

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

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## **EXPLANATORY NOTES**

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

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

##### *Pre-existing law*

176. The law governing when the police can take fingerprints,<sup>1</sup> as well as various types of “forensic” samples,<sup>2</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>3</sup> as well as governing the taking of prints and samples from persons convicted of certain specified offences<sup>4</sup> and in certain other circumstances. In addition, these provisions cover the use, retention and destruction of prints and samples taken before proceedings or after proceedings are concluded.
177. Generally, prints and samples can be used for the prevention or detection of crime and the investigation and prosecution of offences<sup>5</sup> and must be destroyed if no criminal proceedings are brought against the person or, where proceedings are brought, when they are concluded other than with the person being convicted.<sup>6</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>7</sup> In such cases, the prints and samples can be retained for a period after the conclusion of the criminal proceedings.<sup>8</sup>
178. Where prints and samples are taken from a person who is subsequently convicted of an offence, those prints and samples may be retained as part of the person’s criminal records and the provisions of sections 18A to 18F do not apply.
179. These sections apply to a child over the age of criminal responsibility who is suspected of having committed an offence as they apply to an adult.<sup>9</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.

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<sup>1</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>2</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>3</sup> See section 18(2) of the 1995 Act.

<sup>4</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>5</sup> See section 19C(2)(a) of the 1995 Act. Other lawful uses are listed in section 19C(2)(b) to (d).

<sup>6</sup> See section 18(3) of the 1995 Act.

<sup>7</sup> “Relevant violent offences” and “relevant sexual offences” defined in section 19A(6) of the 1995 Act.

<sup>8</sup> Varying between 2 and 3 years, depending on the circumstances, and subject to possible extension.

<sup>9</sup> Children under 12 cannot be prosecuted, however (section 41A of the 1995 Act). And most children of 12 and over are referred to the children’s hearings system rather than prosecuted through the criminal courts.

180. Sections 18E and 18F of the 1995 Act make particular provision for the retention and destruction of prints and samples taken from children where, on referral to the children’s hearing, the offence ground in section 67(2)(j) of the 2011 Act is either accepted or established and the offence involved is a “relevant violent offence” or a “relevant sexual offence”<sup>10</sup> which has been prescribed by the Scottish Ministers in an order under section 18E(6).<sup>11</sup>
181. Section 56 of the 2003 Act also makes provision about the retention and use of prints and samples provided voluntarily, in connection with the investigation of an offence. It does not apply to persons from whom prints and samples can be taken under the 1995 Act<sup>12</sup> or where the prints or samples are taken by virtue of any power of search, any power to take possession of evidence to avoid it being lost or destroyed or under a court warrant.
182. Where the person gives written consent,<sup>13</sup> the prints and samples can be retained and used for the purposes of the prevention or detection of crime, the investigation of an offence and the conduct of a prosecution,<sup>14</sup> as well as for a number of other purposes.<sup>15</sup> The person can limit the purposes for which the prints and samples can be used.<sup>16</sup> And consent can be withdrawn and, where it is, the prints, samples and any information derived from them must be destroyed.<sup>17</sup>
183. Prints and samples taken with the consent of a child aged under eight could (subject to issues about the meaning of consent when applied to a young child) be retained and used under this section given that the child cannot be arrested, held in custody or detained. Section 56 might be used, for instance, where such a child was the victim of an offence committed by someone else or, perhaps, was a witness. The same would apply to a child aged eight or over provided the child had not been arrested and held in custody or detained.

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

184. As a result of raising the age of criminal responsibility to 12, children between the ages of eight and 11 will no longer be covered by the provisions in Part 2 of the 1995 Act and so prints and samples cannot be taken from them under section 18(2), (6) or (6A). In addition, because the offence ground in section 67(2)(j) of the 2011 Act will no longer be applicable, sections 18E and 18F of the 1995 Act will also not apply to prints and samples taken from them.
185. Section 56 of the 2003 Act would still apply and allow prints and samples otherwise lawfully taken on a consent basis to be retained and used with the child’s written consent.<sup>18</sup>

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

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

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<sup>10</sup> As defined in section 19C(6) of the 1995 Act.

