (but they could potentially be excluded from the job by reason of the pre-12 behaviour, or by reason of failing to answer questions about that behaviour after the issue of the enhanced disclosure or scheme record).

### **PART 3: VICTIM INFORMATION**

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

71. Section 53 of the Criminal Justice (Scotland) Act 2003 (the “2003 Act”) permitted the Principal Reporter to disclose certain information about cases involving children to victims (and certain other persons) on request. Such disclosure depended on it appearing to the Principal Reporter that an offence had been committed (so, for example, persons harmed by the behaviour of a child aged under eight, which is never an offence, were unable to request information under section 53). The Principal Reporter also had to be satisfied that the provision of information to the person making the request would not be detrimental to the best interests of any child, and that it was appropriate in the circumstances of the case to provide the information. The information permitted to be provided if these conditions were satisfied was information about the action taken by the Principal Reporter in relation to the offence and about how the case was disposed of.

72. Section 68(3) of the 2011 Act deals with the provision of information to certain persons where, following consideration of a case, the Principal Reporter considers either that no section 67 ground applies or that a ground does apply but it is not necessary for a compulsory supervision order to be made in respect of the child. In these circumstances, no referral to a children’s hearing is made, but the Principal Reporter is obliged by section 68(3)(a) of the 2011 Act to inform certain people of the decision (and the fact that, as a consequence, the case will not proceed to a children’s hearing). The people to be informed are listed in section 68(4) – they include the child, each relevant person in relation to the child<sup>37</sup> and the person who originally referred the case to the Principal Reporter. In addition, the Principal Reporter has power under section 68(3)(b) to inform other people of the decision, provided that the Principal Reporter considers the disclosure to be appropriate.<sup>38</sup>

#### **Changes made by the Act**

##### ***Impact on pre-existing law of change in age of criminal responsibility***

73. Part 1 of the Act would, if section 53 of the 2003 Act remained in place, have meant that information about action taken in response to the behaviour of eight to 11 year olds would not be available to persons affected by such behaviour (as the availability of information under that section depended on an offence having been committed, and eight to 11 year olds will not be able to commit an offence once Part 1 of this Act is in force).

74. Part 1 of the Act does not affect the provision of information under section 68(3) of the 2011 Act, as this provision applies whichever section 67 ground was being considered in relation to the child.

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<sup>37</sup> “Relevant person” is defined in section 200 of the 2011 Act.

<sup>38</sup> Disclosures under section 68(3)(a) and (b) of the 2011 Act must also be made in compliance with data protection law.

***What this Part of the Act does***

75. Section 27 of the Act repeals section 53 of the 2003 Act, preventing the effect mentioned in paragraph 73 above from arising (subsection (3)). New sections 179A, 179B and 179C are inserted into the 2011 Act in replacement (subsection (1)).

76. New section 179A(3) gives certain people a right, in certain circumstances, to request certain information about how a child<sup>39</sup> has been dealt with by the children's hearing system.

77. The right to make a request arises where the Principal Reporter is required to make a determination in respect of a child under section 66(2) of the 2011 Act<sup>40</sup> and the Principal Reporter has information suggesting:

- that a child has committed an offence (as a result of section 1 of the Act, this only applies in relation to children aged 12 or over), or
- that a child aged under 12 (including a child aged under eight) has acted or behaved in a way mentioned in subsection (2) of section 179A (that is, that the child has harmed another person by acting or behaving in a physically violent, sexually violent or sexually coercive, or dangerous, threatening or abusive way). The harm referred to can be physical or psychological.

78. In addition, the right to request information arises where the case of a child aged 16 or 17 who has plead guilty to, or been found guilty of, an offence in court proceedings has been referred for disposal by the children's hearings system.<sup>41</sup>

79. The people who can make a request are:

- any person against whom an offence appears to have been committed (or where that person is a child, any relevant person in relation to the child),
- any person who appears to have been harmed by action or behaviour of a child aged under 12 which was physically violent, sexually violent or sexually coercive, or dangerous, threatening or abusive (or where the person harmed is a child, any relevant person in relation to the child), and

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<sup>39</sup> "Child" is defined for the purposes of the 2011 Act, including new section 179A, 179B and 179C, in section 199 of that Act.

<sup>40</sup> Section 66(1) of the 2011 Act sets out when the requirement to make such a determination arises. This includes where the Principal Reporter receives information about a child from the police under section 61 of the 2011 Act. Determinations under section 66(2) fall to be made in relation to new circumstances involving children who are already subject to a compulsory supervision order, as well as in cases where the child is not subject to such an order.

<sup>41</sup> See section 49 of the 1995 Act. Section 71 of the 2011 Act requires the Principal Reporter to arrange a children's hearing for the purpose of disposing of the case where the child is not already subject to a compulsory supervision order. Section 130 of the 2011 Act has the same effect in relation to cases where the child is already subject to a compulsory supervision order.

- other persons specified in regulations (subject to any conditions specified in the regulations).<sup>42</sup>

80. The Principal Reporter may know, from information held in relation to a case, that a particular person would be entitled to request information under subsection (3) of section 179A. Subsection (5) of that section permits the Principal Reporter to contact such persons to advise them of their right to request information.

81. New section 179B describes the information that may be provided in response to a request under section 179A. The information varies according to how the case was dealt with.

82. In cases referred by a court for disposal by a children's hearing, the holding of a children's hearing is automatic, so there is no need to provide information as to whether a children's hearing required to be arranged. The information to be provided in such cases is the information mentioned in subsection (2)(b) of section 179B.

83. In all other cases covered by section 179A, the holding of a children's hearing is not automatic but turns on the Principal Reporter's determination under section 66(2). Under section 179B(1)(a), the information to be provided in such cases includes information as to whether or not a children's hearing is to be arranged. If a hearing is not to be held (because the Principal Reporter considers that no section 67 ground applies or that such a ground does apply but it is not necessary for a compulsory supervision order to be made in respect of the child), the additional information to be provided is that set out in section 179B(2)(a).<sup>43</sup>

84. If a hearing is to be held (because the Principal Reporter considers that a section 67 ground applies and also that it is necessary for a compulsory supervision order to be made in respect of the child), the additional information to be provided is that set out in section 179B(2)(b).

85. The information provided in response to a request under section 179A does not include information about the reasons for the decisions made by the Principal Reporter and children's hearings or details of the particular measures authorised by any compulsory supervision order to which the child is subject.

86. Provision of the information described in section 179B is not automatic. New section 179C(1) permits the Principal Reporter to comply with a request for information under section 179A only if satisfied that the provision of the information would not be detrimental to the best interests of the child to whom the information relates (or any other child). In

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<sup>42</sup> The regulations are subject to negative procedure (by virtue of existing section 195(3) of the 2011 Act). Section 53 of the 2003 Act included a similar power to that conferred by new section 179A(4)(d) of the 2011 Act. That previous power was used to make [The Children's Hearings \(Provision of Information by Principal Reporter\) \(Prescribed Persons\) \(Scotland\) Order 2003 \(SSI 2003/424\)](#). The persons prescribed were Victim Support Scotland, the Criminal Injuries Compensation Authority, the Criminal Injuries Compensation Appeals Panel and insurers.

<sup>43</sup> This includes information as to any action taken by the Principal Reporter under section 68(5) of the 2011 Act or otherwise. Section 68(5) of the 2011 Act specifically empowers the Principal Reporter, where the case is not proceeding to a children's hearing, to refer the child to a local authority for the provision of advice, guidance and assistance under Chapter 1 of Part 2 of the Children (Scotland) Act 1995 or to certain other specified bodies for the provision of advice, guidance and assistance. In addition, the Principal Reporter has a general power under paragraph 9 of schedule 3 of the 2011 Act to do anything which the Principal Reporter considers appropriate for the purposes of or in connection with the Principal Reporter's statutory functions.

addition, the Principal Reporter must be satisfied that providing the information is appropriate in all the circumstances of the case.<sup>44</sup> In deciding this, the Principal Reporter must take into account the factors set out in section 179C(2).

