Age of Criminal Responsibility (Scotland) Act 2019

Part 4 – Police Investigatory and Other Powers

Statutory Guidance on Investigative Interviews

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Ministerial Foreword

The Age of Criminal Responsibility (Scotland) Act 2019 increases the age of criminal responsibility in Scotland to 12 years of age. This means that primary school-aged children will no longer be dealt with as criminal suspects which requires a meaningful departure from criminal investigative techniques and experiences.

Whilst the policy intention of the Act is to protect younger children from the harmful effects of criminalisation, incidents of harmful behaviour need to be effectively investigated and responded to appropriately. Serious incidents must be met with a compassionate, sensitive, proportionate and effective response, addressing the needs of children, families, victims and the wider community.

The Act provides powers for the police to investigate incidents of serious harm. In this, the Act requires that all involved in such an investigation treat the need to promote and safeguard the child's wellbeing as a primary consideration. In addition, children whose behaviour is being investigated will have access to independent advice, support and assistance. They will receive information in age-appropriate ways and have a right to appeal. There will also be safeguards in place to prevent forensic samples and prints taken from these children from being kept unnecessarily.

This guidance aims to support police, local authorities and others with functions related to investigative interviews under the Act, ensuring that these are carried out in a child-centred way in keeping with the ethos of removing young children from criminal justice processes.

We would like to thank Police Scotland, Social Work Scotland and all partners who have been instrumental in developing this guidance.

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1. INTRODUCTION AND BACKGROUND

Introduction

1.1 This statutory guidance is published by Scottish Ministers in accordance with section 57 of the Age of Criminal Responsibility (Scotland) Act 2019 ("the Act"). It contains information to support the police and local authorities and others with functions related to investigative interviews involving children under the age of 12.

1.2 This guidance covers:

- When an investigative interview can be undertaken;
- planning for interviews (section 2);
- obtaining and withdrawing of agreement to interviewing (section 3);
- applications for child interview orders (section 4);
- the questioning of children in cases where urgent interview is required (section 5).

1.3 In constructing this guidance, the chief constable and each local authority has been consulted and has contributed to its content.

1.4 This guidance is subject to regular review as the procedure is implemented.

1.5 Persons exercising functions to which this guidance relates must, in doing so, have regard to this guidance[1].

Policy Context

1.6 The policy intention of the Act is to protect children from the harmful effects of early criminalisation, whilst ensuring that the child and their family receive the right support. Where the behaviour of a child under the age of 12 has caused serious harm and requires investigation, their rights must be properly recognised, upheld and protected in line with UNCRC[2].

1.7 The Scottish Government's vision of Scotland as the Best Place to Grow Up is one that extends to all children. A holistic approach to understanding and responding to the needs of children, helps improve life chances, promotes more positive outcomes and makes Getting It Right For Every Child (GIRFEC) a reality.

1.8 The Act raised the age of criminal responsibility to 12 years. This means that a child under the age of 12 cannot be charged or arrested with an offence, and police will no longer have recourse to their criminal justice powers.

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[1] Further details on roles, responsibilities and procedures to be followed can be found in The Age of Criminal Responsibility (Scotland) Act 2019 Operational Guidance for Social Work and Police which can be found on Social Work Scotland website.

[2] The UN Committee on the Rights of the Child provides further detail on upholding children's human rights in justice settings in General Comment 24, including during police interviews. Additional guidance is provided in the Council of Europe Guidelines on Child-Friendly Justice.

1.9 Children who require to be interviewed in terms of this Act, must be considered as persons who cannot be held criminally responsible for their actions when under 12. The need to support, promote and safeguard the wellbeing of the child must be a primary consideration.

1.10 To ensure a GIRFEC child-centred approach – whilst continuing to support the police service in their statutory obligation to investigate crime - the police and local authorities must work together to consider the wider influences on a child's developmental needs when thinking about their wellbeing. The child's needs must be addressed through multi-agency assessment, planning and support.

1.11 The Police have lead responsibility for the investigation into behaviour that has caused significant harm, and criminal investigations relating to child abuse and neglect; and share responsibilities to keep the child safe. Social Work Services have lead responsibility for enquiries relating to children who are experiencing or are likely to experience significant harm and assessments of children in need.

1.12 The Act defines "investigative interview" as a meeting or a series of meetings planned by a constable in collaboration with a local authority,[3] conducted by a constable or an officer of a local authority, or jointly by a constable and an officer of the local authority, for the purpose of seeking information from a child in relation to an incident which is the subject of a police investigation[4].