<sup>11</sup> See [The Retention of Samples etc. \(Children’s Hearings\) \(Scotland\) Order 2011 \(SSI 2011/197\)](#) for which relevant violent offences and which relevant sexual offences are currently prescribed for the purposes of section 18E.

<sup>12</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>13</sup> Or such consent is given on behalf of the person.

<sup>14</sup> Section 56(2)(a) of the 2003 Act.

<sup>15</sup> Such as the identification of a deceased person, the interests of national security or an investigation into terrorism (section 56(2)(b) to (d) of the 2003 Act).

<sup>16</sup> See section 56(3) of the 2003 Act.

<sup>17</sup> See section 56(4) and (5) of the 2003 Act.

<sup>18</sup> Or with written consent on behalf of the child.

187. Generally, no prints or samples may be taken from a child under 12 except where authorised by an order of the sheriff under section 63, where authorised by virtue of the power to take prints and samples in urgent cases in section 69, or where authorised by any other statutory provision (see section 58). The limitation applies regardless of the child's behaviour, or their consent to the taking of the print or sample. It also applies for all purposes, so does not depend on the purpose for which the constable seeks to take prints and samples.<sup>19</sup>
188. But it does not apply where the child appears to be the victim of an offence and the taking of prints and samples is necessary to properly investigate the offence. Nor does it apply where the child is harmed by the behaviour of another child below the age of criminal responsibility. See section 58(2). Subsection (3) of section 58 ensures that prints and samples taken for either of these purposes cannot be used to investigate an incident which occurred when the child was aged under 12 and in relation to which the child is themselves suspected of harmful behaviour (as defined in subsection (4)(b)). If the child is aged over 12 by the time a constable wishes to use the prints or samples for this new purpose, the child can consent to that use (subsection (5)(a)). In addition, it is always open to a constable to seek to take new samples from the child by applying for an order under section 63 (or, in urgent cases, under section 69).
189. A similar limitation on the taking of prints and samples from certain children of 12 or over is provided for by section 59. Unlike section 58, the limitation applies only where the purpose of taking prints and samples from the child is to investigate an incident in which the child behaved in a violent, dangerous or harmful way when the child was under 12.<sup>20</sup> Again, prints and samples cannot be taken except where authorised by an order under section 63, where authorised by virtue of the power to take prints and samples in urgent cases in section 69, or where the older child consents.
190. The behaviour to which this section applies is set out in subsection (2) and is behaviour which occurred when the child was under 12 and is behaviour—
- which was violent or dangerous and which caused or could have caused serious physical harm to another person, or
  - which was sexually violent or sexually coercive and harmed or could have harmed another person.
191. This is also part of the test that the sheriff must consider when deciding to make an order under section 63 authorising the taking of prints and samples from a child under 12 or an older child in relation to behaviour that occurred when the child was under 12.
192. The prints and samples with which Chapter 4 of Part 4 of the Act is concerned are defined in section 60 and are “relevant physical data”, “relevant samples” and “intimate samples” (which are a subset of “relevant physical data” and “relevant samples”). The classes of data and samples are essentially the same as the “relevant physical data” and “relevant samples” to which section 18 of the 1995 Act applies.<sup>21</sup> As sections 58 and 59 generally exclude the taking of prints and samples, however, “relevant physical data” and “relevant sample” are defined more widely than in the 1995 Act to include certain “intimate samples”, such as dental impressions, pubic hair, and material obtained from swabbing bodily orifices other than the mouth.<sup>22</sup>
193. [Section 60\(6\)](#) provides the Scottish Ministers with a regulation-making power so that the definitions of “relevant physical data”, “relevant sample” and “intimate sample”

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<sup>19</sup> That contrasts with section 59 which limits the taking of prints and samples from older children but only where the purpose of taking them is to investigate an incident in which the child has behaved in a violent, dangerous or harmful way.

<sup>20</sup> See section 59(1) and (2).

<sup>21</sup> And which are set out in section 18(6) and (6A) and (7A). In addition, “relevant physical data” is defined in this Act to include photographs of the person.

