

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

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## **EXPLANATORY NOTES**

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

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

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

90. Prior to implementation of this Act, where a child aged eight or over is behaving (or is likely to behave) in a way that is causing or risks causing significant harm to another person, a police constable may be able to arrest the child on suspicion that the child has committed (or is committing) an offence.<sup>1</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>2</sup>, such an arrest would also have the immediate effect of removing the child to a place of safety.<sup>3</sup>

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

91. Once section 1 of the Act comes into force, the power described above will not be available in relation to eight to 11 year olds, as children in this age group will no longer be able to commit an offence, and so can't be arrested on suspicion of committing an offence. This puts them into the same position as children under eight are currently in.
92. Depending on the precise circumstances, it may be possible for a constable to remove a child who is behaving (or is likely to behave) in a way that is causing or risks causing significant harm to another person to a place of safety using the power conferred by section 56 of the 2011 Act, but this does depend on the police constable being satisfied that the child him or herself is at risk of harm. Other powers will also persist (for example, the common law power to take a child home (on the basis of the child's agreement)).

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

93. [Section 28](#) of the Act creates a specific power authorising a police constable to take a child aged under 12 (so including those aged under eight) to a place of safety in cases where the child is behaving (or is likely to behave) in a way that is causing or risks causing significant harm to another person and the child's removal is necessary to protect the other person from an immediate risk of such harm. A parent of the child must be informed that the child has been taken to a place of safety.
94. Once removed to a place of safety, the child can be kept in the place of safety for a maximum of 24 hours (subsection (4)(b)). But the child can only be kept in the place of

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

<sup>2</sup> Section 4 of that Act.

<sup>3</sup> Part 1 of that Act also sets out what happens to an arrested person after this point.

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

95. The other reason for keeping the child in a place of safety is if an order under section 63 authorising the taking of an intimate sample (defined in section 60) is being sought. Once a decision has been made on the application for such an order, the child can no longer be kept in the place of safety by virtue of section 28 (unless arrangements for his or her care or protection are not yet in place), even if the maximum period of 24 hours has not yet expired. If no decision has been made on the application on the expiry of the maximum period of 24 hours, the child may no longer be kept in the place of safety.
96. Subsection (11) lists the places of safety to which a child may be taken under section 28. Places of safety include residential or other establishments provided by local authorities, hospitals or surgeries (provided the managers of the hospital or surgery are willing for the child to be kept there), the dwelling of any suitable person (again, provided that the person is willing for the child to be kept there) and police stations.
97. The power to use police stations as a place of safety under section 28 is subject to certain limitations. Under subsection (5), the child may only be kept in a police station if a constable of the rank of inspector or above considers that it is not reasonably practicable for another place of safety to be used. In addition, if the child is in a police station, subsection (8) requires steps to be taken to identify another place of safety and to transfer the child there – except where the child is being kept in the place of safety while an order authorising the taking of an intimate sample is sought (as the purpose of keeping the child in the place of safety in this case is to keep them in an environment which is as forensically secure as possible).
98. A child who is being kept in a police station under section 28 must not be kept in a cell (subsection (6)). Subsection (7) provides for an exception to this prohibition, which allows a child to be kept in a cell if a constable of the rank of inspector or above considers that it is not reasonably practicable for the child to be kept elsewhere within the police station. As soon as this condition ceases to be satisfied, the child must be removed from the cell. For example, it might be necessary to place a child in a cell if the child's behaviour is such that keeping them in another room within the police station would risk the child, or other persons, being harmed. But once that behaviour ceases, the child must be removed from the cell.
99. Subsection (10) states that section 28 does not affect any other power by virtue of which a constable may take a child to a place of safety. For example, if a constable considers both that the conditions in subsections (1) and (2) of section 28 are satisfied and that the conditions for exercise of the power under section 56 of the 2011 Act are satisfied, the constable may use the power under the 2011 Act to take the child to a place of safety rather than the section 28 power. In cases where the conditions set out in subsections (1) and (2) are not met, section 28 simply has no effect – it neither adds to nor removes any other powers that police constables will have, following the change in the age of criminal responsibility, to take a child to a place of safety (for example, the power, with a child's agreement, to take a child home).
100. At all points while the constable is removing and keeping the child in a place of safety, the constable is to treat the need to safeguard and promote the wellbeing of the child as a primary consideration (see section 72).
101. The constable is empowered to use reasonable force (in respect of the child or any other person) in exercising the powers conferred by this section (see section 74). In deciding

to use, and in using, reasonable force in respect of the child, the constable is to comply with subsections (4) to (6) of section 74. In addition, the constable has power, while removing the child to the place of safety, to search the child (see section 66 of the Criminal Justice (Scotland) Act 2016 (the “2016 Act”). The constable must, in deciding whether to search the child using that power, treat the need to safeguard and promote the wellbeing of the child as a primary consideration (section 68 of the 2016 Act).

