

AGE OF CRIMINAL RESPONSIBILITY BILL

Note of Telecon between Minister for Children & Young People and ACC MacDonald - 2 May 2019

In attendance: Minister for Children & Young People
ACC Gillian MacDonald
[redacted] Scotland ACR Team
[redacted], Police Division, SG
PS/Minister for Children & Young People

Key points

- The Minister thanked ACC MacDonald for Police Scotland's involvement in the development of the Bill to date and noted a shared aspiration to deliver legislation that works for the children involved and those in the police, social work etc who work with them. She invited the Police Scotland representatives to outline remaining concerns.
- Police Scotland representatives highlighted the wording of section 23(2) which specifies that, under the ACR Bill, a constable may take a child to a place of safety "if they are satisfied that it is necessary to do so to protect any other person from an immediate risk of significant harm or further such harm". It was suggested that this set a high bar which might discourage officers from returning children involved in less serious incidents home.
- The Minister explained that the police powers in the ACR Bill were designed to be used in very limited circumstances – ie the most serious of cases – and it was for that reason that the bar had deliberately been set high (in keeping with the recommendations of the Advisory Group, on which Police Scotland served). This was also seen to be the will of Parliament. However, she was clear that this shouldn't impact on the police's other powers to take a child to a place of safety and SG had tabled a manuscript amendment to the Bill to that effect.
- The group discussed the police's ability to take a child home in other circumstances – for example using common law powers or powers under the Children's Hearings (Scotland) Act 2011 where there are child welfare/protection concerns. PS representatives were concerned that in a climate where police are increasingly called upon to justify their actions, there was a risk of a 'gap' and need for further clarity to provide reassurance to officers that they could do the right thing. Although there were parallels with the position with under 8s at present, it was easier for the police to justify taking a child under 8 home given the risk of harm.
- The Minister noted the opportunity that statutory guidance would offer in providing further clarity and reassurance, in a way which was not possible on the face of the Bill. As well as introducing this as an a Stage 3 amendment, the Scottish Government was happy to accept a number of the amendments

suggested by Daniel Johnson MSP, in order to provide further clarity and safeguards.

- ACC MacDonald agreed the importance of providing further detail through statutory guidance and thanked the Minister for her offer to both supply the manuscript amendments lodged by Government and to engage further as required.

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- Police Scotland representatives highlighted the wording of section 23(2) which specifies that, under the ACR Bill, a constable may take a child to a place of safety "if they are satisfied that it is necessary to do so to protect any other person from an immediate risk of significant harm or further such harm". It was suggested that this set a high bar with no enabling provisions for officers to act for example to return a child home or take them to an alternative place of safety, if this threshold isn't met.
- The Minister explained that the police powers in the ACR Bill were designed to be used in very limited circumstances – ie the most serious of cases – and it was for that reason that the bar had deliberately been set high (in keeping with the recommendations of the Advisory Group, on which Police Scotland served). This was also seen to be the will of Parliament. However, she was clear that this shouldn't impact on the police's other powers to take a child to a place of safety and SG had tabled a manuscript amendment to the Bill to that effect.
- The group discussed the police's ability to take a child home in other circumstances – for example using common law powers or powers under the Children's Hearings (Scotland) Act 2011 where there are child welfare/protection concerns. PS representatives provided examples of circumstances where no such explicit provisions exist and expressed concern that the new legislation created a gap for police to act when dealing with matters involving children under the new ACR where there isn't an immediate risk of significant harm. Police were concerned that in a climate where police are increasingly called upon to justify their actions, there was a need for further clarity to provide reassurance to officers that they could do the right thing. Although SG representative highlighted parallels with the position with under 8s at present, PS representatives commented that there was more

likely to be grounds for taking a younger child under 8 home in terms of safety and / or risk-harm then there was a child aged 11.

- The Minister noted the opportunity that statutory guidance would offer in providing further clarity and reassurance, in a way which was not possible on the face of the Bill. As well as introducing this as an a Stage 3 amendment, the Scottish Government was happy to accept a number of the amendments suggested by Daniel Johnson MSP, in order to provide further clarity and safeguards.
- ACC MacDonald agreed the importance of providing further detail through statutory guidance and thanked the Minister for her offer to both supply the manuscript amendments lodged by Government and to engage further as required.



