

# Age of Criminal Responsibility (Scotland) Bill

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## Explanatory Notes

### Introduction

1. As required under Rule 9.3.2A of the Parliament's Standing Orders, these Explanatory Notes are published to accompany the Age of Criminal Responsibility (Scotland) Bill, introduced in the Scottish Parliament on 13 March 2018.
2. The following other accompanying documents are published separately:
  - a Financial Memorandum (SP Bill 29–FM);
  - a Policy Memorandum (SP Bill 29–PM);
  - statements on legislative competence made by the Presiding Officer and the Scottish Government (SP Bill 29–LC).
3. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.
4. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section, or a part of a section, does not seem to require any explanation or comment, none is given.

### The Bill: an overview

5. The Bill 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 Bill's implementation, be treated as commission of an

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offence, but will be responded to in a different way. This is already the case in relation to behaviour by children aged under eight.

6. In addition, the Bill 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).

## Part 1: Age of criminal responsibility

### Current law

7. Section 41 of the Criminal Procedure (Scotland) Act 1995 (the “1995 Act”) sets out the current 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 was 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

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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.”

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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> makes provision about how children who commit an offence while aged eight to 11 are to be dealt with by the criminal justice system. It states that:

“(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 ground.<sup>5</sup>

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<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.

<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

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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.

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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>.

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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 Bill

13. Section 1 of the Bill replaces the current 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 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 possibility of something done at that age being prosecuted through the criminal courts and so no need to prohibit such prosecution. Section 41A is therefore repealed by section 2(1) of the Bill.

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.

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<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 Bill necessarily prevents such action being taken in relation to things done by children aged eight to 11.

<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.

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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 Bill 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 Bill, 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 Bill 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

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applies made prior to the date of new section 41 coming into force is not affected.<sup>13</sup>

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.

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<sup>13</sup> If section 3 of the Bill (with the exception of paragraph (a)) was commenced prior to new section 41 of the 1995 Act coming into force then determinations that the offence ground applies in relation to pre-12 behaviour would cease to be made even earlier. But whenever the Principal Reporter ceases to be able to make such determinations, earlier determinations will be 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").

## Part 2: Disclosure of convictions and other information relating to time when person under 12

### Current law

23. The Police Act 1997 (the “1997 Act”) established a system for the 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>16</sup> There are three levels of disclosure under the 1997 Act.

24. 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). The offence ground being accepted or established in or for the purposes of children’s hearings proceedings counts as a conviction for this purpose.<sup>17</sup>

25. 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.

26. 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),
- gives information which the chief officer of any relevant police force<sup>18</sup> reasonably believes is relevant to the purpose for which

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<sup>16</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.

<sup>17</sup> By virtue of section 3 of the Rehabilitation of Offenders Act 1974.

<sup>18</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

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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.

27. 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>19</sup> The convictions covered by this definition include certain spent convictions as well as unspent convictions. In addition, 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>20</sup>

28. The Protection of Vulnerable Groups (Scotland) Act 2007 (the “2007 Act”) provides for additional checks on people doing regulated work with children or protected adults.<sup>21</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 25 above – that is, “prescribed details” of any “relevant

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could include information provided by the chief constable of the English police force for the area where the person previously lived.

<sup>19</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>20</sup> Again, by virtue of section 3 of the Rehabilitation of Offenders Act 1974.

<sup>21</sup> See Part 6 of the 2007 Act for definitions of terms such as “protected adult” and “regulated work”.

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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>22</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,
- any other information prescribed by the Scottish Ministers.<sup>23</sup>

29. 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.

30. The information described in the second bullet-point of paragraph 26 and the third bullet-point of paragraph 28 is referred to as “other relevant information” (“ORI”).

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<sup>22</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 17. 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.

<sup>23</sup> See [The Protection of Vulnerable Groups \(Scotland\) Act 2007 \(Vetting Information\) Regulations 2010 \(SSI 2010/189\)](#).

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31. As already noted, children aged under eight cannot currently be convicted of an offence and so no conviction information in relation to pre-eight behaviour exists to be disclosed in later life under the 1997 Act or the 2007 Act.

32. Children aged eight to 11 can acquire convictions currently, as the offence ground being accepted or established in or for the purposes of children's hearings proceedings counts as a conviction. 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. Information about things done while aged eight to 11 can therefore fall to be disclosed as convictions under the 1997 Act and the 2007 Act. Information about things done by children in this age group may also be disclosed as ORI.

33. The disclosure schemes under the 1997 Act and 2007 Act are both operated in Scotland by Disclosure Scotland.<sup>24</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 26, 28 and 30 above).

## Changes made by the Bill

### **Impact on current law of change in age of criminal responsibility**

34. Once Part 1 of the Bill 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 Bill impacts on the ability of the police to hold information, 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.

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<sup>24</sup> Which is an executive agency of the Scottish Government.