87. Section 179C(3) also prohibits the Principal Reporter from providing information in response to a request under section 179A which is not directly related to the action or behaviour which caused harm or which constituted an offence.<sup>45</sup>

88. Subsections (6) and (7) of section 179A set out what is to happen when a person is entitled to request information under that section (for example, by virtue of having been harmed by a child's behaviour or being a person against whom an offence has been committed) and also entitled to receive information under section 68(3)(a) of the 2011 Act (for example, by virtue of being the person who reported the behaviour or the offence to the Principal Reporter). The more limited information required to be provided under section 68(3)(a) is provided under that section (so without the Principal Reporter having to be satisfied as mentioned in section 179C(1)) and additional information requested under section 179A is provided under section 179C (subject to the conditions in that section being satisfied).

89. Subsection (2) of section 27 of the Act also inserts a new subsection (3A) into section 68 of the 2011 Act, which eliminates any uncertainty about what information may be provided under 68(3)(b)<sup>46</sup> to a person who is also entitled to request information under section 179A (by providing that information which can be requested under section 179A cannot be provided under section 68(3)(b) to such a person).

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

### **Chapter 1: Emergency place of safety**

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

90. Prior to implementation of this Act, where a child aged eight or over is behaving (or is likely to behave) in a way that is causing or risks causing significant harm to another person, a police constable may be able to arrest the child on suspicion that the child has committed (or is committing) an offence.<sup>47</sup> As a person who is arrested outwith a police station must be

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<sup>44</sup> The Principal Reporter must also comply with data protection law in providing information under section 179C.

<sup>45</sup> If, for example, in a case involving a child aged under 12, the facts relating to the behaviour which harmed the person making the request for information are not accepted, the children's hearing may proceed on the basis of other facts which are accepted. If a compulsory supervision order is then made in respect of the child, this information cannot be provided in response to the request under section 179A, as the order made does not relate to the harmful behaviour to which the request relates.

<sup>46</sup> The information available under section 68(3)(b) of the 2011 Act is more limited than that which can be requested under section 179A, but fewer conditions have to be satisfied than if information is provided in response to a request under section 179A. Section 68(3)(a) and (b), of course, apply only where the Principal Reporter determines that the case should not be referred on to a children's hearing.

<sup>47</sup> Section 1(1) of the Criminal Justice (Scotland) Act 2016.

taken to a police station as quickly as reasonably practicable after the arrest<sup>48</sup>, such an arrest would also have the immediate effect of removing the child to a place of safety.<sup>49</sup>

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

91. Once section 1 of the Act comes into force, the power described above will not be available in relation to eight to 11 year olds, as children in this age group will no longer be able to commit an offence, and so can't be arrested on suspicion of committing an offence. This puts them into the same position as children under eight are currently in.

92. Depending on the precise circumstances, it may be possible for a constable to remove a child who is behaving (or is likely to behave) in a way that is causing or risks causing significant harm to another person to a place of safety using the power conferred by section 56 of the 2011 Act, but this does depend on the police constable being satisfied that the child him or herself is at risk of harm. Other powers will also persist (for example, the common law power to take a child home (on the basis of the child's agreement)).

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

93. Section 28 of the Act creates a specific power authorising a police constable to take a child aged under 12 (so including those aged under eight) to a place of safety in cases where the child is behaving (or is likely to behave) in a way that is causing or risks causing significant harm to another person and the child's removal is necessary to protect the other person from an immediate risk of such harm. A parent of the child must be informed that the child has been taken to a place of safety.

94. Once removed to a place of safety, the child can be kept in the place of safety for a maximum of 24 hours (subsection (4)(b)). But the child can only be kept in the place of safety for as long as one of the reasons mentioned in subsection (4)(a) applies. The first reason is that arrangements have not yet been made for the child's care or protection. Such arrangements may be as simple as returning the child to his or her home or to a relative's home, but in other cases might involve steps such as a child protection order being applied for. Once such arrangements are in place, section 28 ceases to authorise the keeping of the child in the place of safety (unless the other reason for keeping the child in the place of safety applies), even if the maximum period of 24 hours has not yet expired.

95. The other reason for keeping the child in a place of safety is if an order under section 63 authorising the taking of an intimate sample (defined in section 60) is being sought. Once a decision has been made on the application for such an order, the child can no longer be kept in the place of safety by virtue of section 28 (unless arrangements for his or her care or protection are not yet in place), even if the maximum period of 24 hours has not yet expired. If no decision has been made on the application on the expiry of the maximum period of 24 hours, the child may no longer be kept in the place of safety.

96. Subsection (11) lists the places of safety to which a child may be taken under section 28. Places of safety include residential or other establishments provided by local authorities, hospitals or surgeries (provided the managers of the hospital or surgery are willing for the

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<sup>48</sup> Section 4 of that Act.

<sup>49</sup> Part 1 of that Act also sets out what happens to an arrested person after this point.

child to be kept there), the dwelling of any suitable person (again, provided that the person is willing for the child to be kept there) and police stations.

97. The power to use police stations as a place of safety under section 28 is subject to certain limitations. Under subsection (5), the child may only be kept in a police station if a constable of the rank of inspector or above considers that it is not reasonably practicable for another place of safety to be used. In addition, if the child is in a police station, subsection (8) requires steps to be taken to identify another place of safety and to transfer the child there – except where the child is being kept in the place of safety while an order authorising the taking of an intimate sample is sought (as the purpose of keeping the child in the place of safety in this case is to keep them in an environment which is as forensically secure as possible).

98. A child who is being kept in a police station under section 28 must not be kept in a cell (subsection (6)). Subsection (7) provides for an exception to this prohibition, which allows a child to be kept in a cell if a constable of the rank of inspector or above considers that it is not reasonably practicable for the child to be kept elsewhere within the police station. As soon as this condition ceases to be satisfied, the child must be removed from the cell. For example, it might be necessary to place a child in a cell if the child's behaviour is such that keeping them in another room within the police station would risk the child, or other persons, being harmed. But once that behaviour ceases, the child must be removed from the cell.

99. Subsection (10) states that section 28 does not affect any other power by virtue of which a constable may take a child to a place of safety. For example, if a constable considers both that the conditions in subsections (1) and (2) of section 28 are satisfied and that the conditions for exercise of the power under section 56 of the 2011 Act are satisfied, the constable may use the power under the 2011 Act to take the child to a place of safety rather than the section 28 power. In cases where the conditions set out in subsections (1) and (2) are not met, section 28 simply has no effect – it neither adds to nor removes any other powers that police constables will have, following the change in the age of criminal responsibility, to take a child to a place of safety (for example, the power, with a child's agreement, to take a child home).

100. At all points while the constable is removing and keeping the child in a place of safety, the constable is to treat the need to safeguard and promote the wellbeing of the child as a primary consideration (see section 72).

101. The constable is empowered to use reasonable force (in respect of the child or any other person) in exercising the powers conferred by this section (see section 74). In deciding to use, and in using, reasonable force in respect of the child, the constable is to comply with subsections (4) to (6) of section 74. In addition, the constable has power, while removing the child to the place of safety, to search the child (see section 66 of the Criminal Justice (Scotland) Act 2016 (the "2016 Act")). The constable must, in deciding whether to search the child using that power, treat the need to safeguard and promote the wellbeing of the child as a primary consideration (section 68 of the 2016 Act).