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ACC Gillian MacDonald
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2 May 2019

Dear Gillian

Thank you for our constructive conversation earlier today. I am very proud of the Age of Criminal Responsibility bill and appreciate the importance of ensuring that its design and implementation are fully informed by delivery partners, including Police Scotland.

Police Scotland's input over the last 4 years has been invaluable in getting us to this crucial stage. We have been happy to respond to a number of the issues identified by your colleagues at different stages of the bill and this continues at Stage 3. In particular, I would highlight:

- Government amendment 109 provides for statutory guidance on the operation of section 23 (power to take a child under 12 to a place of safety) as a whole. I see this as the key vehicle for providing the further clarity that you seek and which I want to provide around how this aspect of Part 4 will operate in practice.
- On the same basis, I am happy to support Daniel Johnson's amendments 109A and 109B which make clear that the guidance will cover what constitutes 'significant harm' and the circumstances in which a constable may take a child to a place of safety.
- Government amendment 157 makes clear that Section 23 does not affect any other power by virtue of which a constable may take a child to a place of safety. I would expect the statutory guidance to expand upon that.

Tha Ministearan na h-Alba, an luchd-comhairleachaidh sònraichte agus an Rùnaire Maireannach fo chumhachan Achd Coiteachaidh (Alba) 2016. Faicibh www.lobbying.scot

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- Government amendment 149A enables support for part (b) of Daniel Johnson's amendment 149 (requirement for use of a police station to be authorised by an Inspector or above), subject to the removal of the requirement that a police station only be used when the child is endangering others by behaving in a violent manner (which might unnecessarily restrict an officer's flexibility in, for example, a remote rural area or potential self-harm situation).
- Government amendment 104 mirrors this by prohibiting the use of a police cell, unless authorised by an Inspector or above.
- I also intend to support Daniel Johnson's amendment 151 requiring Ministers to compile and produce a list of places of safety pertaining to section 23.

These amendments make clear that substantive guidance - and thereafter, training and materials - will be provided to support police officers' operation of the legal requirements in s23. We have also sought to put in place additional safeguards to effectively create a presumption against the use of police stations and cells as places of safety and will support other MSPs' amendments in this regard.

Taken together, I hope this demonstrates how I have sought to listen and respond to issues raised by Police Scotland and other partners. As we discussed, I am clear that the test for taking a child to a place of safety under section 23 should remain as currently stated on the face of the bill. We need to keep the bar high if we are to remain true to the ethos of the bill. There is every opportunity, however, to use the guidance and to provide the further detail you seek. I would welcome the involvement of both Police Scotland and the Scottish Police Federation in the development of that guidance.

I can also assure you of my commitment to engage with key delivery partners in both the implementation of the Bill and future discussions about the age of criminal responsibility more generally. I look forward to our further work together.



MAREE TODD

Tha Ministearan na h-Alba, an luchd-comhairleachaidh sònraichte agus an Rùnaire Maireannach fo chumhachan Achd Coiteachaidh (Alba) 2016. Faicibh www.lobbying.scot

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Date: 3 May 2019

Your Ref:

Our Ref:

Maree Todd BPA/MSP
Minister for Children and Young People
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**POLICE
SCOTLAND**

Keeping people safe

POILEAS ALBA

Gillian MacDonald
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Dear Minister,

AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) BILL 2018 (2018 BILL)

Thank you for your time to discuss the 2018 Bill yesterday, I found it a very useful conversation. I am also grateful for the timely response by letter last night which sets out the Governments position in relation to section 23.

Firstly, I would like to express my appreciation for the work of your officials in the Police Powers Team in recent weeks to listen to our concerns. As you have said, there has been a significant amount of progress on a range of issues where we had concerns. This work has, I hope, been of value to you and your colleagues and is one of the reasons I decided to put a dedicated project team in place. Like you, I recognise the importance of children's rights and Police Scotland is committed to ensuring we continue to develop our services to meet the needs of all Scotland's children.