1.13 Investigative interviews under the Act are only for the most serious cases involving concerns about the behaviour of a child whilst under the age of 12 and, only when it is considered necessary, in order to properly investigate the child's behaviour and the circumstances surrounding it. Where an investigative interview is required, the Act provides a distinct process for this to occur.

1.14 A child who is under 16 years of age (or who is 16 or 17 years of age and subject to a compulsory supervision order) may also be interviewed as long as the behaviour being investigated relates to when the child was under 12 years of age.

1.15 The Act provides for a child who is involved in an investigative interview to be supported by a child interview rights practitioner (ChIRP), who will provide advice, support and assistance to a child in relation to their involvement in such interviews[5]. The ChIRP must be a solicitor registered with the Children's Legal Assistance Scheme, thereby offering the skills and knowledge of a solicitor required to be registered with that Scheme.

Criteria for Holding Investigative Interview

1.16 The Act limits the power of the police to question a child under 12 years of age to circumstances where a constable has reasonable grounds to suspect that the child:

[3] The authority in whose area the child predominantly resides or, if there is no area of predominant residence, the authority with whose area the child has the closest connection.
[4] Section 39(3)
[5] Section 51 – Right to have a child interview rights practitioner present.

- by behaving in a violent or dangerous way, has caused or risked causing serious physical harm to another person, OR
- by behaving in a sexually violent or sexually coercive way, has caused or risked causing harm (whether physical or not) to another person.

1.17 The extent to which harm might be considered serious has been defined as harmful behaviour of a violent or sexual nature which is life threatening and/or traumatic, and from which recovery, whether physical or psychological, may reasonably be expected to be difficult or impossible.

1.18 It is a matter of professional judgement, based on the gathered evidence and context, as to whether the degree of harm to which the victim is suspected of having been subjected, or is likely to be subjected, is 'serious'.

1.19 Police can continue to speak with child witnesses of such behaviour and with children suspected of less harmful behaviour, in an age appropriate way, without applying provisions in the Act. Constables should use professional judgement to establish whether using formal investigative powers within this legislation may be necessary and proportionate.

1.20 The child may only be questioned by a constable[6] or participate in an investigative interview, in relation to the incident involving the behaviour, if authorised by:

- agreement of the child and parent, or
- a child interview order granted by a sheriff on application by the police, or
- in urgent cases where there is risk of loss of life (section 5).

1.21 The purpose of the interview is to seek information from a child in relation to an incident which is the subject of a police investigation. The interview must be necessary in order to properly investigate the child's behaviour and the circumstances surrounding it. The intention is to find out what has happened, and identify needs in order to plan support.

1.22 Any exercise of the functions authorised by this Act must treat the need to safeguard and promote the wellbeing of the child as a primary consideration.

1.23 The approach taken by professionals involved must reflect the non-criminal, non-stigmatising nature of the interview. Language that implies commission of a crime by a child under 12 should not be used.

1.24 At all stages of an investigation in terms of the Act, police officers and social workers (and any others involved) will be alert to the needs and rights of all children and should follow GIRFEC and trauma-informed principles[7] in any interactions.

[6] The Act allows for the constable to cause a child to be questioned by another person.
[7] https://www.nes.scot.nhs.uk/our-work/trauma-national-trauma-training-programme/

1.25 The reasons for decisions about holding interviews and the reasons for decisions arising from interviews must both be clearly recorded. Interviews must be recorded and retained for transparency and audit purposes.

1.26 With the exception of questioning under urgent cases (Section 5), planning and conduct of an interview must be collaborative.

1.27 The rights of the child and the parent should be respected and fulfilled.

2. PLANNING - INTER-AGENCY REFERRAL DISCUSSIONS

2.1 Planning has different elements: planning for the wider needs of the child as a result of the behaviour, planning for consideration of the need for an investigative interview, and planning for the interview itself. Planning for interviews should be included as part of organisations' wider planning for the needs of the child where possible.

2.2 The Act places specific responsibilities on the police and local authority in relation to a multi-agency approach to investigative interviews. This approach includes all stages in planning and action, including consideration of the need for an interview; and consideration of any interim safety planning needed to protect the child from significant harm.

2.3 Inter-agency referral discussions (IRDs) are established mechanisms that allow a multi-agency approach for children and their needs. They should inform the consideration of an investigative interview. Guidance on holding an IRD for ACR purposes is aligned with the principles and approach for child protection IRDs and are outlined in the ACRA Operational Guidance for Social Work and Police which can be found on the Social Work Scotland website.

Considering interview at an inter-agency referral discussion

2.4 The IRD should take place prior to any investigative interview. This does not preclude the police from continuing with the investigation and securing evidence from other sources. The exception to this would be where police need to question the child immediately[8]. Under these conditions, a retrospective IRD will take place on the next working day.