102. Any person who obstructs the constable's exercise of the power to remove and keep the child in a place of safety commits an offence (punishable by a fine not exceeding level 3 on the standard scale) (section 75). Of course, no child aged under 12 (including the child

being removed to the place of safety) can commit this offence (by virtue of new section 41 of the 1995 Act as inserted by section 1 of the Act).

103. Section 29 requires the Scottish Ministers to compile and maintain a list of places of safety (including the times at which each place of safety is available for use). In doing so, they must consult the chief constable of Police Scotland and each local authority (and any other persons they consider appropriate, which might include, for example, other organisations which provide children's services). The list may be modified over time to add or remove places of safety. The list must be published in a way that the Scottish Ministers consider appropriate and also made available to the chief constable of Police Scotland and local authorities (and to any other persons originally consulted). The list could be consulted, for example, to find out whether a place of safety of a particular type listed in section 28(11) is available in a particular locality at a time when a child requires to be taken to a place of safety under section 28.

104. Section 30 allows regulations to be made specifying additional things that are to be done when a child is kept in a place of safety under section 28 (for example, who is to be notified that the child is in a place of safety, and the information to be given to the child).<sup>50</sup> The regulations may also require particular records to be kept in relation to cases where a child is taken to a place of safety under section 28 (including, for example, records of the reasons why it was not considered reasonably practicable for a place of safety other than a police station to be used). The regulations will be subject to the negative procedure (see section 82(2)(b)).

105. Section 31 requires the Scottish Ministers to issue guidance to the chief constable of Police Scotland and to local authorities about such matters relating to the exercise of the place of safety power conferred by section 28 as they consider appropriate. Subsection (2) provides an illustrative list of matters that may be covered, including guidance as to what constitutes significant harm for the purposes of section 28(1) and (2), guidance as to the circumstances in which the section 28 power may be exercised and guidance as to the keeping of child who is being kept in a police station under section 28 in a cell. In addition, the guidance may cover co-operation between the chief constable of Police Scotland and local authorities in relation to the identification of places of safety, both at the time a particular child needs to be taken to a place of safety under section 28 and in advance of any particular incident. Places of safety identified in this way might then be included in the list maintained under section 29. The guidance may also cover processes to be put in place by the chief constable of Police Scotland and local authorities to minimise the number of occasions on which police stations need to be used as places of safety under section 28 and to ensure that the need to safeguard and promote the wellbeing of the child is treated as a primary consideration (as required by section 72) in any case where the section 28 power is used.

106. The chief constable of Police Scotland and local authorities must have regard to the guidance once it is issued. The chief constable and local authorities must also be consulted during the preparation of the guidance, along with any other persons that the Scottish

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<sup>50</sup> The regulation-making power conferred by section 57 of the 2011 Act includes power to make similar provision in relation to the power to remove a child to a place of safety under section 56 of that Act – see [The Children's Hearings \(Scotland\) Act 2011 \(Child Protection Emergency Measures\) Regulations 2012 \(SSI 2012/334\)](#).

Ministers consider it is appropriate to consult. The guidance may be revised from time to time. The consultation requirements also apply in relation to such revisions.

107. Section 32 requires the Scottish Ministers to produce reports on the exercise of the section 28 place of safety power. The Scottish Ministers have power to specify in regulations (subject to the affirmative procedure – see section 82(3)(d)) the information which is to be included in these reports. Reports under this section require to be laid before the Scottish Parliament and published. The first report is to be prepared as soon as reasonably practicable after section 28 has been in force for a year, and annually thereafter (although subsection (3) gives the Scottish Ministers power, again subject to the affirmative procedure, to increase the number of years that can elapse before the next report is required).

108. In addition to annual reports under section 32, the Scottish Ministers are required under section 78 to carry out a general review of the operation of the Act in the three years after section 1 comes into force. This would include a review of the operation of section 28. Section 79 gives the Scottish Ministers powers to require information from certain persons in connection with the section 78 review and subsequent monitoring of the use of powers under Part 4 (including section 28). So, for example, information recorded by virtue of regulations made under section 30(2)(c) which is needed for the section 78 review or for a subsequent section 32 report could (subject to data protection law) be required to be provided under section 79. See paragraphs 231 to 234 for further discussion of sections 78 and 79.

## **Chapter 2: Search of children under 12**

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

109. There are a large number of powers in statute under which the police can search a person on the basis that the constable reasonably suspects that the person has committed an offence, is committing an offence or may be about to commit an offence.<sup>51</sup> Such search powers may also allow a person to be searched where there is a reasonable belief that offences are taking or may take place in a particular area but where it is not known who has committed or might be about to commit the offence.<sup>52</sup>

110. Many of these search powers allow persons and vehicles or vessels to be stopped as well as searched.<sup>53</sup> Some allow the constable to arrest, without warrant, a person so that the person can be searched.<sup>54</sup> Some also give the constable power to require persons to produce documents to the constable and may also allow the constable to seize documents and other evidence found during a search.<sup>55</sup>

111. Where a child is over the age of criminal responsibility, these powers will also be available in relation to the child and the child can be searched.

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<sup>51</sup> For example, section 21 of the Criminal Law (Consolidation) (Scotland) Act 1995 gives a constable power, without warrant, to enter sports grounds, arrest and search persons suspected of committing an offence under Part 2 of that Act, such as possessing alcohol in the sports ground (an offence under section 20(2)), and stop and search vehicles.

<sup>52</sup> See, for example, section 60 of the Criminal Justice and Public Order Act 1994.

<sup>53</sup> For example, section 60 of the Civic Government (Scotland) Act 1982.

<sup>54</sup> See, for an example, section 11(1)(c) of the Protection of Badgers Act 1992.

<sup>55</sup> For example, section 23 of the Misuse of Drugs Act 1971.



112. There are also statutory provisions regulating when the police can search persons, including children, on a consensual basis. Section 65 of the 2016 Act prohibits search of persons who are not in police custody<sup>56</sup> unless expressly authorised by statute or by a court order. So the police cannot search a person even if the person consents. Section 66 allows the police to search a person who is not in custody but is being taken to a place under the authority of a statutory power or a court order.<sup>57</sup> Section 67 permits the search of persons at certain sporting and entertainment events for the purposes of ensuring the health, safety or security of people on the premises or at the event.

113. Section 68 applies specifically to children under 18. It requires a constable, who is considering whether to search a child who is not in police custody, to treat the need to safeguard and promote the wellbeing of the child as a primary consideration in making that decision.

114. These provisions, and any other statutory powers allowing the search of persons not in police custody, also apply to children, and may apply to children under the age of criminal responsibility.

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

115. As a result of raising the age of criminal responsibility to 12, statutory search powers that depend on a person being suspected of an offence will no longer apply in relation to the suspected behaviour of children between the ages of eight and 11. Search powers that do not depend on the person having committed an offence will still apply to children below the age of criminal responsibility to the extent that they currently apply.<sup>58</sup>

116. Powers to search persons not in police custody otherwise than on suspicion of an offence will be unaffected, however, and will continue to apply to the extent that they apply currently.<sup>59</sup>

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

117. This Chapter of Part 4 of the Act makes provision for the search of children under 12 in two ways. Section 33 applies<sup>60</sup> certain existing statutory search powers, which depend on a person being suspected of committing an offence, to the behaviour of children under 12 despite the fact they are under the age of criminal responsibility. And sections 34 to 38 provide for children under 12 to be searched under the authority of an order of the sheriff where the child has behaved in a violent or dangerous way which caused or could have caused serious physical harm to another person, or who has behaved in a sexually violent or sexually coercive way and caused or risked causing harm.