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35. 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 Bill – that is, such convictions will still exist after the Bill 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, fall to be disclosed in certain circumstances. And, again, nothing in the Bill 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 Bill does**

### **Change to definition of “conviction” for purposes of 1997 and 2007 Acts**

36. Section 4 of the Bill changes the position in relation to convictions acquired prior to the change in the age of criminal responsibility. It amends the definitions of “conviction” in sections 112 and 113A of the 1997 Act so as to exclude convictions for offences committed while a person was aged eight to 11. The exclusions extend both to cases where, prior to section 41A of the 1995 Act coming into force, a child aged eight to 11 was prosecuted in court and convicted of an offence and to cases where the offence ground has been accepted or established in relation to a child aged eight to 11 in or for the purposes of children’s hearings proceedings. These changes mean that the existence of such convictions can no longer be disclosed as part of a basic disclosure or a standard disclosure under the 1997 Act.

37. Information that a person has such a conviction will also not be disclosed in an enhanced disclosure under the 1997 Act. Although section 113B of the 1997 Act is not directly amended by the Bill, this section relies on the definition of “conviction” provided in section 113A. So the change made to that definition by section 4(3) of the Bill also has effect in relation to enhanced disclosures.

38. As noted in the first bullet-point of paragraph 28 above, vetting information under the 2007 Act includes information referred to in section 113A(3)(a) of the 1997 Act. So the change made to the definition of “conviction” in that section by section 4(3) of the Bill also carries through to

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the 2007 Act. This means that the fact that a person has a conviction for an offence committed while the person was aged eight to 11 will no longer be disclosed as vetting information as part of a scheme record. The existence of such a conviction will also not automatically prevent a short scheme record stating that no vetting information exists.

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

39. As noted above, enhanced disclosures under the 1997 Act and scheme records under the 2007 Act can include ORI. Section 5(1) of the Bill 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 this respect. 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>25</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 9 to 15 of the Bill is that the information ought to be included in the disclosure.

### **The independent reviewer**

40. Section 6 of the Bill creates the position of independent reviewer. The principal function conferred on the reviewer by the Bill is reviewing information proposed to be included in enhanced disclosures or scheme records as other relevant information. 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 16).

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<sup>25</sup> The provision being inserted into the 1997 Act by section 5 of the Bill 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 5 of the Bill also refers only to the chief constable of the Police Service of Scotland. Section 21 of the Bill defines “chief constable” in the same way – so the review process set out in the Bill only applies in relation to information held by the Police Service of Scotland.

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Section 19 allows the independent reviewer's functions to be modified by regulations (subject to the affirmative procedure – see section 66(3)).

41. The independent reviewer will be appointed by the Scottish Ministers (section 7(1)). The rest of section 7 makes self-explanatory provision about various other matters to do with appointment. The reviewer is likely to require administrative support and section 8 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**

42. Sections 9 to 15 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.

43. 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, 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 9 to 15 will be followed.

44. 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 9). The chief constable will also, under section 10, 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.

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45. On receipt of the information, the independent reviewer notifies the applicant about the review in accordance with section 11. 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>26</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.

46. The independent reviewer also has power, under section 12, to require other persons to provide the reviewer with information which the reviewer thinks is necessary to carry out the review.

47. The independent reviewer must then proceed to review whether the information identified by the chief constable ought to be disclosed. Section 13(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 12. 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.

48. The tests that the independent reviewer is required to apply (see section 13(1) and (2)) are the same as those that the chief constable is required to apply. That is, whether the information is relevant to the purpose for which the enhanced disclosure or scheme record is sought and, if so, 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).

49. In carrying out a review, the independent reviewer is also required to have regard to any guidance issued by the Scottish Ministers under section 17.

50. 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

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<sup>26</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 18.

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applicant and the Scottish Ministers (that is, Disclosure Scotland) of their decision (section 14). Under section 15, 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>27</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 20).

51. 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 5 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.

## Part 3: Victim information

### Current law

52. Section 53 of the Criminal Justice (Scotland) Act 2003 (the "2003 Act") permits the Principal Reporter to disclose certain information about cases involving children to victims (and certain other persons) on request. For section 53 to apply, it must appear to the Principal Reporter that an offence has been committed (so, for example, persons harmed by the behaviour of a child aged under eight, which is never an offence, cannot request information under section 53). The Principal Reporter also has to be satisfied that the provision of information to the person making the request won't be detrimental to the best interests of any child, and that it is appropriate in the circumstances of the case to provide the information. The information permitted to be provided if these conditions are satisfied is

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<sup>27</sup> By virtue of the change made to the Courts Reform (Scotland) Act 2014 by 65 of the Bill, summary sheriffs can also deal with such appeals (with their determination also being final).

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information about the action taken by the Principal Reporter in relation to the offence and about how the case was disposed of.