2.5 An IRD is the start of the formal process of information sharing, assessment, analysis and decision-making following the reported concern about the child's behaviour that has or may have caused serious harm. The police have a duty to conduct a thorough investigation of the incident (whether or not the child needs to be interviewed) and must liaise with social work to conduct this assessment of risk, needs and protective measures for the child. Police will share information relating to the incident under investigation, including the evidence gathered thus far and the facts that have been established.

[8] An interview under 'urgent circumstances' is covered in section 54 of the Act.

2.6 This initial discussion will form the basis of a strategy (subject to review, based on new information or changing circumstances) that will be adopted by all participating agencies. Practitioners in police, social work and health must participate in the IRD. Notwithstanding, information gathering should involve education and other services working together to ensure safety and wellbeing of the child, as appropriate.

2.7 The discussion will take cognisance of ongoing police investigation into the incident, including the need to complete routine enquiries.

2.8 To determine whether an investigative interview with the child is necessary, the discussion should try to ascertain:

- the suitability of conducting an interview with the child in question;
- if this would be in the child's best interests; and
- the necessity of an interview in relation to the police investigation.

2.9 Agencies can share relevant background/chronological information relating to child and family in relation to strengths, risks and needs in context. They must work in partnership with parents[9] and consult with health, education and other professionals who know the child well and hold key relevant information, as appropriate in each situation.

2.10 Where the victim is a child, then consideration should be given to preparations being made for a joint investigative interview of that child, as any disclosures made and other relevant information may influence the direction of the discussion and the determination of subsequent outcomes. This information will also impact on the requirement for an investigative interview for the child whose behaviour is the subject of interview.

2.11 The information gathered should inform any existing, or the development of a new child's plan, and the response strategy (all actions must be legitimate, proportionate and justified) to be adopted by all agencies. This will be subject to review as and when new information becomes available that might require a revision of the initial approach.

2.12 In gathering relevant information, it is important to remember that the children's reporter can only refer the child to a children's hearing on non-offence grounds. In relation to these grounds the standard of proof is the balance of probabilities and the civil rules of evidence apply (with the principal ones being that no corroboration is required and hearsay evidence is permissible). However, it might be that information comes to light during the course of the interview which could form the basis of offence grounds for another child.

2.13 All evidence and information gathered at that stage must be reviewed and where there is insufficient detail around the child's behaviour and the circumstances

[9] "parent" includes guardian and any person who has care of the relevant child, (except where provided otherwise: see section 40(7) and (8) https://www.legislation.gov.uk/asp/2019/7/section/40/enacted)

surrounding it, then an investigative interview in terms of this Act should be considered.

2.14 At any stage during the IRD, the police may relay any intentions to make an application for a search or forensics order[10] from the sheriff and provide the rationale for such an action.[11]

2.15 Prior to any investigative interview of the child, a decision must be reached as to what information will be provided to the child in relation to a possible outcome. It is important to balance the need to keep the child informed, against making sure the child is fully supported and is not exposed to additional stressors.

2.16 Police will make the final decision in respect of whether an investigative interview is required and justifiable, and whether this can be authorised by agreement or by an application for a child interview order.

2.17 A record must be retained of all IRD discussions, including where there is disagreement between agencies. The rationale for any outcomes must also be accurately recorded and documented in line with operational requirements to ensure they are auditable.

2.18 The details for planning and conducting and investigative interview are provided in The Age of Criminal Responsibility (Scotland) Act 2019 Operational Guidance for Police and Social Work on the Social Work Scotland website.

3. OBTAINING AND WITHDRAWAL OF AGREEMENT

Seeking agreement

3.1 The wellbeing of the child is a primary consideration and it is preferable to hold an interview by agreement where possible. This is likely to reduce the time-lag between the incident taking place and the child being afforded the opportunity to speak about the circumstances surrounding it.

3.2 Agreement by the child and parent authorises an investigative interview of the child about the behaviour to which the investigation relates.

3.3 Prior to seeking agreement to conduct an interview (or to making an application to a sheriff for a child interview order), an IRD should have taken place.