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<sup>56</sup> “Police custody” is defined in section 64 of the 2016 Act and essentially begins when a person has been arrested (and ends on the occurrence on a number of events).

<sup>57</sup> This section will apply to the power in section 28 of the Act to take a child under 12 to a place of safety.

<sup>58</sup> For example, section 60(1) and (4) of the Criminal Justice and Public Order Act 1994.

<sup>59</sup> Such as section 67 of the 2016 Act.

<sup>60</sup> With certain modifications – see section 33(3).

*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.<sup>61</sup>

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 power<sup>62</sup> 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.<sup>63</sup>

*Search under court order*

123. Sections 34 and 35 set out the process involved in applying for an order under section 36. The constable can apply to the sheriff for an order under section 36.<sup>64</sup> Section 34(2) sets out the requirements that the application must comply with, including that it must state the grounds on which the application is made.

124. These grounds will include<sup>65</sup> that the constable has reasonable suspicion that the child, by behaving in a violent or dangerous way, has caused or could have caused serious physical harm to another person or that the child caused or could have caused harm (physical or psychological) to another person by behaving in a sexually violent or sexually coercive way. They will also include information as to why the constable reasonably suspects that evidence

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<sup>61</sup> Which is an offence under section 47 of that Act.

<sup>62</sup> Generally, an offence of obstructing a constable in the exercise of his power to carry out the search.

<sup>63</sup> 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.

<sup>64</sup> By virtue of section 81 of the Act, summary sheriffs may also deal with such applications.

<sup>65</sup> By virtue of this being part of the test which the sheriff must apply under section 36(2).

relevant to the investigation of the child's behaviour may be found on the child, in premises or in a vehicle.

125. Section 34(2) also requires that the application includes supporting evidence that will enable the sheriff to come to a decision on the application.<sup>66</sup>

126. Section 35 governs the procedure the sheriff must follow when considering an application under section 34. 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's chambers (which would provide a degree of privacy to the proceedings).

127. Subsection (3) requires the sheriff, before deciding the application, to consider whether the constable, the child, a parent of the child, 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.

128. The matters as to which the sheriff must be satisfied before making an order, and what the order authorises, are set out in section 36. The sheriff must be satisfied that there are reasonable grounds to suspect that the child in relation to whom the application is made has, by behaving in a violent or dangerous way, caused or could have caused serious physical harm to another person or, by behaving in a sexually violent or coercive way, caused or could have caused harm (physical or psychological) to another person.

129. The sheriff must also be satisfied that evidence relevant to the investigation of the child's behaviour may be found on the child, in premises or in a vehicle.

130. When considering these matters, the sheriff must have regard to the nature and seriousness of the child's behaviour and to whether making the order (and, therefore, authorising the search) is appropriate in the circumstances, including, but not restricted to, the child's age.

131. The order may authorise any or all of the matters listed in section 36(4). As well as authorising the search of the child, the order may also authorise the search of premises (as defined in subsection (7)), the search of a vehicle (also defined in that subsection and including vessels), and the seizure of anything found during the search.

132. Section 74 of the Act has the effect that a constable carrying out a search under the authority of an order under section 36 may use reasonable force in doing so. Use of reasonable force, in relation to premises, includes the power to overcome locks and other things that might hinder the constable in gaining entry.<sup>67</sup>

133. Where the constable opens and searches unoccupied premises, section 36(6) requires the constable to secure the premises on completing the search.

134. Where the sheriff makes an order authorising the search of a child under 12, the constable must give notice of it, and a copy of it, to the child and a parent of the child (if the

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<sup>66</sup> See section 34(2)(e).

<sup>67</sup> Traditionally referred to as a power to "open shut and lockfast places".

constable is able to do so). The child must also be given an explanation of the order in a way that the child will be able to understand.<sup>68</sup>

### *Appeals*

135. Section 110 of the Courts Reform (Scotland) Act 2014 (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 36 to make or refuse to make an order authorising the search of a child aged under 12. Sections 111 and 116 of the 2014 Act apply to appeals under section 110 and that 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 it or vary it.

136. Section 38 of the Act provides for a number of aspects of the appeal process as it applies in relation to orders under section 36 (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)).

137. The making of an appeal suspends the effect of any order under section 36 originally made by the sheriff. Such an order only authorises the search of the child (or other actions specified in the order) in the period of 7 days beginning with the day on which the order was made (section 36(5)). By the time an appeal is made and determined, that period may have expired. Section 38 therefore also allows the Sheriff Appeal Court, in a case where it upholds or varies the original order with the result that an action which has not yet taken place is authorised, to specify a new period (not exceeding seven days starting with the day the appeal is determined) during which the action is authorised.

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

138. In addition to the particular provisions of Chapter 2 of Part 4 of the Act, sections 72 to 75 in Chapter 5 are also relevant to the search of a child or of premises, vehicles or vessels under Chapter 2.

139. Section 72 means that a constable applying under section 34 for an order under section 36 for authority to search a child under must treat the need to safeguard and promote the child’s wellbeing as a primary consideration. The same duty applies to the sheriff taking a decision on whether to make an order under section 36.

140. Section 74 authorises a constable, searching a child under the authority of an order under section 36, to use reasonable force. But, in doing so, the constable must first seek the child’s cooperation, may only use reasonable force as a last resort and must use as little force, and for as little time, as possible.<sup>69</sup> Those safeguards also apply where the constable is exercising an existing power of search by virtue of section 33 and the search power allows the use of reasonable force.

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<sup>68</sup> See section 37(3).

<sup>69</sup> See section 74(3) to (6).

141. If someone intentionally obstructs a constable who is searching a child under a section 36 order, section 75 provides that the person has committed an offence and may, on conviction, be fined. A child aged under 12 (including the child being searched) cannot, of course, commit this offence.

142. But section 75 does not apply to a search under an existing statutory power carried out by virtue of section 33(2).<sup>70</sup>

### **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>71</sup> and also provides that the person is under no obligation to answer questions.<sup>72</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>73</sup>. The rights conferred by sections 31 and 32 of the 2016 Act do not apply in such cases.

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<sup>70</sup> As mentioned in paragraph 120, even where that statutory power provides for an offence, the child under 12 who is being searched cannot commit the offence. If the offence in question can be committed by other persons, other children aged under 12 could not, by virtue of new section 41 inserted into the 1995 Act by section 1, commit the offence, but a person aged 12 or over who obstructs the search of the child aged under 12 could.

<sup>71</sup> “Police custody” is defined in section 64 of the 2016 Act.

<sup>72</sup> Apart from providing their name, address, date of birth, place of birth and nationality.

<sup>73</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.

***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 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>74</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

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<sup>74</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)).

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>75</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 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>76</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>77</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.

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<sup>75</sup> By virtue of section 81 of the Act, summary sheriffs may also deal with applications for child interview orders.

<sup>76</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>77</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)).

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>78</sup> (see section 47). Section 42(3) therefore requires the constable to identify the relevant local authority 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>79</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

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<sup>78</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).

<sup>79</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.



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).

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.

### **Chapter 4: Taking of prints and samples from certain children**

#### *Pre-existing law*

176. The law governing when the police can take fingerprints,<sup>80</sup> as well as various types of "forensic" samples,<sup>81</sup> from a person suspected of committing an offence is mainly to be found in Part 2 of the 1995 Act, in particular in sections 18 to 19C. Those provisions allow the taking of prints and samples from persons suspected of offences,<sup>82</sup> as well as governing the

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<sup>80</sup> As well as other prints, including palm prints and prints and impressions of other parts of the skin. These are defined in the 1995 Act as "relevant physical data" – see section 18(7A).