<sup>22</sup> Section 65 makes provision about the taking of intimate samples if authorised by an order under section 63 and provides that only medical professionals can take them.

can be kept up to date to reflect scientific and other developments. Regulations under this subsection are subject to the affirmative procedure.<sup>23</sup>

194. The Act provides for two routes for the police to obtain authorisation to take prints and samples from a child under 12 or from an older child in relation to behaviour when the child was under 12.
195. Both are available only where the police have reasonable grounds to suspect that the child, by behaving in a violent or dangerous way, has caused or risked causing serious physical harm<sup>24</sup> to another person; or, by behaving in a sexually violent or coercive way, caused or risked causing harm<sup>25</sup> to another person.
196. The first route is to seek and obtain an order from the sheriff under section 63 authorising the taking of prints and samples from the child. The other is where a senior police officer who is independent of the investigation<sup>26</sup> into the child's behaviour authorises a constable under section 69 to take prints and samples. Even where prints and samples are taken under section 69, however, they cannot be used, and must be destroyed, unless the police apply for and obtain an order under section 63.<sup>27</sup>

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

197. [Sections 61](#) and [62](#) set out the process involved in applying for an order under section 63. The constable can apply to the sheriff for an order under section 63.<sup>28</sup> [Section 61\(2\)](#) sets out the requirements that the application must comply with, including that it must state the grounds on which the application is made.
198. These grounds will include<sup>29</sup> that the constable has reasonable suspicion that the child, by behaving in a violent or dangerous way, has caused or could have caused serious physical harm to another person or that the child caused or could have caused harm (physical or psychological) to another person by behaving in a sexually violent or sexually coercive way. They will also include information as to why the constable considers the taking of prints and samples from the child is needed in order to investigate that behaviour.
199. [Section 61\(2\)](#) also requires the constable to specify which prints and samples the constable seeks to take, and whether intimate samples are sought, and that the application includes supporting evidence that will enable the sheriff to come to a decision on the application.<sup>30</sup>
200. [Section 62](#) governs the procedure the sheriff must follow when considering an application under section 61. The sheriff has discretion as to whether to hold a hearing or to determine the application without hearing from the constable or anyone else. The sheriff also has discretion over whether to consider the application in open court or in the sheriff's chambers (which would provide a degree of privacy to the proceedings).
201. Subsection (3) requires the sheriff, before deciding the application, to consider whether the constable, the child, a parent of the child, or anyone else the sheriff thinks has an interest, should be given an opportunity to make representations to the sheriff on the application and whether an order should be made.
202. The matters as to which the sheriff must be satisfied before making an order, and what the order authorises, are set out in section 63. The sheriff must be satisfied that there are reasonable grounds to suspect that the child in relation to whom the application is made

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<sup>23</sup> By virtue of section 82(3)(f) of the Act.

<sup>24</sup> Including death.

<sup>25</sup> Physical or psychological.

<sup>26</sup> Of the rank of superintendent or above – see section 69(5) of the Act.

<sup>27</sup> As set out in section 70.

<sup>28</sup> By virtue of section 81 of the Act, summary sheriffs may also deal with such applications.

<sup>29</sup> By virtue of this being part of the test which the sheriff must apply under section 63(2).

<sup>30</sup> See section 61(2)(f).

has, by behaving in a violent or dangerous way, caused or could have caused serious physical harm to another person or, by behaving in a sexually violent or coercive way, caused or could have caused harm (physical or psychological) to another person.