53. 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>28</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>29</sup>

## Changes made by the Bill

### **Impact on current law of change in age of criminal responsibility**

54. Part 1 of the Bill would, if section 53 of the 2003 Act was not amended, mean 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 section 53 of that Act depends on an offence having been committed and eight to 11 year olds will not be able to commit an offence once Part 1 of the Bill is in force).

55. Part 1 of the Bill 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.

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

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<sup>28</sup> "Relevant person" is defined in section 200 of the 2011 Act.

<sup>29</sup> Disclosures under section 68(3)(a) and (b) of the 2011 Act (and section 53 of the 2003 Act) must also be made in compliance with data protection law.

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56. Section 22 of the Bill prevents the effect mentioned in paragraph 54 above from arising by repealing section 53 of the 2003 Act (subsection (3)) and, in replacement, inserting new sections 179A, 179B and 179C into the 2011 Act (subsection (1)).

57. New section 179A(3) gives certain people a right, in certain circumstances, to request certain information about how a child<sup>30</sup> has been dealt with by the children's hearing system.

58. 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>31</sup> and the Principal Reporter has information suggesting:

- that a child has committed an offence (as a result of section 1 of the Bill, 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 behaved in a way mentioned in subsection (2) of section 179A (that is, that the child has harmed another person by 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.

59. 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>32</sup>

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<sup>30</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>31</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>32</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

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60. The people who can make a request are:

- any person who appears to have been harmed by 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),
- 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), and
- other persons specified in regulations (subject to any conditions specified in the regulations).<sup>33</sup>

61. The Principal Reporter may know, from information that he or she holds in relation to a case, that a particular person would be entitled to request information under subsection (3) of section 179A. Subsection (4) of that section permits the Principal Reporter to contact such persons to advise them of their right to request information.

62. 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.

63. 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.

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relation to cases where the child is already subject to a compulsory supervision order.

<sup>33</sup> The equivalent provision made under section 53 of the 2003 Act is [The Children's Hearings \(Provision of Information by Principal Reporter\) \(Prescribed Persons\) \(Scotland\) Order 2003 \(SSI 2003/424\)](#). The persons currently prescribed are Victim Support Scotland, the Criminal Injuries Compensation Authority, the Criminal Injuries Compensation Appeals Panel and insurers. That order was subject to the negative procedure, and the new regulations under section 179A(4)(d) of the 2011 Act will also be subject to negative procedure (by virtue of existing section 195(3) of that Act).

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64. 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>34</sup>

65. 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).

66. 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.

67. Provision of the information described in section 179B is not automatic. The Principal Reporter is only obliged to comply with a request under section 179A 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 addition, the Principal Reporter must be satisfied that providing the information is appropriate in all the

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<sup>34</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.

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circumstances of the case.<sup>35</sup> In deciding this, the Principal Reporter must take into account the factors set out in section 179C(2).

68. 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 behaviour which caused harm or which constituted an offence.<sup>36</sup>

69. 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).

70. Subsection (2) of section 22 of the Bill 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>37</sup> to a person who is also entitled to request information under section 179A (by providing that

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<sup>35</sup> The Principal Reporter must also comply with data protection law in providing information under section 179C.

<sup>36</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>37</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.

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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**

#### **Current law**

71. Currently, 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>38</sup> As a person who is arrested outwith a police station must be taken to a police station as quickly as reasonably practicable after the arrest<sup>39</sup>, such an arrest would also have the immediate effect of removing the child to a place of safety.<sup>40</sup>

#### **Changes made by the Bill**

##### **Impact on current law of change in age of criminal responsibility**

72. Once section 1 of the Bill comes into force, this power 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.

73. 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.

##### **What this Chapter of the Bill does**

74. Section 23 of the Bill creates a specific power authorising a police constable to take a child aged under 12 (so including those aged under

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<sup>38</sup> Section 1(1) of the Criminal Justice (Scotland) Act 2016.

<sup>39</sup> Section 4 of that Act.

<sup>40</sup> Part 1 of that Act also sets out what happens to an arrested person after this point.

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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 that harm or risk.

75. 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 23 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.

76. The other reason for keeping the child in a place of safety is if an order under section 52 authorising the taking of an intimate sample (defined in section 49) 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 23 (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.

77. In section 23, "place of safety" has the meaning given by section 202(1) of the 2011 Act, which is as follows:

““place of safety”, in relation to a child, means—

- (a) a residential or other establishment provided by a local authority,
- (b) a community home within the meaning of section 53 of the Children Act 1989,
- (c) a police station,
- (d) a hospital or surgery, the person or body of persons responsible for the management of which is willing temporarily to receive the child,

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- (e) the dwelling-house of a suitable person who is so willing, or
- (f) any other suitable place the occupier of which is so willing”.

