
EXPLANATORY NOTE

(This note is not part of the Order)

This Order makes provision in consequence of the Age of Criminal Responsibility (Scotland) Act 2019 (“the 2019 Act”), which raises the age of criminal responsibility in Scotland to 12 years.

Part 2 of the 2019 Act makes provision relating to the disclosure of criminal records and information which relates to a time when a person was under the age of 12. It amends the definition of “conviction” in the Rehabilitation of Offenders Act 1974 (c. 53) to remove behaviour which took place when a person was under the age of 12. It also establishes a new office of “the independent reviewer” to review information concerning behaviour of persons when under the age of 12 before such information is disclosed in an enhanced criminal record certificate as defined by section 113B of the Police Act 1997 (“the 1997 Act”) or a scheme record under section 52 of the Protection of Vulnerable Groups (Scotland) Act 2007 (“the 2007 Act”).

Part 4 of the Act makes provision for new police powers to investigate alleged seriously harmful behaviour by children under the age of 12, once they can no longer be treated as criminal suspects. The relevant powers include power to apply for a court order authorising search (of the child or any premises or vehicle), interview of the child or the taking of forensic samples from the child. Section 69 also confers an emergency power to take samples on the authority of a senior officer where there would be a risk of loss of evidence by the time a court order could be obtained (such an order must be sought subsequently). These powers are only available where it is suspected that the child, by behaving violently or dangerously, has caused or risked causing serious physical harm to another person, or where it is suspected that the child, by behaving in a sexually violent or sexually coercive way, has caused or risked causing harm to another person. The 2019 Act confers these powers only on constables of the Police Service of Scotland (see section 80).

This Order makes provision to ensure the proper cross-border operation of provisions in the 2019 Act.

Part 2 deals with the disclosure of convictions and other information which relate to a time when a person was under the age of 12.

Before issuing an enhanced criminal record certificate or a scheme record, the Scottish Ministers can request certain information from chief officers, under section 113B(4) of the 1997 Act and section 75(2) of the 2007 Act, for inclusion on that certificate or scheme record. As a result of changes made by the 2019 Act, if such information relates to a time when the person was under the age of 12, the chief constable of Police Scotland can only provide the information to the Scottish Ministers where the independent reviewer has determined that it ought to be included. Article 4 of the Order places the same requirement on certain chief officers of police forces elsewhere in the United Kingdom, so that the information can only be sent to the Scottish Ministers when the independent reviewer has determined it ought to be included on the enhanced criminal record certificate or scheme record. The chief officers covered by article 4 are listed in article 4(4).

Article 5 applies when one of those chief officers has identified information which relates to a time when the person was under the age of 12, and the chief officer is of the opinion that it ought to be included in the enhanced criminal record certificate or scheme record. Article 5 places a requirement on that chief officer to refer the information to the independent reviewer, together with (a) where the information is for an enhanced criminal record certificate, information about the purpose in relation to which the certificate is required (b) where the information is for a scheme record, information about the regulated work in relation to which the scheme member participates in the scheme (c) an explanation as to why the chief officer considers the information ought to be included and (d)

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any other information the chief officer considers to be relevant to the exercise of the independent reviewer's functions.

Article 6 of the Order places a requirement on chief officers to notify the Scottish Ministers when they have sent information to the independent reviewer.

Article 7 creates a power for the independent reviewer to require certain persons to provide information. These persons include; chief officers, local authorities, Her Majesty's Courts and Tribunals Service, the Disclosure and Barring Service, the Department of Justice in Northern Ireland and any other person the independent reviewer considers appropriate.

Article 8 amends paragraph 4 of schedule 18 of the Data Protection Act 2018 to add certain records in connection with the independent reviewer to the definition of "relevant records" for the purpose of the offence under section 184 of that Act (requiring a person to produce relevant records).

Part 3 provides for the enforcement of court orders obtained under Part 4 of the 2019 Act in other parts of the United Kingdom. It also confers police powers on constables of non-territorial forces operating in Scotland corresponding to those conferred on Police Scotland constables by Part 4 of the Act, extends the emergency power to take samples under section 69 of the Act where the child is in another part of the UK and creates a new obstruction offence.

Article 10 deals with the situation where a search order has been made under section 36 of the 2019 Act and the child, or the premises or vehicle to be searched, is in England, Wales or Northern Ireland. It enables a constable of Police Scotland ("a Scottish constable"), of the Police Service of Northern Ireland ("a PSNI constable") or of a police force in England and Wales to take any action to enforce a search order which a Scottish constable could take if the child, premises or vehicle was in Scotland. The constable executing the order is under obligations corresponding to those which a Scottish constable acting in Scotland would have as regards communication and explanation of the order and securing of premises searched.

Article 11 makes provision relating to applications for a child interview order where the child is in England, Wales or Northern Ireland, enabling the court to require a person in the other jurisdiction to produce the child for interview and to make transportation arrangements to be implemented in the other jurisdiction. Article 11 also empowers a Scottish or PSNI constable or a constable of a police force in England and Wales to take any action to secure the child's attendance at interview which could have been taken by a Scottish constable if the child was in Scotland.

Article 12 applies where an order is made for the taking of forensic samples and the child is in another UK jurisdiction. The order may require a person in the other jurisdiction to produce the child to a constable for the purposes of the order. The article enables a Scottish or PSNI constable or a constable of a police force in England and Wales to take any action for the purposes of the order which a Scottish constable would have been entitled to take if the child was in Scotland, subject to corresponding duties to communicate and explain the order. It regulates the taking of samples, and provides for their transfer to Police Scotland custody where they have not been taken by a Scottish constable.

Article 13 creates an emergency power to take forensic samples from a child in England, Wales or Northern Ireland. The power may be exercised by a Scottish or PSNI constable or a constable of a police force in England and Wales, but only where authorised by a relevant senior officer under section 69(2) of the 2019 Act (i.e. an officer of at least the rank of superintendent, who has not been involved in the investigation). Similar provision is made to that contained in article 12, for instance for the transfer of samples to Police Scotland custody. Paragraphs (5) to (7) require and regulate the making of an application for a court order after the event authorising the taking of the relevant samples. Paragraph (8) contains time limits by which samples must be destroyed where a successful application is not made.

Article 14 makes provision for the destruction of samples where the taking of these has been authorised by a court order under section 63 of the 2019 Act and the child is not resident in Scotland.

Article 16 creates an offence of obstructing a constable or other person exercising functions under articles 10 to 13 or acting in pursuance of a child interview order, or of interfering with a Scottish police investigation into suspected seriously harmful behaviour by a child under the age of 12.

Article 17 relates to constables of non-territorial forces (Ministry of Defence Police, British Transport Police and Civil Nuclear Constabulary). It amends the legislation governing those forces so as to confer the same powers on those constables when acting in Scotland, and impose the same restrictions on their use, as are conferred and imposed on Scottish constables by Part 4 of the 2019 Act, and makes various consequential adjustments.

An impact assessment has not been produced for this instrument as no additional impact on the private, voluntary or public sectors is foreseen.

Changes to legislation:

There are currently no known outstanding effects for the The Age of Criminal Responsibility (Scotland) Act 2019 (Consequential Provisions and Modifications) Order 2021.