203. The sheriff must also be satisfied that taking prints and samples – either those specified in the application by the constable under section 61(2)(e) or other prints and samples<sup>31</sup> – is necessary to properly investigate the child’s behaviour and the circumstances surrounding it, including whether a person other than the child has committed an offence. Given the nature of an investigation of the sort that might be involved here, it may not be entirely clear who did what and it could eventually transpire that another person, over the age of criminal responsibility, has committed an offence. But it may be that the taking prints and samples from the child is what ascertains that it was the other person, and not the child, whose behaviour actually caused the harm. For the sheriff to make the order, however, there must be reasonable suspicion that the child has behaved in the way set out in section 63(2)(a).
204. When considering these matters, the sheriff must have regard to the nature and seriousness of the child’s behaviour and to whether taking prints and samples is appropriate in the circumstances, including, but not restricted to, the child’s age.
205. As well as authorising the taking of prints and samples, the order must also specify the prints and samples that may be taken from the child, and must also specify a time period within which the samples must be taken.<sup>32</sup> In addition, it authorises taking steps in relation to the prints and samples, which would include comparing fingerprints with a fingerprint database and analysing DNA samples. The order also authorises the removal of the child to and the keeping of the child in a place at which prints and samples are to be taken.
206. The order may also require a person, such as a parent, to produce the child to the constable so that prints and samples can be taken (see section 63(6)).
207. The order does not specify that it is the constable who is to take the prints and samples. Intimate samples, for instance, the taking of which may be authorised by an order under section 63, cannot be taken by a constable and can only be taken by medical professionals.
208. [Section 65](#) makes provision about this. Dental impressions may only be taken by a registered dentist, while other intimate samples may be taken either by a doctor, a nurse or a person who is a member of another health care profession<sup>33</sup> or a person of a type prescribed by the Scottish Ministers.<sup>34</sup>
209. Where the sheriff makes an order authorising the taking of prints and samples, the constable must give notice of it, and a copy of it, to the child and a parent of the child (if the constable is able to do). The child must also be provided with an explanation of the order in a way that the child will be able to understand.<sup>35</sup>

## ***Appeals***

210. As already noted, section 110 of the 2014 Act provides generally that any decision of the sheriff may be appealed to the Sheriff Appeal Court. That section will apply to a decision of the sheriff under section 63 to make or refuse an order authorising the taking of prints and samples. Sections 111 and 116 of the 2014 Act apply to appeals under section 110 and that the Rules of Court relating to section 110 appeals also apply.

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<sup>31</sup> By virtue of section 63(4)(a) the sheriff must specify in the order the prints and samples that the order authorises the constable to take from the child but these need not be the same prints and samples sought in the application.

<sup>32</sup> The default position is for the period to be no more than 7 days but the sheriff may specify a longer period – see section 63(4)(b).

<sup>33</sup> Designated by regulations under section 65(3). Such regulations are subject to the negative procedure by virtue of section 82(2)(e).

<sup>34</sup> By regulations under section 65(2)(b)(iii) – subject to the negative procedure by virtue of section 82(2)(d).

<sup>35</sup> See section 64.

So section 111, for instance, provides that the Sheriff Appeal Court may uphold the sheriff's decision or reverse it or vary it.

211. [Section 67](#) provides for a number of aspects of the appeal process as it applies in relation to orders under section 63 authorising the taking of prints and samples (or applications for such orders). It sets out that either a constable or the child (or another person acting on the child's behalf) must, within the time-limits set out in subsection (2), apply to the sheriff for permission to appeal. The appeal may proceed only where the sheriff gives permission. If permission to appeal is given, the appeal must be made on the day on which that permission is given or during the following two working days (subsection (3)). Where an appeal is made, the decision of the Sheriff Appeal Court is final (subsection (4)).
212. The making of an appeal suspends the effect of any order under section 63 originally made by the sheriff. Such an order only authorises the taking of prints and samples within a certain period. By the time an appeal is made and determined, that period may have expired. Section 67 therefore also allows the Sheriff Appeal Court, in a case where it upholds or varies the original order with the result that the taking of prints and samples which have not yet been taken is once again authorised, to specify a new period within which the data or samples may be taken.
213. [Section 68](#) sets out what is to happen to data or samples that have already been taken by virtue of an order under section 63 if an appeal is then made against the order. Subsection (2) provides that no steps (or further steps), other than holding or preserving the data or sample, can be taken until the appeal is decided. If the outcome of the appeal is that the taking of data or sample is no longer authorised (whether because the order is quashed in its entirety or varied so that the taking of particular data or samples is no longer authorised), the constable who originally applied for the order under section 63 is required to ensure that any record of data the taking of which is no longer authorised is destroyed. The same applies to any samples the taking of which is no longer authorised. In addition, all information derived from any such samples must be destroyed.