78. Subsection (5) restricts the ability to rely on paragraph (c) of this definition, in that the child may only be kept in a police station if it is not reasonably practicable for the child to be kept in one of the other types of place of safety. If the child is in a police station, subsection (6) 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 a forensically secure environment).

79. Section 24 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 23 (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>41</sup> The regulations will be subject to the negative procedure (see section 66).

80. 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 59).

81. 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 61). In deciding to use, and in using, reasonable force in respect of the child, the constable is to comply with subsections (4) to (7) of section 61. 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).

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41 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).

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82. 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 62). 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 Bill).

## Chapter 2: Search of children under 12

### **Current law**

83. 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>42</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>43</sup>

84. Many of these search powers allow persons and vehicles or vessels to be stopped as well as searched.<sup>44</sup> Some allow the constable to arrest, without warrant, a person so that the person can be searched.<sup>45</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>46</sup>

85. 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>42</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>43</sup> See, for instance, section 60 of the Criminal Justice and Public Order Act 1994.

<sup>44</sup> For example, section 60 of the Civic Government (Scotland) Act 1982.

<sup>45</sup> See, for an example, section 11(1)(c) of the Protection of Badgers Act 1992.

<sup>46</sup> For instance, section 23 of the Misuse of Drugs Act 1971.

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86. 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>47</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>48</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.

87. 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.

88. 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 Bill**

### **Impact on current law of raising age of criminal responsibility**

89. 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>49</sup>

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<sup>47</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>48</sup> This section will apply to the power in section 23 of the Bill to take a child under 12 to a place of safety.

<sup>49</sup> For instance, section 60(1) and (4) of the Criminal Justice and Public Order Act 1994.

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90. Powers to search persons not in police custody will be unaffected, however, and will continue to apply to the extent that they apply currently.<sup>50</sup>

### **What this Chapter of the Bill does**

91. This Chapter of Part 4 of the Bill makes provision for the search of children under 12 in two ways. Section 23 applies<sup>51</sup> certain existing statutory search powers, that 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 26 to 30 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**

92. Section 25(1) describes 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>52</sup>

93. 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.

94. 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 25(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 25(2), in relation to the child. And to avoid any suggestion that section 25(2) would have the effect

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<sup>50</sup> Such as section 67 of the 2016 Act.

<sup>51</sup> With certain modifications – see section 23(3).

<sup>52</sup> Which is an offence under section 47 of the 1995 Act.

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that an offence provision attached to a search power<sup>53</sup> would apply to a child under 12, subsection (3)(c) makes it clear that this is not the effect of subsection (2).

95. Section 25(3)(b) ensures that any existing powers to apply for and obtain search warrants that are contained in the enactments to which section 25 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 28 of this Bill.

96. Subsection (4)(a) provides the Scottish Ministers with a regulation-making power to exclude existing statutory search powers from the application of section 25. By virtue of section 66(3)(b) of the Bill, 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>54</sup>

### **Search under court order**

97. Sections 26 and 27 set out the process involved in applying for an order under section 28. The constable can apply to the sheriff for an order under section 28.<sup>55</sup> Section 26(2) sets out the requirements that the application must comply with, including that it must state the grounds on which the application is made.

98. These grounds will include<sup>56</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 harm (physical or psychological) to another person by behaving in a sexually violent or sexually coercive way. They will also

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<sup>53</sup> Generally, an offence of obstructing a constable in the exercise of his power to carry out the search.

<sup>54</sup> This power is also subject to the affirmative procedure. By virtue of section 66(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>55</sup> By virtue of section 65 of the Bill, summary sheriffs may also deal with such applications.

<sup>56</sup> By virtue of this being part of the test which the sheriff must apply under section 28(2).

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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.

99. Section 26(2) also requires that the application includes supporting evidence that will enable the sheriff to come to a decision on the application.<sup>57</sup>

100. Section 27 governs the procedure the sheriff must follow when considering an application under section 26. 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).

101. 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.

102. The matters as to which the sheriff must be satisfied before making an order, and what the order authorises, are set out in section 28. 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.

103. 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.

104. 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.

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<sup>57</sup> See section 26(2)(e).

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105. The order may authorise any or all of the matters listed in section 28(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.

106. Section 61 of the Bill has the effect that a constable carrying out a search under the authority of an order under section 28 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>58</sup>

107. Where the constable opens and searches unoccupied premises, section 28(6) requires the constable to secure the premises on completing the search.

108. 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). The child must also be given an explanation of the order in a way that the child will be able to understand.<sup>59</sup>

## Appeals

109. 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 28 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.

110. Section 30 of the Bill provides for three aspects of the appeal. First, it sets the time limit for appealing against the sheriff’s decision. Secondly, it provides that the appeal may proceed only where the sheriff gives

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<sup>58</sup> Traditionally referred to as a power to “open shut and lockfast places”.

<sup>59</sup> See section 29(3).