<sup>81</sup> Samples of hair, of DNA (from swabbing inside the mouth), blood, urine etc. – see section 18(6) and (6A) of the 1995 Act.

<sup>82</sup> See section 18(2) of the 1995 Act.

taking of prints and samples from persons convicted of certain specified offences<sup>83</sup> and in certain other circumstances. In addition, these provisions cover the use, retention and destruction of prints and samples taken before proceedings or after proceedings are concluded.

177. Generally, prints and samples can be used for the prevention or detection of crime and the investigation and prosecution of offences<sup>84</sup> and must be destroyed if no criminal proceedings are brought against the person or, where proceedings are brought, when they are concluded other than with the person being convicted.<sup>85</sup> There are exceptions, however, to the requirement to destroy prints and samples as soon as proceedings are concluded, mainly relating to circumstances where they were taken from persons suspected of and prosecuted for certain violent and sexual offences.<sup>86</sup> In such cases, the prints and samples can be retained for a period after the conclusion of the criminal proceedings.<sup>87</sup>

178. Where prints and samples are taken from a person who is subsequently convicted of an offence, those prints and samples may be retained as part of the person's criminal records and the provisions of sections 18A to 18F do not apply.

179. These sections apply to a child over the age of criminal responsibility who is suspected of having committed an offence as they apply to an adult.<sup>88</sup> Although such children are unlikely to be prosecuted and convicted, prints and samples can nevertheless be taken under section 18(2) of the 1995 Act.

180. Sections 18E and 18F of the 1995 Act make particular provision for the retention and destruction of prints and samples taken from children where, on referral to the children's hearing, the offence ground in section 67(2)(j) of the 2011 Act is either accepted or established and the offence involved is a "relevant violent offence" or a "relevant sexual offence"<sup>89</sup> which has been prescribed by the Scottish Ministers in an order under section 18E(6).<sup>90</sup>

181. Section 56 of the 2003 Act also makes provision about the retention and use of prints and samples provided voluntarily, in connection with the investigation of an offence. It does not apply to persons from whom prints and samples can be taken under the 1995 Act<sup>91</sup> or where the prints or samples are taken by virtue of any power of search, any power to take possession of evidence to avoid it being lost or destroyed or under a court warrant.

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<sup>83</sup> Mainly "relevant violent offences" and "relevant sexual offences", defined in section 19A(6) of the 1995 Act, as well as certain other sexual offences (see, e.g., section 19AA).

<sup>84</sup> See section 19C(2)(a) of the 1995 Act. Other lawful uses are listed in section 19C(2)(b) to (d).

<sup>85</sup> See section 18(3) of the 1995 Act.

<sup>86</sup> "Relevant violent offences" and "relevant sexual offences" defined in section 19A(6) of the 1995 Act.

<sup>87</sup> Varying between 2 and 3 years, depending on the circumstances, and subject to possible extension.

<sup>88</sup> Children under 12 cannot be prosecuted, however (section 41A of the 1995 Act). And most children of 12 and over are referred to the children's hearings system rather than prosecuted through the criminal courts.

<sup>89</sup> As defined in section 19C(6) of the 1995 Act.

<sup>90</sup> See [The Retention of Samples etc. \(Children's Hearings\) \(Scotland\) Order 2011 \(SSI 2011/197\)](#) for which relevant violent offences and which relevant sexual offences are currently prescribed for the purposes of section 18E.

<sup>91</sup> Persons suspect of having committed offences and to whom section 18(1) of the 1995 Act applies, i.e. who have been arrested and are in custody. The 2016 Act replaced the previous law on arrest and detention under section 14 of the 1995 Act and amended section 18(1) accordingly (see 2016 Act, schedule 2, paragraph 28(1): in force 28 January 2018).

182. Where the person gives written consent,<sup>92</sup> the prints and samples can be retained and used for the purposes of the prevention or detection of crime, the investigation of an offence and the conduct of a prosecution,<sup>93</sup> as well as for a number of other purposes.<sup>94</sup> The person can limit the purposes for which the prints and samples can be used.<sup>95</sup> And consent can be withdrawn and, where it is, the prints, samples and any information derived from them must be destroyed.<sup>96</sup>

183. Prints and samples taken with the consent of a child aged under eight could (subject to issues about the meaning of consent when applied to a young child) be retained and used under this section given that the child cannot be arrested, held in custody or detained. Section 56 might be used, for instance, where such a child was the victim of an offence committed by someone else or, perhaps, was a witness. The same would apply to a child aged eight or over provided the child had not been arrested and held in custody or detained.

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

184. As a result of raising the age of criminal responsibility to 12, children between the ages of eight and 11 will no longer be covered by the provisions in Part 2 of the 1995 Act and so prints and samples cannot be taken from them under section 18(2), (6) or (6A). In addition, because the offence ground in section 67(2)(j) of the 2011 Act will no longer be applicable, sections 18E and 18F of the 1995 Act will also not apply to prints and samples taken from them.

185. Section 56 of the 2003 Act would still apply and allow prints and samples otherwise lawfully taken on a consent basis to be retained and used with the child's written consent.<sup>97</sup>

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

186. The Act will put in place new arrangements for the taking of prints and samples from children under 12 and from children of 12 and over in relation to conduct which occurred when they were under 12.

187. Generally, no prints or samples may be taken from a child under 12 except where authorised by an order of the sheriff under section 63, where authorised by virtue of the power to take prints and samples in urgent cases in section 69, or where authorised by any other statutory provision (see section 58). The limitation applies regardless of the child's behaviour, or their consent to the taking of the print or sample. It also applies for all purposes, so does not depend on the purpose for which the constable seeks to take prints and samples.<sup>98</sup>

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<sup>92</sup> Or such consent is given on behalf of the person.

<sup>93</sup> Section 56(2)(a) of the 2003 Act.

<sup>94</sup> Such as the identification of a deceased person, the interests of national security or an investigation into terrorism (section 56(2)(b) to (d) of the 2003 Act).

<sup>95</sup> See section 56(3) of the 2003 Act.

<sup>96</sup> See section 56(4) and (5) of the 2003 Act.

<sup>97</sup> Or with written consent on behalf of the child.

<sup>98</sup> That contrasts with section 59 which limits the taking of prints and samples from older children but only where the purpose of taking them is to investigate an incident in which the child has behaved in a violent, dangerous or harmful way.

188. But it does not apply where the child appears to be the victim of an offence and the taking of prints and samples is necessary to properly investigate the offence. Nor does it apply where the child is harmed by the behaviour of another child below the age of criminal responsibility. See section 58(2). Subsection (3) of section 58 ensures that prints and samples taken for either of these purposes cannot be used to investigate an incident which occurred when the child was aged under 12 and in relation to which the child is themselves suspected of harmful behaviour (as defined in subsection (4)(b)). If the child is aged over 12 by the time a constable wishes to use the prints or samples for this new purpose, the child can consent to that use (subsection (5)(a)). In addition, it is always open to a constable to seek to take new samples from the child by applying for an order under section 63 (or, in urgent cases, under section 69).

189. A similar limitation on the taking of prints and samples from certain children of 12 or over is provided for by section 59. Unlike section 58, the limitation applies only where the purpose of taking prints and samples from the child is to investigate an incident in which the child behaved in a violent, dangerous or harmful way when the child was under 12.<sup>99</sup> Again, prints and samples cannot be taken except where authorised by an order under section 63, where authorised by virtue of the power to take prints and samples in urgent cases in section 69, or where the older child consents.