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

214. The Act recognises that there may be situations in which there is not time to seek and obtain an order from the sheriff under section 63. Section 69 therefore provides a way for a constable to take prints and samples without an order where a senior police officer<sup>36</sup> who has not been involved in the investigation into the child's behaviour gives the constable authority to do so.
215. Intimate samples may not, however, be taken under the authority provided by this section.<sup>37</sup>
216. The test the senior officer applies is essentially the same as the test the sheriff would apply under section 63 but with the addition of a further matter. This is that it is not practicable for the constable to apply for an order because of the risk that, if the prints and samples are not taken immediately, evidence would be lost or destroyed. That evidence might be the sample itself or it might be evidence derived from a sample.<sup>38</sup>
217. Like the sheriff when deciding an application under section 63, in considering whether to authorise the taking of prints and samples, the senior officer must have regard to the nature and seriousness of the child's behaviour and to whether taking prints and samples is appropriate in the circumstances, including, but not restricted to, the child's age.
218. Because the taking of prints and samples under this section has not been authorised by the sheriff, if the constable wants to take any steps with them (other than simply storing and preserving them), the constable must apply for an order under section 63. Section

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<sup>36</sup> A superintendent or an officer of a higher rank.

<sup>37</sup> See section 69(4).

<sup>38</sup> For example, material under a child's fingernails.

70 provides that, if an order is not applied for and, indeed, made, the prints and samples taken under section 69 must be destroyed.<sup>39</sup>

219. The constable has 7 days to apply for the order and section 62 applies to an application following the taking of prints and samples under section 69 as it applies to an application where that hasn't occurred, but with the modification that the application must specify the prints and samples already taken rather than those which the constable seeks to take.<sup>40</sup>
220. Where the sheriff makes an order in such a case, the order does not specify the period within which the prints and samples can be taken, since they have already been taken.<sup>41</sup>

### ***Destruction of prints and samples***

221. Unlike the provisions on prints and samples in the 1995 Act, where provision is made for retaining them after court proceedings have concluded, section 66 of the Act provides for prints and samples taken by virtue of an order under section 63 to be destroyed at the earliest opportunity.
222. This essentially means when either no further action is being taken in relation to the child's behaviour or where that action – principally through the children's hearings system – has come to a conclusion. For instance, if the constable concludes that no action should be taken, and that the matter should not be referred to the Principal Reporter under section 61 of the 2011 Act, the prints and samples must be destroyed.
223. On the other hand, if the matter is referred to the Principal Reporter, and the Principal Reporter determines under section 66(2) of the 2011 Act that a ground in section 67 of that Act applies and that a compulsory supervision order should be made in respect of the child, and refers the matter to a children's hearing,<sup>42</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>43</sup>
224. [Section 71](#) makes equivalent provision in relation to the destruction of data and samples taken by virtue of section 59(1)(b) – that is, where the data or samples are taken from a child aged 12 or over with the child's consent (in relation to behaviour that occurred when the child was aged under 12).

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

225. In addition to the particular provisions of Chapter 4 of Part 4 of the Act, sections 72 to 75 in Chapter 5 are also relevant to taking of prints and samples from children.
226. [Section 72](#) means that a constable applying for an order under section 63, taking prints and samples under the order, and taking prints and samples under the authority of section 69, must treat the need to safeguard and promote the child's wellbeing as a primary consideration. The same duty applies to a relevant senior officer considering whether to authorise the taking of prints and samples under section 69 and to the sheriff taking a decision on whether to make an order under section 63.
227. [Section 74](#) authorises a constable taking prints and samples under the Act to use reasonable force. But, in doing so where a child under 12 is involved, the constable

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<sup>39</sup> See section 70(5). The duty to ensure the prints and samples are destroyed falls on the senior officer who authorised the constable to take them. Section 66 governs when prints and samples must be destroyed where an order under section 63 has been made, including where the order follows the taking of prints and samples under section 69.

<sup>40</sup> See section 70(4).

<sup>41</sup> See section 63(5).

<sup>42</sup> Under section 69(2) of the 2011 Act.

<sup>43</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.

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

must first seek the child's cooperation and may only use reasonable force as a last resort and must use as little force, and for as little time, as possible.

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