

# AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) ACT 2019

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## EXPLANATORY NOTES

### PART 1: AGE OF CRIMINAL RESPONSIBILITY

#### *Pre-existing law*

7. Section 41 of the Criminal Procedure (Scotland) Act 1995 (the “1995 Act”), as in force up to commencement of section 1 of this Act, sets out the position on the age of criminal responsibility as follows:

““It shall be conclusively presumed that no child under the age of eight years can be guilty of any offence.”
8. This is understood to mean that a child aged under eight cannot commit an offence (and therefore cannot be prosecuted).<sup>1</sup> A child aged under eight who does something which would, if the child is aged eight or over, be an offence may be referred to the Principal Reporter for consideration of whether to arrange a children’s hearing in relation to the child.<sup>2</sup> But the child cannot be dealt with on the ground that they have committed an offence (“the offence ground” – as set out in section 67(2)(j) of the Children’s Hearings (Scotland) Act 2011 (the “2011 Act”). Rather, the child’s behaviour may indicate that one of the other grounds applies.<sup>3</sup>
9. Section 41A of the 1995 Act<sup>4</sup>, as in force prior to commencement of section 2 of this Act, makes provision about how children who commit an offence while aged eight to 11 are to be dealt with by the criminal justice system, as follows:
  - (1) “A child under the age of 12 years may not be prosecuted for an offence.
  - (2) A person aged 12 years or more may not be prosecuted for an offence which was committed at a time when the person was under the age of 12 years.”.
10. This means that, while a child aged eight to 11 is considered capable of committing an offence, an offence committed by a child of this age is not dealt with through the criminal courts. Instead, the child may be referred to the children’s hearing

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<sup>1</sup> The meaning of the concept of the age of criminal responsibility has been discussed in more detail by the Scottish Law Commission. See Discussion Paper 115 – Age of Criminal Responsibility (July 2011) and Report 185 on Age of Criminal Responsibility (January 2002) (both at [Scottish Law Commission: Reports: 2000 - 2009](#)). See also the case of *Merrin v S* (1987 SLT 193), in which it was stated, amongst other things, that “an offence at common law can only be committed if the accused has *mens rea*. A child under the age of eight years cannot have *mens rea*.”

<sup>2</sup> See Part 6 of the Children’s Hearing (Scotland) Act 2011 for more detail on how cases (in relation to children of all ages) are referred to the Principal Reporter and the determination that the Principal Reporter is required to make.

<sup>3</sup> The other grounds include, for example, that the child is likely to suffer unnecessarily, or the health and development of the child is likely to be seriously impaired, due to a lack of parental care (section 67(2)(a) of the 2011 Act) or that the child’s conduct has had, or is likely to have, a serious adverse effect on the health, safety or development of the child or another person (section 67(2)(m) of the 2011 Act).

<sup>4</sup> Section 41A was inserted into the 1995 Act by section 52 of the Criminal Justice and Licensing (Scotland) Act 2010 and came into force on 28 March 2011. Prior to this, children aged eight to 11 who committed an offence could be prosecuted in the courts (but only with the authorisation of the Lord Advocate under section 42 of the 1995 Act) or dealt with through the children’s hearings system. The latter was more common.

system, where he or she may be dealt with using the offence ground or, depending on the circumstances, another ground.<sup>5</sup> Regardless of the ground used, the child's welfare is the paramount consideration for the children's hearing in deciding whether a compulsory supervision order ought to be made in respect of the child and, if so, what measures the order should contain.<sup>6</sup> The measures that a compulsory supervision order can contain are also the same regardless of which ground is used.

11. If a case proceeds on the basis of the offence ground, the standard of proof that applies in the event of an application being made to the sheriff to determine whether the ground is established is the criminal standard of proof (that is "beyond reasonable doubt").<sup>7</sup> If a sheriff is required to determine whether any other ground mentioned in section 67(2) of the 2011 Act is established, then the civil standard of proof applies (that is, "on the balance of probabilities") and, in addition, sections 1 and 2 of the Civil Evidence (Scotland) Act 1988 apply.<sup>8</sup>
12. For completeness, it should be noted that section 42 of the 1995 Act provides that children aged 12 to 15 who commit an offence may only be prosecuted if the Lord Advocate authorises the prosecution. However, the majority of children in this age group who commit offences are dealt with either through the children's hearing system or through early and effective intervention.<sup>9</sup> Children aged 16 or over can be prosecuted, although a child of this age who offends while already subject to a compulsory supervision order may be referred back to a children's hearing. Compulsory supervision orders are subject to regular review, but any such order still in effect when a person turns 18 is terminated at that point.<sup>10</sup>

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

13. **Section 1** of the Act replaces the pre-existing version of section 41 of the 1995 Act with a new version of that section. The new section 41 uses updated language to provide that a child aged under 12 cannot commit an offence.<sup>11</sup> So, on the day new section 41 comes into force, the age of criminal responsibility changes from eight to 12.
14. Children aged eight to 11, of course, already cannot be prosecuted for an offence by virtue of section 41A(1) of the 1995 Act. But one of the significant, practical effects of new section 41 is that things done by children aged eight to 11 after new section 41 comes into force will no longer be able to be dealt with through the children's hearings system on the basis of the offence ground. All behaviour by children in this age group who are referred to the Principal Reporter will in future be dealt with on a non-offence ground.<sup>12</sup>
15. New section 41 means that section 41A will not be required in the future - --- if children aged eight to 11 cannot commit offences, there is no need to prohibit their prosecution through the criminal courts. Section 41A is therefore repealed by section 2(1) of the Act.