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permission. Finally, subsection (3) provides that the decision of the Sheriff Appeal Court is final.

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

111. In addition to the particular provisions of Chapter 2 of Part 4 of the Bill, sections 59 to 62 in Chapter 5 are also relevant to the search of a child or of premises, vehicles or vessels under Chapter 2.

112. Section 59 means that a constable applying under section 26 for an order under section 28 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 28.

113. Section 61 authorises a constable, searching a child under the authority of an order under section 28, 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>60</sup> Those safeguards also apply where the constable is exercising an existing power of search by virtue of section 25 and the search power allows the use of reasonable force.

114. If someone intentionally obstructs a constable who is searching a child under a section 28 order, section 62 provides that the person has committed an offence and may, on conviction, be fined. This doesn't apply to a child under 12, however, whether the child being searched or another child.

115. But section 62 does not apply to a search under an existing statutory power carried out by virtue of section 25(2).<sup>61</sup>

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

### **Current law**

116. 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

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<sup>60</sup> See section 61(3) to (6).

<sup>61</sup> As mentioned above, however, even where that statutory power provides for an offence, a child under 12, including the child being searched, cannot commit the offence.

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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) currently extend to children aged eight to 11 (as such children can, at present, commit an offence) but not to children aged under eight (who cannot).

117. Section 34 of that Act empowers constables to question an arrested person in relation to the offence while in police custody<sup>62</sup> and also provides that the person is under no obligation to answer questions.<sup>63</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.

118. 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>64</sup>. The rights conferred by sections 31 and 32 of the 2016 Act do not apply in such cases.

## **Changes made by the Bill**

### **Impact on current law of raising age of criminal responsibility**

119. 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

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<sup>62</sup> “Police custody” is defined in section 64 of the 2016 Act.

<sup>63</sup> Apart from providing their name, address, date of birth, place of birth and nationality.

<sup>64</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.

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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 Bill.

## **What this Chapter of the Bill does**

### **Prohibition on questioning**

120. Subsection (1) of section 31 prohibits police questioning of children aged under 12<sup>65</sup> from the point where a constable reasonably suspects that the child has behaved as mentioned in subsection (2)(b) (that is, 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 prohibition does not apply where the questioning is authorised by a child interview order made under section 34 or, in an emergency situation, by a police superintendent under section 44. This means that police questioning in relation to incidents falling within subsection (2) of section 31 cannot take place on a voluntary basis.<sup>66</sup>

121. Subsection (1) prohibits direct questioning of the child by a police constable at any time (except where authorised as mentioned above). This 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, although questioning is permitted (on a voluntary basis) until the constable forms a reasonable suspicion that the child has acted as mentioned in subsection (2)(b). Direct questioning by a police constable in any interview involving any degree of pre-planning is also prohibited, and questioning by local authority officers (in practice, usually social workers) in a police-

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<sup>65</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 31(3)).

<sup>66</sup> Including questioning of children aged under eight who are suspected of behaving as mentioned in section 31(2)(b) (which is a change from the current situation, where such interviews could take place on a voluntary basis, and without the rights in sections 31 and 32 of the 2016 Act applying).

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planned or jointly planned interview is also prohibited (again, except where authorised as mentioned above) (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.

122. Subsection (1) 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 acted as mentioned in subsection (2)(b) in that (or a different) incident, the constable (and any local authority officer present, if it is a police-planned or jointly planned interview) cannot ask any further questions in relation to the behaviour mentioned in subsection (2)(b).

123. If a constable wishes to question a child once reasonable suspicion that the child has behaved as mentioned in section 31(2)(b) exists, then (unless the situation is an emergency to which section 44 applies) the constable must apply to the sheriff<sup>67</sup> for a child interview order.

## **Child interview orders**

124. Section 32 sets out the process for applying for an order to interview a child (as defined in section 31(3)) in relation to suspected behaviour by the child that falls within section 31(2)(b). 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>68</sup> (see section 36). Section 32(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

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<sup>67</sup> By virtue of section 65 of the Bill, summary sheriffs may also deal with applications for child interview orders.

<sup>68</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).

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reasons why the questioning of the child is necessary) and contain supporting evidence.

125. Section 33 governs the procedure the sheriff must follow when considering an application under section 32. 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).

126. Subsection (3) requires the sheriff, before deciding the application, to consider whether the constable, the child, a parent of the child,<sup>69</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.

127. The matters as to which the sheriff must be satisfied before making an order, and what the order authorises, are set out in section 34. The sheriff must be satisfied that there are reasonable grounds to suspect that the child in relation to whom the application is made, by behaving in a violent or dangerous way, has caused or could have caused serious physical harm to another person or, by behaving in a sexually violent or sexually coercive way, caused or could have caused harm (physical or psychological) to another person. In addition, the sheriff must be satisfied that questioning of the child is necessary to fully investigate the incident to which the application relates. The factors to be taken into account in this consideration are set out in subsection (3).