It is this commitment to Scotland's children and the need to keep them safe which is at the heart of the concerns we have expressed in relation to section 23. As we discussed yesterday, it is essential that our officers have the ability to respond effectively when there is a clear need to keep children safe. Nonetheless, I also accept that such powers must be measured and have the necessary balance to ensure we do not unnecessarily impinge on our children's ability to go about their normal day to day lives. As you know, that balance is core to the ethos of policing in Scotland, to keep people safe whilst allowing our citizens to live their lives free from unnecessary intrusion.

It is against this backdrop that we have again today considered the position you have set out in yesterday's meeting and your subsequent letter. I have gone through the points you have made and offered a specific response to each below, however, I must advise that the amendments stop short of addressing our remaining concerns with section 23. Without an amendment to section 23(2), we remain concerned that any statutory guidance will have insufficient scope to address our concerns. By the nature of the drafting of section 23(2) any statutory guidance will only be able to describe what is meant by "*.....constable is satisfied that it is necessary to do so to protect any other person from an immediate risk of significant harm or further such harm*".

I wholeheartedly agree with you that the bar for such a power should be set high, but that high bar needs to have the flexibility to consider all the factors present in any given situation. The highly prescriptive nature of the drafting of section 23(2) and the fact that it is incident based means that we cannot see how statutory guidance will be able to consider such scenarios in a child centred way. It will create gaps and without an endorsing provision which supports police action will leave our officers in circumstances where they (and the wider public) can see that the police should act but the law provides them no basis to do so. We also think it is worth noting that amending section 23(2) does not reduce the effect of section 23(1). This still frames our response (and any guidance) on the basis of "*...the constable has reasonable grounds to believe is behaving or is likely to behave in a way that is causing or risks causing significant harm to another person.*"

We also discussed yesterday, less serious behaviour by young children and the current procedures that our officers follow when they witness a child causing harm or the child is accused of such behaviour. As we explained, there is nothing similar to section 23 in current legislation. By introducing such a prescriptive piece of legislation it will change the framework for responding to any situation i.e. if there is no immediate risk of significant harm or such further harm, our officers have no power to respond. In our opinion this is not balanced and is not child centred and would benefit from an enabling provision which supports police action related to less serious but nevertheless concerning behaviour.

In the interests of completeness and to address additional concerns in relation to places of safety, I have provided a response to each of your specific points below:

1. Amendment 109 – whilst this is useful, it will be constrained by the current drafting of section 23(2), and therefore am not persuaded that it will provide the further clarity you hoped to achieve.
2. Amendments 109A & B – provide helpful focus however, that focus remains on the meaning of "*immediate risk of significant harm or further such harm*". Unless they are taken with amendment 148 falls short of addressing our concerns.
3. Amendment 157 – It would be useful if you could clarify what other power you envisage being used in such circumstances? The only powers that a constable has are set out in section 56 of the Children's Hearing (Scotland) Act 2011 and section 22 of the Criminal

Justice (Scotland) Act 2016. Neither of those powers are relevant to the circumstances we envisage being covered by this legislation.

4. Amendment 149 & 149A – Police Scotland maintains that a police station is not a suitable environment for a young child. As we stated in our initial evidence submission to the Scottish Parliament in July 2018:

“A police station is not the best environment to meet the needs of a child in these circumstances. We would welcome confirmation of how the alternative resources necessary across Scotland will be put in place.”

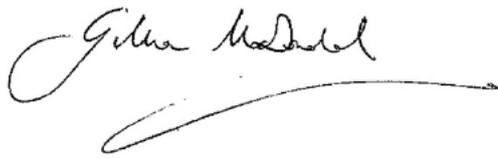
You will appreciate therefore that it is not possible for us to view your amendment 149A positively as it increases the possibility of the police station being used. Indeed, it is somewhat disconcerting that you have sighted the example of a child self-harming as the type of situation you envisage being met by taking such a vulnerable child to a police station rather than a more suitable establishment which can genuinely meet their needs.

In addition, I would challenge the need for such a contingency in a rural setting. My team recently scoped the available resources in Orkney by way of example. This demonstrated that there are two police stations, both positioned within the central belt of the main island, however there are 22 schools, 2 libraries and 16 points where GP services are provided across the communities of Orkney. We believe there is a need for a much broader discussion about how these provisions are met in practice to ensure the right services are made available to children at the point of need (24/7).