190. The behaviour to which this section applies is set out in subsection (2) and is behaviour which occurred when the child was under 12 and is behaviour—

- which was violent or dangerous and which caused or could have caused serious physical harm to another person, or
- which was sexually violent or sexually coercive and harmed or could have harmed another person.

191. This is also part of the test that the sheriff must consider when deciding to make an order under section 63 authorising the taking of prints and samples from a child under 12 or an older child in relation to behaviour that occurred when the child was under 12.

192. The prints and samples with which Chapter 4 of Part 4 of the Act is concerned are defined in section 60 and are “relevant physical data”, “relevant samples” and “intimate samples” (which are a subset of “relevant physical data” and “relevant samples”). The classes of data and samples are essentially the same as the “relevant physical data” and “relevant samples” to which section 18 of the 1995 Act applies.<sup>100</sup> As sections 58 and 59 generally exclude the taking of prints and samples, however, “relevant physical data” and “relevant sample” are defined more widely than in the 1995 Act to include certain “intimate samples”, such as dental impressions, pubic hair, and material obtained from swabbing bodily orifices other than the mouth.<sup>101</sup>

193. Section 60(6) provides the Scottish Ministers with a regulation-making power so that the definitions of “relevant physical data”, “relevant sample” and “intimate sample” can be

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<sup>99</sup> See section 59(1) and (2).

<sup>100</sup> And which are set out in section 18(6) and (6A) and (7A). In addition, “relevant physical data” is defined in this Act to include photographs of the person.

<sup>101</sup> Section 65 makes provision about the taking of intimate samples if authorised by an order under section 63 and provides that only medical professionals can take them.

kept up to date to reflect scientific and other developments. Regulations under this subsection are subject to the affirmative procedure.<sup>102</sup>

194. The Act provides for two routes for the police to obtain authorisation to take prints and samples from a child under 12 or from an older child in relation to behaviour when the child was under 12.

195. Both are available only where the police have reasonable grounds to suspect that the child, by behaving in a violent or dangerous way, has caused or risked causing serious physical harm<sup>103</sup> to another person; or, by behaving in a sexually violent or coercive way, caused or risked causing harm<sup>104</sup> to another person.

196. The first route is to seek and obtain an order from the sheriff under section 63 authorising the taking of prints and samples from the child. The other is where a senior police officer who is independent of the investigation<sup>105</sup> into the child's behaviour authorises a constable under section 69 to take prints and samples. Even where prints and samples are taken under section 69, however, they cannot be used, and must be destroyed, unless the police apply for and obtain an order under section 63.<sup>106</sup>

#### *Taking of prints and samples under court order*

197. Sections 61 and 62 set out the process involved in applying for an order under section 63. The constable can apply to the sheriff for an order under section 63.<sup>107</sup> Section 61(2) sets out the requirements that the application must comply with, including that it must state the grounds on which the application is made.

198. These grounds will include<sup>108</sup> that the constable has reasonable suspicion that the child, by behaving in a violent or dangerous way, has caused or could have caused serious physical harm to another person or that the child caused or could have caused harm (physical or psychological) to another person by behaving in a sexually violent or sexually coercive way. They will also include information as to why the constable considers the taking of prints and samples from the child is needed in order to investigate that behaviour.

199. Section 61(2) also requires the constable to specify which prints and samples the constable seeks to take, and whether intimate samples are sought, and that the application includes supporting evidence that will enable the sheriff to come to a decision on the application.<sup>109</sup>

200. Section 62 governs the procedure the sheriff must follow when considering an application under section 61. 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's chambers (which would provide a degree of privacy to the proceedings).

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<sup>102</sup> By virtue of section 82(3)(f) of the Act.

<sup>103</sup> Including death.

<sup>104</sup> Physical or psychological.

<sup>105</sup> Of the rank of superintendent or above – see section 69(5) of the Act.

<sup>106</sup> As set out in section 70.

<sup>107</sup> By virtue of section 81 of the Act, summary sheriffs may also deal with such applications.

<sup>108</sup> By virtue of this being part of the test which the sheriff must apply under section 63(2).

<sup>109</sup> See section 61(2)(f).



201. Subsection (3) requires the sheriff, before deciding the application, to consider whether the constable, the child, a parent of the child, 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.

202. The matters as to which the sheriff must be satisfied before making an order, and what the order authorises, are set out in section 63. The sheriff must be satisfied that there are reasonable grounds to suspect that the child in relation to whom the application is made has, by behaving in a violent or dangerous way, caused or could have caused serious physical harm to another person or, by behaving in a sexually violent or coercive way, caused or could have caused harm (physical or psychological) to another person.

203. The sheriff must also be satisfied that taking prints and samples – either those specified in the application by the constable under section 61(2)(e) or other prints and samples<sup>110</sup> – 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. Given the nature of an investigation of the sort that might be involved here, it may not be entirely clear who did what and it could eventually transpire that another person, over the age of criminal responsibility, has committed an offence. But it may be that the taking prints and samples from the child is what ascertains that it was the other person, and not the child, whose behaviour actually caused the harm. For the sheriff to make the order, however, there must be reasonable suspicion that the child has behaved in the way set out in section 63(2)(a).

204. When considering these matters, the sheriff must have regard to the nature and seriousness of the child’s behaviour and to whether taking prints and samples is appropriate in the circumstances, including, but not restricted to, the child’s age.

205. As well as authorising the taking of prints and samples, the order must also specify the prints and samples that may be taken from the child, and must also specify a time period within which the samples must be taken.<sup>111</sup> In addition, it authorises taking steps in relation to the prints and samples, which would include comparing fingerprints with a fingerprint database and analysing DNA samples. The order also authorises the removal of the child to and the keeping of the child in a place at which prints and samples are to be taken.

206. The order may also require a person, such as a parent, to produce the child to the constable so that prints and samples can be taken (see section 63(6)).

207. The order does not specify that it is the constable who is to take the prints and samples. Intimate samples, for instance, the taking of which may be authorised by an order under section 63, cannot be taken by a constable and can only be taken by medical professionals.

208. Section 65 makes provision about this. Dental impressions may only be taken by a registered dentist, while other intimate samples may be taken either by a doctor, a nurse or a

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<sup>110</sup> By virtue of section 63(4)(a) the sheriff must specify in the order the prints and samples that the order authorises the constable to take from the child but these need not be the same prints and samples sought in the application.

<sup>111</sup> The default position is for the period to be no more than 7 days but the sheriff may specify a longer period – see section 63(4)(b).

person who is a member of another health care profession<sup>112</sup> or a person of a type prescribed by the Scottish Ministers.<sup>113</sup>

209. Where the sheriff makes an order authorising the taking of prints and samples, the constable must give notice of it, and a copy of it, to the child and a parent of the child (if the constable is able to do). The child must also be provided with an explanation of the order in a way that the child will be able to understand.<sup>114</sup>

### *Appeals*

210. 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 63 to make or refuse an order authorising the taking of prints and samples. Sections 111 and 116 of the 2014 Act apply to appeals under section 110 and that the Rules of Court relating to section 110 appeals also apply. So section 111, for instance, provides that the Sheriff Appeal Court may uphold the sheriff's decision or reverse it or vary it.

211. Section 67 provides for a number of aspects of the appeal process as it applies in relation to orders under section 63 authorising the taking of prints and samples (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 set out 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 given 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)).

212. The making of an appeal suspends the effect of any order under section 63 originally made by the sheriff. Such an order only authorises the taking of prints and samples within a certain period. By the time an appeal is made and determined, that period may have expired. Section 67 therefore also allows the Sheriff Appeal Court, in a case where it upholds or varies the original order with the result that the taking of prints and samples which have not yet been taken is once again authorised, to specify a new period within which the data or samples may be taken.