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<sup>5</sup> *Constanda v M* (1999 SC 348) held that the Principal Reporter has to use the offence ground as the basis of a referral if the sole factual basis of a referral is the commission of an offence (although one of the other grounds may be relied on in circumstances where the commission of an offence is simply part of a wider picture amounting to the ground).

<sup>6</sup> Except that a decision which is inconsistent with treating the need to promote and safeguard the welfare of the child throughout the child's childhood as the paramount consideration may be made if necessary for the purpose of protecting members of the public from serious harm (whether physical or not). In such a case, the child's welfare is instead a primary consideration. See sections 25 and 26 of the 2011 Act.

<sup>7</sup> See section 102(3) of the 2011 Act.

<sup>8</sup> This means that corroboration is not required and that hearsay is always admissible.

<sup>9</sup> Early and effective intervention is one element of the wider "whole system approach". The aim of the approach is to reduce offending by young people under the age of 18. See <http://www.gov.scot/Topics/Justice/policies/young-offending/whole-system-approach>.

<sup>10</sup> See section 199 of the 2011 Act.

<sup>11</sup> This does not mean that things done by children aged eight to 11 which would previously have been an offence are lawful as such, just that such things are not treated as criminal acts. For example, many acts which constitute offences are also delicts and can be actioned as such in the civil courts (although such actions are rare). Nothing in the Act necessarily prevents such action being taken in relation to things done by children aged eight to 11.

<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.

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

16. But new section 41 is not retrospective – it only applies in relation to things done after it comes into force. This has two consequences. First, it means that actions taken prior to the change in the age of criminal responsibility, in respect of things done by children aged eight to 11, stand. So, for example, a child aged 11 who is, on the date new section 41 comes into force, subject to a compulsory supervision order, following the offence ground having been accepted or established, remains subject to that order.
17. It also means that things done by children aged eight to 11 prior to new section 41 coming into force but which, for example, have not yet come to light may still constitute an offence. Section 2(2) of the Act therefore maintains the current prohibition on the prosecution in such cases (by providing that section 41A continues to have effect in relation to such offences).
18. The prohibition on the prosecution of children aged under 12 contained in subsection (1) of section 41A obviously has effect only in relation to children aged eight to 11 at the time at which (but for that section) any prosecution would take place. If something done by a child when aged under 12 comes to light after the child has turned 12, it is subsection (2) of section 41A which prevents prosecution. This means that subsection (1) of section 41A will cease to have any effect 4 years after the change in the age of criminal responsibility – by that point, all children aged eight to 11 at the time new section 41 comes into force will have turned 12. From that point on, subsection (2) of section 41A will be sufficient to ensure that no-one can be prosecuted for something done, while aged under 12, prior to the change in the age of criminal responsibility. That subsection will continue to operate, by virtue of section 2(2) of the Act, for as long as is necessary.
19. [Section 2](#) maintains the current position in relation to prosecution of children for things done while aged eight to 11 for as long as necessary. Fully maintaining the current position in relation to dealing with things done by a child aged eight to 11 prior to the change in the age of criminal responsibility would mean allowing such cases to be dealt with by a children’s hearing, on the basis of the offence ground, after the date of that change. However, the Act does not maintain the current position in this respect. Instead, section 3 provides that, from the date new section 41 comes into force, new cases involving behaviour that occurred prior to that date, and while the child was aged eight to 11, cannot be dealt with on the basis of the offence ground (even though such behaviour may still, in strict legal terms, be an offence). It does this by prohibiting the Principal Reporter from determining that the offence ground applies in such circumstances. However, any determination that the offence ground applies made prior to the date of new section 41 coming into force is not affected.<sup>13</sup>
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

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<sup>13</sup> At the time of publication of these Notes, section 3 is already in force (but with paragraph (a) being read with the words “before the day on which section 1 came into force” omitted) ([the Age of Criminal Responsibility \(Scotland\) Act 2019 \(Commencement No. 1 and Transitory Provision\) Regulations 2019 \(SSI 2019/349\)](#)). This means that the Principal Reporter ceased to be able (from 29 November 2019) to make determinations finding that the offence ground applies in relation to pre-12 behaviour (with the Principal Reporter instead considering whether the behaviour means that one of the other grounds listed in section 67(2) of the 2011 Act applies). Determinations made prior to 29 November 2019 that the offence ground applies in relation to pre-12 behaviour are unaffected.

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

**15** 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").