128. If the sheriff is satisfied as mentioned in subsection (2)(b), 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 be continue to be prohibited under section 31(1). In contrast, if the sheriff refuses to make a child interview order because he or she is not satisfied as mentioned in subsection (2)(b) (either because there are no reasonable grounds to suspect that the behaviour involved in the incident falls within subsection (2)(b) or that such behaviour was involved

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<sup>69</sup> "Parent" is defined in section 63 of the Bill as including the guardian of a child and any person who has care of the child.

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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.

129. 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).

130. 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 31, 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 specified day, 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 31(1).

131. Section 35 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 39), and as the child’s advocacy worker (see section 40), during the interview are known they must also be provided with a copy of the order.

## **Planning and conduct of investigative interviews authorised by child interview order**

132. Section 36 requires that an investigative interview authorised by a child interview order must be jointly planned by the police and the relevant local authority. 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

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information to be included in the plans. Once finalised, the plans are to be provided to the child and, if practicable, a parent, explained to the child in an appropriate way and, once the supporter and advocacy worker are identified, provided to those individuals.

133. Section 37 provides that the interview cannot start unless the child has been given a copy of the interview plans. In addition, it ensures that the interview (and any other action authorised by the order) is carried out in accordance with any directions given by the sheriff and with the plans drawn up under section 36.

134. Sections 38, 39 and 40 set out the child's rights in relation to the interview, which are as follows:

- the right not to answer questions,
- the right to have a supporter present: the supporter must be aged over 18 and may, but need not, be a parent of the child. The child's views will be taken into account in identifying the supporter, but a person can only act as a supporter if they are considered appropriate by the person conducting the interview (this issue may be covered in guidance under section 46). 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 39(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 39(4)) the supporter must be present at the location where the interview is taking place at all times. 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 advocacy worker must be present at all times (section 41).
- the right to have an advocacy worker present: section 40(5) sets out some examples of the type of support and assistance that may be provided by an advocacy worker. As with the supporter, the advocacy worker 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 advocacy worker to be present or the advocacy worker wishes to be present, then access cannot be denied – there is no basis on

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which an advocacy worker can be excluded from the interview room. As already noted, one of the support or the advocacy worker must be present at all times. Section 122 of the 2011 Act provides for regulations to be made in relation to the provision of children's advocacy services in proceedings before children's hearings. Section 40(10) amends the definition of "children's advocacy services" so that those regulations can cover matters such as the qualifications and (by virtue of the amendment made by section 40(9)) the experience required by advocacy workers in the context of investigative interviews authorised by a child interview order as well as in children's hearings proceedings.<sup>70</sup>

135. Section 42 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.

## **Appeals**

136. 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 34 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.

137. Section 43 provides for three aspects of the appeal. First, it sets the time limit for appealing against the sheriff's decision. Secondly, it provides that the appeal may proceed only where the sheriff gives permission. Finally, subsection (3) provides that the decision of the Sheriff Appeal Court is final.

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<sup>70</sup> Regulations under section 122 of the 2011 Act containing provision of the nature provided for in the Bill are subject to the affirmative procedure.

## **Questioning in urgent cases**

138. Sections 44 and 45 make provision about the questioning of children (as defined in section 31(1)) 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.

139. 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 an advocacy worker must also be informed (even though the child has no specific right to an advocacy worker in relation to the emergency questioning).

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

140. 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 a child interview order, a constable or social worker conducting such an interview or a constable questioning a child in urgent circumstances under section 44, or an advocacy worker) must treat the need to safeguard and promote the wellbeing of the child as a primary consideration (section 59). The sheriff, in deciding whether to grant an application for a child interview order, is subject to the same duty. Section 61 authorises a constable who is authorised to carry out such an interview, or to question a child under section 44, 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. Any person who obstructs a constable acting under a child interview order (or section 44) 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 62). Of course, no child aged under 12 (including the child being questioned) can

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commit this offence (by virtue of new section 41 of the 1995 Act as inserted by section 1 of the Bill).

## **Guidance**

141. Section 46 requires the Scottish Ministers to issue guidance about various matters to do with child interview orders and investigative interviews conducted under such an order. The guidance may also cover questioning in an emergency situation under section 44. 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**

### **Current law**

142. The law governing when the police can take fingerprints,<sup>71</sup> as well as various types of “forensic” samples,<sup>72</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>73</sup> as well as governing the taking of prints and samples from persons convicted of certain specified offences<sup>74</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.

143. Generally, prints and samples can be used for the prevention or detection of crime and the investigation and prosecution of offences<sup>75</sup> and must be destroyed if no criminal proceedings are brought against the person or, where proceedings are brought, when they are concluded other

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<sup>71</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>72</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>73</sup> See section 18(2) of the 1995 Act.