213. Section 68 sets out what is to happen to data or samples that have already been taken by virtue of an order under section 63 if an appeal is then made against the order. Subsection (2) provides that no steps (or further steps), other than holding or preserving the data or sample, can be taken until the appeal is decided. If the outcome of the appeal is that the taking of data or sample is no longer authorised (whether because the order is quashed in its entirety or varied so that the taking of particular data or samples is no longer authorised), the constable who originally applied for the order under section 63 is required to ensure that any record of data the taking of which is no longer authorised is destroyed. The same applies to any samples the taking of which is no longer authorised. In addition, all information derived from any such samples must be destroyed.

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<sup>112</sup> Designated by regulations under section 65(3). Such regulations are subject to the negative procedure by virtue of section 82(2)(e).

<sup>113</sup> By regulations under section 65(2)(b)(iii) – subject to the negative procedure by virtue of section 82(2)(d).

<sup>114</sup> See section 64.

*Taking prints and samples in urgent cases*

214. The Act recognises that there may be situations in which there is not time to seek and obtain an order from the sheriff under section 63. Section 69 therefore provides a way for a constable to take prints and samples without an order where a senior police officer<sup>115</sup> who has not been involved in the investigation into the child's behaviour gives the constable authority to do so.

215. Intimate samples may not, however, be taken under the authority provided by this section.<sup>116</sup>

216. The test the senior officer applies is essentially the same as the test the sheriff would apply under section 63 but with the addition of a further matter. This is that it is not practicable for the constable to apply for an order because of the risk that, if the prints and samples are not taken immediately, evidence would be lost or destroyed. That evidence might be the sample itself or it might be evidence derived from a sample.<sup>117</sup>

217. Like the sheriff when deciding an application under section 63, in considering whether to authorise the taking of prints and samples, the senior officer must have regard to the nature and seriousness of the child's behaviour and to whether taking prints and samples is appropriate in the circumstances, including, but not restricted to, the child's age.

218. Because the taking of prints and samples under this section has not been authorised by the sheriff, if the constable wants to take any steps with them (other than simply storing and preserving them), the constable must apply for an order under section 63. Section 70 provides that, if an order is not applied for and, indeed, made, the prints and samples taken under section 69 must be destroyed.<sup>118</sup>

219. The constable has 7 days to apply for the order and section 62 applies to an application following the taking of prints and samples under section 69 as it applies to an application where that hasn't occurred, but with the modification that the application must specify the prints and samples already taken rather than those which the constable seeks to take.<sup>119</sup>

220. Where the sheriff makes an order in such a case, the order does not specify the period within which the prints and samples can be taken, since they have already been taken.<sup>120</sup>

*Destruction of prints and samples*

221. Unlike the provisions on prints and samples in the 1995 Act, where provision is made for retaining them after court proceedings have concluded, section 66 of the Act provides for prints and samples taken by virtue of an order under section 63 to be destroyed at the earliest opportunity.

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<sup>115</sup> A superintendent or an officer of a higher rank.

<sup>116</sup> See section 69(4).

<sup>117</sup> For example, material under a child's fingernails.

<sup>118</sup> See section 70(5). The duty to ensure the prints and samples are destroyed falls on the senior officer who authorised the constable to take them. Section 66 governs when prints and samples must be destroyed where an order under section 63 has been made, including where the order follows the taking of prints and samples under section 69.

<sup>119</sup> See section 70(4).

<sup>120</sup> See section 63(5).

222. This essentially means when either no further action is being taken in relation to the child's behaviour or where that action – principally through the children's hearings system – has come to a conclusion. For instance, if the constable concludes that no action should be taken, and that the matter should not be referred to the Principal Reporter under section 61 of the 2011 Act, the prints and samples must be destroyed.

223. On the other hand, if the matter is referred to the Principal Reporter, and the Principal Reporter determines under section 66(2) of the 2011 Act that a ground in section 67 of that Act applies and that a compulsory supervision order should be made in respect of the child, and refers the matter to a children's hearing,<sup>121</sup> then the prints and samples will not be destroyed until the process put in train by that referral has come to a conclusion, for instance by the referral being discharged or by the children's hearing deciding to make a compulsory supervision order.<sup>122</sup>

224. Section 71 makes equivalent provision in relation to the destruction of data and samples taken by virtue of section 59(1)(b) – that is, where the data or samples are taken from a child aged 12 or over with the child's consent (in relation to behaviour that occurred when the child was aged under 12).

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

225. In addition to the particular provisions of Chapter 4 of Part 4 of the Act, sections 72 to 75 in Chapter 5 are also relevant to taking of prints and samples from children.

226. Section 72 means that a constable applying for an order under section 63, taking prints and samples under the order, and taking prints and samples under the authority of section 69, must treat the need to safeguard and promote the child's wellbeing as a primary consideration. The same duty applies to a relevant senior officer considering whether to authorise the taking of prints and samples under section 69 and to the sheriff taking a decision on whether to make an order under section 63.

227. Section 74 authorises a constable taking prints and samples under the Act to use reasonable force. But, in doing so where a child under 12 is involved, the constable must first seek the child's cooperation and may only use reasonable force as a last resort and must use as little force, and for as little time, as possible.

228. If someone intentionally obstructs a constable who is taking prints and samples, section 75 provides that the person has committed an offence and may, on conviction, be fined. This doesn't apply to a child under 12, whether the child from whom prints and samples are being taken or not. It would, however, apply to an older child, including one from whom prints and samples are being taken.

### **Chapter 5: General provision**

229. The effect of provisions in this Chapter has generally been explained in connection with the police powers provided for in each of Chapters 1 to 4. The exception is section 73, which amends the Legal Aid (Scotland) Act 1986 (the "1986 Act"). Part 5A of that Act provides for children's legal aid to be available in connection with certain proceedings under

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<sup>121</sup> Under section 69(2) of the 2011 Act.

<sup>122</sup> And once the period for any appeal has expired without an appeal being taken or, where an appeal is taken, once it has been disposed of.

the 2011 Act. The amendments made to Part 5A by section 73 of this Act allow the Scottish Ministers to make regulations providing for children's legal aid to also be available in connection with proceedings before the sheriff in connection with applications for orders authorising the search of children aged under 12, child interview orders and applications for orders authorising the taking of prints and samples in relation to the investigation of harmful behaviour that took place when a child was aged under 12. Such regulations would be subject to affirmative procedure (by virtue of the amendment made to section 37 of the 1986 Act by section 73(4)).

## **PART 5: CHILDREN'S HEARINGS: DUTY TO CONSIDER NEED FOR FURTHER REPORTS**

230. Section 67 amends sections 91, 119 and 138 of the 2011 Act. All of these sections deal with the powers of children's hearings. In each case, the power includes power, if the hearing considers it appropriate to do so, to defer making the decision involved in each case to a subsequent hearing. The new provision inserted into each of these sections provides that, in deciding whether to defer making the decision to a subsequent hearing, the hearing must consider whether to require the Principal Reporter to obtain any further reports which the hearing consider relevant to the decisions which would be made at the subsequent hearing. This ensures that the question of whether any further information is required is specifically considered by the hearing in deciding whether it is appropriate to defer a decision to a subsequent hearing.

## **PART 6: REVIEW OF AGE OF CRIMINAL RESPONSIBILITY**

231. Section 78 requires the Scottish Ministers to carry out a review of the operation of the Act. The review is to cover the operation of the Act generally – looking, for example, at whether the Act has achieved its policy objectives and whether all of the provisions in the Act are operating as intended. In addition, the review is to consider the operation of the Act with a view to considering the future age of criminal responsibility – for example, it could examine whether, in light of any benefits delivered by the Act's change in approach to harmful behaviour by children under 12, the age of criminal responsibility should be raised beyond 12 and, if so, whether the provisions in the Act would be capable of operating successfully in relation to higher age groups or whether new provision would be required. If the review recommends a change in the age of criminal responsibility, further primary legislation will be required to deliver this change.