5. Amendment 151 – This appears positive but we would welcome clarity of how this will be collated to ensure it is current and what our partners will consider as a “place of safety” across their estate. As we have stated above, we believe there is a need to ensure we do not put artificial barriers in the way of a child’s needs which results in them being taken to a police station when, for example, there are other more suitable local authority or health premises nearby which would be much more child friendly and cause them significantly less trauma.

Whilst there are challenges which remain, I assure you on behalf of Police Scotland, that we remain committed to informing the work of you and your officials on this matter. Subject to the remaining parliamentary consideration of the 2018 Bill, once enacted, I have given a commitment to the ongoing support from my project team which will take this legislation through to implementation. This will provide continuity, expertise and support to both you and our wider partners to ensure that we collectively work to deliver meaningful improvements in the rights of children and effective service delivery to all our communities and all our citizens.

Your sincerely,

A handwritten signature in black ink, appearing to read 'Gillian MacDonald', with a long, sweeping horizontal flourish extending to the right.

Gillian MacDonald
Assistant Chief Constable

From: [REDACTED] n behalf of Minister for Children and Young People
Sent: 05 May 2019 18:24
To: projectageofcriminalresponsibility@scotland.pnn.police.uk;
ACCCrimeandProtection@scotland.pnn.police.uk;
[REDACTED] scottishpolicesupers.org.uk
Cc: Minister for Children and Young People
Subject: Age of Criminal Responsibility (Scotland) Bill
Attachments: ACR Bill - Stage 3 - Note on Place of Safety.docx

Dear Colleagues

Firstly, I want to thank you and your colleagues for ongoing constructive engagement on this issue. I want to assure you that I have given serious and deliberative consideration to Police Scotland's recent correspondence around section 23 in the bill. My officials have collated the attached note which I hope you will agree, sets out the position clearly in relation to a number of the powers that police officers will be able to continue to utilise, just as they do now.

Our discourse on this issue has however also amplified the need to provide detailed guidance as per my amendment 109. The amendments 109a and 109b from [REDACTED] helpfully add further certainty on what that statutory guidance will contain and I will be supporting those at Stage 3. I would value the involvement of Police Scotland and staff associations in the scoping and development of that guidance.

Discussions have also emphasised the need to take time to implement Part 4 as a whole safely, so that the police and other public agencies have the tools they need and importantly, confidence in their powers and duties under this legislation and elsewhere. I am committed to doing so and again it is my intention to fully involve Police Scotland and the staff associations in that work.

I hope this note provides assurance on this matter and also that the thoughtful and child centred policing that goes on currently every day in Scotland's communities to keep children and others safe from harm will be able to continue. I am of course available to discuss this or any other matter with you ahead of stage 3 on Tuesday.

MAREE TODD
Minister for Children and Young People

AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) BILL –PLACES OF SAFETY

Key Points

Discussions in an Advisory Group on Minimum Age of Criminal Responsibility formed the basis of the ACR proposals. Police Scotland carried an influential voice in their deliberations and were members throughout. The Advisory Group's clear recommendation was that in the most serious circumstances a power should be created to take a child to a place of safety, to allow enquiries to be made in relation to the child's needs, including where the support of a parent or carer is not forthcoming. It was this recommendation that led to Section 23 being included in the Bill.

Following the Advisory Group's work, Scottish Government consulted extensively on the Bill. The conclusions published in 2016 made clear that an extension of the National Guidance on Child Protection was the most appropriate place for practitioner guidance for managing the welfare of and risks posed by children exhibiting harmful behaviour. That National Guidance is now under review and as indicated, revisions to it will reflect the terms of the ACR Bill.

No examples were forthcoming in the consultation where children's behaviour causing concern would not be covered under existing criteria such as causing harm to others or being outwith the control of their guardians/parents. No examples have been forthcoming since the consultation either.

Powers already exist in both statute and common law to allow police officers, beyond the scope of what is in this bill, to address the need to take a child to a place of safety where an officer considers there are wider child welfare and protection considerations.

The range of police powers in the Bill, relating to the most harmful incidents, does not impact on their general duties, for example to prevent crime and maintain order. They can still intervene in incidents involving 'lower level' harmful behaviour, engaging with the child in an age-appropriate way; they just can't do so with reference to criminal justice powers of arrest, holding in custody etc.