102. Any person who obstructs the constable’s exercise of the power to remove and keep the child in a place of safety commits an offence (punishable by a fine not exceeding level 3 on the standard scale) (section 75). Of course, no child aged under 12 (including the child being removed to the place of safety) can commit this offence (by virtue of new section 41 of the 1995 Act as inserted by section 1 of the Act).
103. [Section 29](#) requires the Scottish Ministers to compile and maintain a list of places of safety (including the times at which each place of safety is available for use). In doing so, they must consult the chief constable of Police Scotland and each local authority (and any other persons they consider appropriate, which might include, for example, other organisations which provide children’s services). The list may be modified over time to add or remove places of safety. The list must be published in a way that the Scottish Ministers consider appropriate and also made available to the chief constable of Police Scotland and local authorities (and to any other persons originally consulted). The list could be consulted, for example, to find out whether a place of safety of a particular type listed in section 28(11) is available in a particular locality at a time when a child requires to be taken to a place of safety under section 28.
104. [Section 30](#) allows regulations to be made specifying additional things that are to be done when a child is kept in a place of safety under section 28 (for example, who is to be notified that the child is in a place of safety, and the information to be given to the child).<sup>4</sup> The regulations may also require particular records to be kept in relation to cases where a child is taken to a place of safety under section 28 (including, for example, records of the reasons why it was not considered reasonably practicable for a place of safety other than a police station to be used). The regulations will be subject to the negative procedure (see section 82(2)(b)).
105. [Section 31](#) requires the Scottish Ministers to issue guidance to the chief constable of Police Scotland and to local authorities about such matters relating to the exercise of the place of safety power conferred by section 28 as they consider appropriate. Subsection (2) provides an illustrative list of matters that may be covered, including guidance as to what constitutes significant harm for the purposes of section 28(1) and (2), guidance as to the circumstances in which the section 28 power may be exercised and guidance as to the keeping of child who is being kept in a police station under section 28 in a cell. In addition, the guidance may cover co-operation between the chief constable of Police Scotland and local authorities in relation to the identification of places of safety, both at the time a particular child needs to be taken to a place of safety under section 28 and in advance of any particular incident. Places of safety identified in this way might then be included in the list maintained under section 29. The guidance may also cover processes to be put in place by the chief constable of Police Scotland and local authorities to minimise the number of occasions on which police stations need to be used as places of safety under section 28 and to ensure that the need to safeguard and promote the wellbeing of the child is treated as a primary consideration (as required by section 72) in any case where the section 28 power is used.
106. The chief constable of Police Scotland and local authorities must have regard to the guidance once it is issued. The chief constable and local authorities must also be consulted during the preparation of the guidance, along with any other persons that the Scottish Ministers consider it is appropriate to consult. The guidance may be

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<sup>4</sup> The regulation-making power conferred by section 57 of the 2011 Act includes power to make similar provision in relation to the power to remove a child to a place of safety under section 56 of that Act – see [The Children’s Hearings \(Scotland\) Act 2011 \(Child Protection Emergency Measures\) Regulations 2012 \(SSI 2012/334\)](#).

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revised from time to time. The consultation requirements also apply in relation to such revisions.

107. **Section 32** requires the Scottish Ministers to produce reports on the exercise of the section 28 place of safety power. The Scottish Ministers have power to specify in regulations (subject to the affirmative procedure – see section 82(3)(d)) the information which is to be included in these reports. Reports under this section require to be laid before the Scottish Parliament and published. The first report is to be prepared as soon as reasonably practicable after section 28 has been in force for a year, and annually thereafter (although subsection (3) gives the Scottish Ministers power, again subject to the affirmative procedure, to increase the number of years that can elapse before the next report is required).
108. In addition to annual reports under section 32, the Scottish Ministers are required under section 78 to carry out a general review of the operation of the Act in the three years after section 1 comes into force. This would include a review of the operation of section 28. Section 79 gives the Scottish Ministers powers to require information from certain persons in connection with the section 78 review and subsequent monitoring of the use of powers under Part 4 (including section 28). So, for example, information recorded by virtue of regulations made under section 30(2)(c) which is needed for the section 78 review or for a subsequent section 32 report could (subject to data protection law) be required to be provided under section 79. See paragraphs 231 to 234 for further discussion of sections 78 and 79.