232. The review is to take place in the 3 years following section 1 coming into force – see the opening words of subsection (1)(a) and subsection (5). A report requires to be prepared following the review, which must then be published and laid before the Scottish Parliament (subsections (1)(b) and (2)). All of these things must be done within a year of the conclusion of the review (that is, no later than 4 years after section 1 comes into force) (subsection (4)).

233. Subsection (3) requires the Scottish Ministers to consult such persons as they consider appropriate in carrying out the review. Persons consulted might include children affected by the change in the age of criminal responsibility and people affected by harmful behaviour carried out by children aged under 12, as well as partner agencies such as Police Scotland and local authorities.

234. The Scottish Ministers are likely to require information about how different aspects of the Act have been operating in practice in order to carry out the review. Section 79 therefore gives Ministers power to require the bodies listed in subsection (3) to provide them with information about the exercise of functions under Part 4 for this purpose.<sup>123</sup> Information can also be required for the purpose of monitoring the exercise of functions under Part 4 following the review period (which, as noted above, only lasts for 3 years from section 1 coming into force).<sup>124</sup> Ministers could use these powers, for example, to require the chief constable of Police Scotland to provide them with anonymised information about the number of investigative interviews carried out by agreement and the Scottish Courts and Tribunals Service to provide them with anonymised details of how many child interview orders have been applied for and how many granted. Information obtained by virtue of section 79(2)(b) might in particular be used in reporting on the use of the power conferred by section 28 to take children under 12 to a place of safety, as required by section 32.

## PARLIAMENTARY HISTORY

235. The following is a list of the proceedings in the Scottish Parliament on the Bill for the Act and significant documents connected to the Bill published by the Parliament during the Bill's parliamentary passage.

Proceedings and reports	Reference
<b>Introduction</b>	
Bill as introduced (13 March 2018)	<a href="#">SP Bill 29 (Session 5 (2018))</a>
Explanatory Notes (13 March 2018)	<a href="#">SP Bill 29–EN (Session 5 (2018))</a>
Financial Memorandum (13 March 2018)	<a href="#">SP Bill 29–FM (Session 5 (2018))</a>
Policy Memorandum (13 March 2018)	<a href="#">SP Bill 29–PM (Session 5 (2018))</a>
Statements on legislative competence (13 March 2018)	<a href="#">SP Bill 29–LC (Session 5 (2018))</a>
Delegated Powers Memorandum (13 March 2018)	<a href="#">SP Bill 29–DPM (Session 5 (2018))</a>
SPICe briefing (15 August 2018)	<a href="#">SB18–49</a>
<b>Stage 1</b>	
<i>Equalities and Human Rights Committee (lead committee)</i>	
Consideration in private (19 April 2018)	<a href="#">Minutes of proceedings (EHRiC/S5/18/11/M)</a>
Evidence session (6 September 2018)	<a href="#">Official Report (cols. 1 to 42)</a>
Evidence session (20 September 2018)	<a href="#">Official Report (cols. 1 to 32)</a>
Evidence session (27 September 2018)	<a href="#">Official Report (cols. 1 to 38)</a>
Evidence session (4 October 2018)	<a href="#">Official Report (cols. 1 to 27)</a>

<sup>123</sup> This power is subject to data protection requirements.

<sup>124</sup> Note that the fact that this provision refers to Part 4 of the Act only does not necessarily mean that the Scottish Ministers will not monitor the exercise of the functions conferred by Parts 2 and 3 of the Act after the end of the review period. But information about the exercise of those functions is likely to be available from other sources – via Disclosure Scotland and the annual reports required to be prepared by the independent reviewer (see section 21 of this Act) and the Scottish Children's Report Administration (see paragraph 21 of schedule 3 of the 2011 Act).

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

Proceedings and reports	Reference
Consideration in private (25 October 2018)	<a href="#">Minutes of proceedings (EHRiC/S5/18/26/M)</a>
Consideration in private (1 November 2018)	<a href="#">Minutes of proceedings (EHRiC/S5/18/27/M)</a>
Stage 1 Report (7 November 2018)	<a href="#">5th Report, 2018 (Session 5) (SP Paper 411)</a>
<i>Delegated Powers and Law Reform Committee</i>	
Report on Bill at Stage 1 (12 September 2018)	<a href="#">37th Report, 2018 (Session 5) (SP Paper 374)</a>
<i>Whole Parliament</i>	
Stage 1 debate (13 November 2018)	<a href="#">Official Report (cols. 7 to 60 and 62)</a>
<b>Stage 2</b>	
<i>Equalities and Human Rights Committee: Stage 2 evidence</i>	
Consideration in private (13 December 2018)	<a href="#">Minutes of proceedings (EHRiC/S5/18/32/M)</a>
Stage 2 evidence submissions	<a href="#">Completed business: Age of Criminal Responsibility (Scotland) Bill</a>
Evidence session (Equalities and Human Rights Committee, 10 January 2019)	<a href="#">Official Report (cols. 1 to 16)</a>
Evidence session (Equalities and Human Rights Committee, 17 January 2019)	<a href="#">Official Report (cols. 1 to 52)</a>
<i>Equalities and Human Rights Committee: consideration of amendments</i>	
1st Marshalled List of amendments	<a href="#">SP Bill 29-ML1</a>
1st Groupings of amendments	<a href="#">SP Bill 29-G1</a>
Consideration of amendments (31 January 2019)	<a href="#">Official Report (cols. 2 to 38)</a> <a href="#">Minutes of proceedings (EHRiC/S5/19/3/M)</a>
2nd Marshalled List of amendments	<a href="#">SP Bill 29-ML2</a>
2nd Groupings of amendments	<a href="#">SP Bill 29-G2</a>
Consideration of amendments (7 February 2019)	<a href="#">Official Report (cols. 1 to 36)</a> <a href="#">Minutes of proceedings (EHRiC/S5/19/4/M)</a>
<i>Other documents</i>	
Bill as amended at Stage 2 (7 February 2019)	<a href="#">SP Bill 29A (Session 5 (2019))</a>
Supplementary Delegated Powers Memorandum (1 March 2019)	<a href="#">SP Bill 29A–DPM</a>
Supplementary Financial Memorandum (1 March 2019)	<a href="#">SP Bill 29A–FM</a>

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Proceedings and reports	Reference
Revised Explanatory Notes (30 April 2019)	<a href="#">SP Bill 29A-EN</a>
<b>After Stage 2</b>	
<i>Delegated Powers and Law Reform Committee</i>	
Report on Bill as amended at Stage 2 (24 April 2019)	<a href="#">20th Report, 2019 (Session 5) (SP Paper 515)</a>
<b>Stage 3</b>	
Marshalled List of amendments	<a href="#">SP Bill 29A-ML</a>
Groupings of amendments	<a href="#">SP Bill 29A-G</a>
Stage 3 debate (whole Parliament, 7 May 2019)	<a href="#">Official Report (cols. 10 to 113 and 116 to 118)</a> <a href="#">Minutes of proceedings</a>
Bill as passed (7 May 2019)	<a href="#">SP Bill 29B (Session 5 (2019))</a>
<b>After passing</b>	
Royal Assent (11 June 2019)	<a href="#">Age of Criminal Responsibility (Scotland) Act 2019 (asp 7)</a>

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