3.4 Before seeking agreement, it should be clear:

- Who needs to agree;
- Who can agree (both in terms of fitting the criteria of parent[12] and the ability to agree);

[10] Chapter 4 of Part 4 of the Act covers this.
[11] Where forensics have been obtained through an emergency authorisation, a retrospective application will be required.
[12] The Act defines 'parent' and what constitutes being 'related' to the child at section 40(7) and (8)

- Any issues of suitability for agreement that would mean an order needs to be considered;
- What information can and needs to be provided to inform the child and parent's decision and in what format the information needs to be presented;
- What supports may be required to allow understanding;
- What the potential outcomes from the interview are;
- Who will ask for the agreement;
- How the agreement will be sought;
- How understanding will be verified;
- Who can be present when the child is asked for their agreement
- How any potential scenarios will be responded to (for example, requests to consult someone, time to consider);

3.5 In determining the ability and suitability of a parent to agree to an interview, the police and local authority should review all available information, including that held by themselves and other agencies. This is particularly important when the parent/s have retained parental rights and responsibilities but the child resides outwith their care and they have no active relationship or contact with the child. This should be discussed during the IRD process.

3.6 It is essential that the police and the local authority fully understand the criteria applied to those who qualify to give agreement to the interview[13]. Should a child interview order be necessary, this information will be central to the application for the order.

3.7 It is important that all efforts are made in the circumstances to ensure that there is understanding of what is being asked to be agreed to and, the implications of that agreement. Where there is any doubt as to understanding of that agreement, further consideration should be given to whether authorisation needs to be made by way of a child interview order.

3.8 Once agreement has been provided, notice in writing must be provided by the police to the child and parent advising them of their rights and what will happen next as a result of their agreement[14]. The information in the notice should also be explained. Explanation to the child must be in simple terms that are appropriate to the child's age and maturity. Consideration should be given as to who (whether police, social work or other person) is most suitable to explain this information to the child[15].

3.9 The written notice should be given to the child as soon as reasonably practicable and in any case, prior to the commencement of the interview.

[13] Section 40(7) and (8)
[14] Section 41 of the Act covers what is required to be notified.
[15] Section 41 places the duty on a constable to provide a notice in writing explaining the information. Another professional communicating information to the child would be following authorisation of a constable.

3.10 Considerations around the agreement process, decisions made (whether there is agreement or not) and rationale for any delays experienced in delivering the notice should be fully documented and retained.

3.11 The child's interview rights practitioner, once identified, should also be given a copy of the notice.

Withdrawal of agreement

3.12 An investigative interview authorised by agreement in terms of the Act is no longer authorised if a person withdraws their agreement.

3.13 In agreeing to the interview, the child and parent must be clear that they have the right to withdraw their agreement at any time and how they can exercise this right. They should also be told how police may proceed should agreement be withdrawn.

3.14 See paras 4.12 and 4.13 regarding rights of appeal against a child interview order.

3.15 A child should be clear that in exercising their right to not answer questions (some or all) in the interview, this will not be taken as them withdrawing their agreement to the interview.

3.16 Where interviews are continued over different meetings, the child should be reminded, at each meeting, of their right to withdraw agreement should they wish to do so.

3.17 Those conducting the interview should be satisfied at all times during the interview that the child is in agreement with the interview continuing. Where there is any doubt, they should check that the child is content to continue.

3.18 Where agreement to the interview is withdrawn, the interview must stop. This must be explained to the child and parent and they should be informed that further considerations will be made as to the need for the interview to continue on a future occasion and if so, how this can happen.

3.19 A child or parent who withdraws their agreement to interview can subsequently agree to an interview continuing. This agreement must be freely made.

3.20 Where agreement is withdrawn, the IRD process should consider:

- the need to safeguard and promote the child's wellbeing;
- the need to interview the child further (based on the criteria and justification for the need to interview the child at all and their best interests);
- whether the person withdrawing agreement is likely to change their mind;

- whether an application for a child interview order is necessary and justified.

4. APPLICATIONS FOR CHILD INTERVIEW ORDERS

4.1 A child interview order authorises an investigative interview of the child to whose behaviour the application relates.

4.2 In any consideration of the need for an order and in making an application for the order, there are specific responsibilities on the police to apply for an order and to consult the relevant local authority, so that a multi-agency approach is taken.

4.3 A child interview order may be required:

where a decision has been made that an interview is required and meets the criteria, and

- agreement is not provided (due to actively not agreeing or being unable to agree through a lack of capacity or understanding); or
- agreement provided is subsequently withdrawn; or
- where a child has been questioned under urgent circumstances[16] and a retrospective order is required (see Section 5); or
- where in the particular circumstances of the matter, the police believe it is justifiable to apply for an order without seeking agreement first, eg where there is no 'parent' and therefore no possibility of seeking agreement or where the local authority has parental responsibilities.

4.4 The police have the power to apply for a child interview order at any time during the investigation. This power is not dependent on withdrawal of an agreement.