<sup>74</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>75</sup> See section 19C(2)(a) of the 1995 Act. Other lawful uses are listed in section 19C(2)(b) to (d).

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than with the person being convicted.<sup>76</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>77</sup> In such cases, the prints and samples can be retained for a period after the conclusion of the criminal proceedings.<sup>78</sup>

144. 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.

145. 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>79</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.

146. 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>80</sup> which has been prescribed by the Scottish Ministers in an order under section 18E(6).<sup>81</sup>

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<sup>76</sup> See section 18(3) of the 1995 Act.

<sup>77</sup> "Relevant violent offences" and "relevant sexual offences" defined in section 19A(6) of the 1995 Act.

<sup>78</sup> Varying between 2 and 3 years, depending on the circumstances, and subject to possible extension.

<sup>79</sup> Children under 12 cannot be prosecuted, however (1995 Act, section 41A). And most children of 12 and over are referred to the children's hearings system rather than prosecuted through the criminal courts.

<sup>80</sup> As defined in section 19C(6) of the 1995 Act.

<sup>81</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.

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147. Section 56 of the 2003 Act also makes provision about the taking of prints and samples, in this case 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>82</sup> or where the prints or samples can be 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.

148. The prints and samples can be taken only where the person gives written consent,<sup>83</sup> and 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>84</sup> as well as for a number of other purposes.<sup>85</sup> The person can limit the purposes for which the prints and samples can be used.<sup>86</sup> And consent can be withdrawn and, where it is, the prints, samples and any information derived from them must be destroyed.<sup>87</sup>

149. Prints and samples could be taken under this section from a child under the current age of criminal responsibility 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. They could also be taken from a child aged eight or over provided the child had not been arrested and held in custody or detained.

## **Changes made by the Bill**

### **Impact on current law of raising age of criminal responsibility**

150. 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

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<sup>82</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).

<sup>83</sup> Or such consent is given on behalf of the person.

<sup>84</sup> Section 56(2)(a).

<sup>85</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)).

<sup>86</sup> See section 56(3).

<sup>87</sup> See section 56(4) and (5).

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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.

151. Section 56 of the 2003 Act would still apply and allow prints and samples to be taken with the child's written consent.<sup>88</sup>

### **What this Chapter of the Bill does**

152. The Bill 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.

153. Generally, no prints or samples may be taken from a child under 12 except where authorised by an order of the sheriff under section 52, where authorised by virtue of the power to take prints and samples in urgent cases in section 57, or where authorised by any other statutory provision.<sup>89</sup> See section 47. The limitation applies regardless of the child's behaviour. It also applies for all purposes, so does not depend on the purpose for which the constable seeks to take prints and samples.<sup>90</sup>

154. 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 47(2).

155. A similar limitation on the taking of prints and samples from certain children of 12 or over is provided for by section 48. Unlike section 47, 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,

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<sup>88</sup> Or with written consent on behalf of the child.

<sup>89</sup> Such as section 56 of the 2003 Act.

<sup>90</sup> That contrasts with section 48 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.

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dangerous or harmful way when the child was under 12.<sup>91</sup> Again, prints and samples cannot be taken except where authorised by an order under section 52, where authorised by virtue of the power to take prints and samples in urgent cases in section 57, or where the older child consents.

156. 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.

157. This is also part of the test that the sheriff must consider when deciding to make an order under section 52 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.

158. The prints and samples with which Chapter 4 of Part 4 of the Bill is concerned are defined in section 49 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>92</sup> As sections 47 and 48 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>93</sup>

159. Section 49(6) will provide the Scottish Ministers with a regulation-making power so that the definitions of “relevant physical data”, “relevant

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<sup>91</sup> See section 48(1) and (2).

<sup>92</sup> And which are set out in section 18(6) and (6A) and (7A). In addition, “relevant physical data” is defined in this Bill to include photographs of the person.

<sup>93</sup> Section 54 makes provision about the taking of intimate samples if authorised by an order under section 52 and provides that only medical professionals can take them.

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sample” and “intimate sample” can be kept up to date to reflect scientific and other developments. Regulations under this subsection would be subject to the affirmative procedure.<sup>94</sup>

160. The Bill 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.

161. 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>95</sup> to another person; or, by behaving in a sexually violent or coercive way, caused or risked causing harm<sup>96</sup> to another person.

162. The first route is to seek and obtain an order from the sheriff under section 52 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>97</sup> into the child’s behaviour authorises a constable under section 57 to take prints and samples. Even where prints and samples are taken under section 57, however, they cannot be used, and must be destroyed, unless the police apply for and obtain an order under section 52.<sup>98</sup>

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

163. Sections 50 and 51 set out the process involved in applying for an order under section 52. The constable can apply to the sheriff for an order under section 52.<sup>99</sup> Section 50(2) sets out the requirements that the application must comply with, including that it must state the grounds on which the application is made.

