

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

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## **EXPLANATORY NOTES**

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

#### *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>1</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>2</sup>
110. Many of these search powers allow persons and vehicles or vessels to be stopped as well as searched.<sup>3</sup> Some allow the constable to arrest, without warrant, a person so that the person can be searched.<sup>4</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>5</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.
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>6</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>7</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.

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**1** 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.

**2** See, for example, section 60 of the Criminal Justice and Public Order Act 1994.

**3** For example, section 60 of the Civic Government (Scotland) Act 1982.

**4** See, for an example, section 11(1)(c) of the Protection of Badgers Act 1992.

**5** For example, section 23 of the Misuse of Drugs Act 1971.

**6** “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).

**7** This section will apply to the power in section 28 of the Act to take a child under 12 to a place of safety.

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>8</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>9</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>10</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.

***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>11</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>12</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.

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<sup>8</sup> For example, section 60(1) and (4) of the Criminal Justice and Public Order Act 1994.

<sup>9</sup> Such as section 67 of the 2016 Act.

<sup>10</sup> With certain modifications – see section 33(3).

<sup>11</sup> Which is an offence under section 47 of that Act.

<sup>12</sup> Generally, an offence of obstructing a constable in the exercise of his power to carry out the search.

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>13</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>14</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>15</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 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>16</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.

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**13** 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.

**14** By virtue of section 81 of the Act, summary sheriffs may also deal with such applications.

**15** By virtue of this being part of the test which the sheriff must apply under section 36(2).

**16** See section 34(2)(e).

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>17</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 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>18</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>19</sup> Those safeguards also apply where

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<sup>17</sup> Traditionally referred to as a power to “open shut and lockfast places”.

<sup>18</sup> See section 37(3).

<sup>19</sup> See section 74(3) to (6).

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

the constable is exercising an existing power of search by virtue of section 33 and the search power allows the use of reasonable force.

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>20</sup>

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**20** 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.