4.5 An order can:

- require a person, in a position to do so, to produce the child to a specified person, to ensure the child's attendance at the interview;
- authorise the person above or another person to transport the child to and from the interview;
- authorise any other action required in connection with the interview (including to safeguard and promote the child's wellbeing).

4.6 Police in consultation with the local authority (and others if relevant) can identify if these measures are required in advance of the application and in their considerations have regard to the need to safeguard and promote the child's wellbeing in any measures applied for.

4.7 Police, in consultation with the local authority, can identify if there is a need to ask for directions to be included in the order and specify this in their application[17]. In their considerations they should have regard to the need to safeguard and promote

[16] Section 54 applies where there is a risk of loss of life if the child is not questioned immediately.
[17] Section 44 of the Act which covers this.

the child's wellbeing in any directions requested.

4.8 An order specifies the period of time within which the interview can be conducted up to a maximum of 7 days. The time for any period given begins on the day after the day that the order is made, or a later date if specified in the order. Provisional planning should reflect the impact of this potentially narrow timing for interview.

4.9 It is the responsibility of the police to notify the local authority, as soon as reasonably practicable upon receipt of notification that an order has been made or an intention to appeal against any decision on the order. The police and local authority have a duty to comply with any directions in the order.

4.10 Once an order has been made, the child and parent must be provided with a copy of the order as soon as reasonably practicable and have the order explained to them, ensuring that the child's explanation is appropriate to their age and maturity[18]. The police should do this in collaboration with the local authority.

4.11 Intimation of the granting of the order and other matters connected to application for orders will be contained in court rules.

4.12 The child (or another person acting on the child's behalf) can, within the time-limits specified, apply to the sheriff for permission to appeal. The decision of the Sheriff Appeal Court is final. The making of an appeal suspends the effect of any child interview order originally made by the sheriff.

4.13 A child who wishes to appeal an order is entitled to legal representation and children's legal aid to help them to do this. This will be dependent on their capacity to instruct a solicitor and their wish to do so. Where the child has a child interview rights practitioner, this person may be able to advise and represent the child as a solicitor in relation to an appeal.

4.14 Further detail on applying to the sheriff for an order is outlined in The Age of Criminal Responsibility (Scotland) Act 2019 Operational Guidance for Social Work and Police which can be found on Social Work Scotland website.

5. QUESTIONING IN URGENT CASES

5.1 The Act provides for questioning of a child where a constable has reasonable grounds to suspect that a child under 12 years of age by behaving in a violent or dangerous way:

- has caused or risked causing serious physical harm to another person, and
- there is a risk of loss of life if the child is not questioned immediately.

[18] This is to ensure understanding of the information and their rights in relation to the order, in particular their right to seek the court's permission to appeal.

5.2 Sexual, emotional and psychological harm are not included for the purposes of this section.

5.3 Only a senior officer of the rank of superintendent or above can authorise the interview and if so, as soon as is reasonably practicable after authorisation is granted, the police must apply for a child interview order authorising the interview.

5.4 The senior officer must be satisfied that there are reasonable grounds to suspect that the child, while under 12 years of age by behaving in a violent or dangerous way, has caused or risked causing serious physical harm to another person. In addition, the relevant senior officer must deem it necessary that:

- the child must be questioned to properly investigate their behaviour and the surrounding circumstances (including whether someone else has committed an offence); and
- it is not practicable to apply for a child interview order due to a risk of loss of life if the child is not questioned immediately.

5.5 In making a determination, the relevant senior officer must have regard to the:

- nature and seriousness of the child's behaviour, and
- whether the questioning of the child is appropriate given their circumstances (including age and matters related to the child's behaviour).

5.6 In exercising this function, the relevant senior officer must treat the need to safeguard and promote the child's wellbeing as a primary consideration.

5.7 In questioning the child as authorised by the senior officer, the person conducting the interview and any other person involved in the interview should comply with the requirements and the core principles for the conduct of investigative interviews.

5.8 Where questioning occurs on an urgent basis, the child retains their right not to answer any questions and this is to be confirmed when the authorisation for the interview is being provided and explained to the child.

5.9 A parent of the child must, if practicable, be informed that authorisation for questioning has been granted (although this need not be complied with if informing the parent would exacerbate the risk of loss of life. Decisions regarding this and the rationale, should be recorded for audit purposes.

5.10 An application for a child interview order must be made as soon as practicable after the authorisation for emergency questioning is granted and a child interview rights practitioner must also be informed.

5.11 A retrospective IRD should take place on the next working day.

5.12 Where a Child Interview Order is not granted, information gathered during urgent questioning cannot be used and must be destroyed.

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