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<sup>94</sup> By virtue of section 66(3)(c) of the Bill.

<sup>95</sup> Including death.

<sup>96</sup> Physical or psychological.

<sup>97</sup> Of the rank of superintendent or above – see section 57(5) of the Bill.

<sup>98</sup> As set out in section 58.

<sup>99</sup> By virtue of section 65 of the Bill, summary sheriffs may also deal with such applications.

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164. These grounds will include<sup>100</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 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.

165. Section 50(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>101</sup>

166. Section 51 governs the procedure the sheriff must follow when considering an application under section 50. 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).

167. 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.

168. The matters as to which the sheriff must be satisfied before making an order, and what the order authorises, are set out in section 52. 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.

169. The sheriff must also be satisfied that taking prints and samples – either those specified in the application by the constable under section

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<sup>100</sup> By virtue of this being part of the test which the sheriff must apply under section 52(2).

<sup>101</sup> See section 50(2)(f).

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50(2)(e) or other prints and samples<sup>102</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 52(2)(a).

170. 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.

171. 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 take them.<sup>103</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.

172. 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 52(6)).

173. 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 52, cannot be taken by a constable and can only be taken by medical professionals.

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<sup>102</sup> By virtue of section 52(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>103</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 52(4)(b).

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174. Section 54 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 person who is a member of another health care profession<sup>104</sup> or a person of a type prescribed by the Scottish Ministers.<sup>105</sup>

175. 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>106</sup>

## **Appeals**

176. 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 52 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.

177. Section 56 provides for three aspects of the appeal. First, it sets the time limits for appealing against the sheriff's decision. Secondly, it provides that the appeal may proceed only where the sheriff gives permission. Finally, subsection (3) provides that the decision of the Sheriff Appeal Court is final.

## **Taking prints and samples in urgent cases**

178. The Bill recognises that there may be situations in which there is not time to seek and obtain an order from the sheriff under section 52. Section 57 therefore provides a way for a constable to take prints and samples without an order where a senior police officer<sup>107</sup> who is not been involved in

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<sup>104</sup> Designated by regulations under section 54(3)(b). Such regulations are subject to the negative procedure by virtue of section 66(2)(d).

<sup>105</sup> By regulations under section 54(2)(b)(iii) – subject to the negative procedure by virtue of section 66(2)(c).

<sup>106</sup> See section 53.

<sup>107</sup> A superintendent or an officer of a higher rank.

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the investigation into the child's behaviour gives the constable authority to do so.

179. Intimate samples may not, however, be taken under the authority provided by this section.<sup>108</sup>

180. The test the senior officer applies is essentially the same as the test the sheriff would apply under section 52 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>109</sup>

181. Like the sheriff when deciding an application under section 52, 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.

182. 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 52. Section 58 provides that, if an order is not applied for and, indeed, made, the prints and samples taken under section 57 must be destroyed.<sup>110</sup>

183. The constable has 7 days to apply for the order and section 51 applies to an application following the taking of prints and samples under section 57 as it applies to an application where that hasn't occurred, but with the modification that the application must specify the prints and

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<sup>108</sup> See section 57(4).

<sup>109</sup> For instance, material under a child's fingernails.

<sup>110</sup> See section 58(5). The duty to ensure the prints and samples are destroyed falls on the senior officer who authorised the constable to take them. Section 55 governs when prints and samples must be destroyed where an order under section 52 has been made, including where the order follows the taking of prints and samples under section 57.

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samples already taken rather than those which the constable seeks to take.<sup>111</sup>

184. 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>112</sup>

## **Destruction of prints and samples**

185. Unlike the provisions on prints and samples in the 1995 Act, where provision is made for retaining them after court proceedings have concluded, section 55 of the Bill provides for the prints and samples to be destroyed at the earliest opportunity.

186. 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.

187. 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>113</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>114</sup>

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

188. In addition to the particular provisions of Chapter 4 of Part 4 of the Bill, sections 59 to 62 in Chapter 5 are also relevant to taking of prints and samples from children.

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<sup>111</sup> See section 58(4).

<sup>112</sup> See section 52(5).

<sup>113</sup> Under section 69(2) of the 2011 Act.

<sup>114</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.

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189. Section 59 means that a constable applying for an order under section 52, taking prints and samples under the order, and taking prints and samples under the authority of section 57, 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 57 and to the sheriff taking a decision on whether to make an order under section 52.

190. Section 61 authorises a constable, taking prints and samples under the Bill, 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.

191. If someone intentionally obstructs a constable who is taking prints and samples, section 62 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

192. 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 60, which amends the Legal Aid (Scotland) Act 1986 (the "1986 Act"). Part 5A of that Act currently provides for children's legal aid to be available in connection with certain proceedings under the 2011 Act. The amendments made to Part 5A by section 60 of the Bill 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 60(4)).

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## Explanatory Notes

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