The police do not need any specific new statutory power to take a child home to their primary carer with their consent. They already can already do so. Section 23 does not change anything in this respect. There are powers under common law for the police to intervene by taking a child home in any situation, where the child is willing to accompany them. In addition, child protection powers also exist which enable the police to take a child to a place of safety, even where that consent is not forthcoming..

Police Scotland are committed to keeping children and young people safe. They and other partners appreciate that engagement with children in their early years will influence their perspective on policing for the rest of their lives. The Bill does not interfere with or impede the thoughtful and child centred policing that goes on currently every day in communities across Scotland. Implementation will be carefully planned to provide the right guidance to help the Police keep children safe, and as

part of meaningfully raising the age of criminal responsibility, continuing to respond to the needs of victims and the wider community and investigating harm in a non-stigmatising manner.

The following is set out below:

- The Advisory Group
- Place of Safety provision in the ACR Bill
- Existing Police powers
- Potential amendment of the Bill at Stage 3
- Broader context- Getting it right for every child, the Whole System Approach.

The Advisory Group

1. The 2015 Report on the Advisory Group on the Minimum Age of Criminal Responsibility recommended that the police would need powers to allow incidents involving children below the age of criminal responsibility to be investigated. This would include a power for police to take a child in such circumstances to a place of safety.
2. The Police powers advisory group, led by Police Scotland, provided the recommendation to provide the new explicit power for the most serious circumstances. The power was required to have a high threshold to respond to the potential gap following the loss of suspect status. This resulted in this recommendation being included in the Advisory Group's report :

In the most serious circumstances a power should be created to take a child to a place of safety, to allow enquiries to be made in relation to the child's needs, including where the support of a parent or carer is not forthcoming. (Para 4.16 (iii))<<¹

Place of Safety in the ACR Bill

3. Part 4 of the bill, establishes appropriate new powers for the police and other partner agencies to deal with and investigate incidents where a child under 12 is believed to have been involved in significant harm to another person, or behaviour which risks causing such harm. The measures in Part 4 provide for a range of police powers, including should it be needed, a power to take a child to a place of safety if there is an immediate risk of significant harm to another person. Section 23 secures and articulates the recommendation from the Advisory Group:

EMERGENCY PLACE OF SAFETY

23 Power to take child under 12 to place of safety

¹ The Report of the Advisory Group on the Minimum Age of Criminal Responsibility, found at https://consult.gov.scot/youth-justice/minimum-age-of-criminal-responsibility/supporting_documents/00497071.pdf

- (1) This section applies where a constable finds in any place a child under 12 years of age who the constable has reasonable grounds to believe is behaving or is likely to behave in a way that is causing or risks causing significant harm to another person.
- (2) The constable may take the child to a place of safety and keep the child there if the constable is satisfied that it is necessary to do so to protect any other person from an immediate risk of significant harm or further such harm.
- (3) As soon as practicable after a constable takes a child to a place of safety under this section, the constable must inform a parent of the child.
- (4) A child may be kept in a place of safety under this section—
- (a) only for so long as is necessary—
 - (i) to put in place arrangements for the care or protection of the child, or
 - (ii) for an order under section 52 authorising the taking of intimate samples from the child to be obtained, and
 - (b) in either case, for no longer than 24 hours.
- (5) A child may be kept in a place of safety that is a police station only if it is not reasonably practicable to keep the child in a place of safety that is not a police station.
- (6) Where a child is kept in a police station, the constable must take steps to identify a place of safety that is not a police station and transfer the child to that place as soon as is reasonably practicable.
- (7) Subsection (6) does not apply where subsection (4)(a)(ii) applies.
- (8) In this section—
- “intimate sample” has the meaning given by section 49(4),
 - “place of safety”, in relation to a child, means—
 - (i) a residential or other establishment provided by a local authority,
 - (ii) a community home within the meaning of section 53 of the Children Act 1989 (c.41),
 - (iii) a hospital or surgery, the person or body of persons responsible for the management of which is willing temporarily to receive the child,
 - (iv) the dwelling-house of a suitable person who is so willing,
 - (v) any other suitable place the occupier of which is so willing, or
 - (vi) if no place of safety within the meaning of subparagraphs (i) to (v) is available, a police station.

Existing police powers

4. The intention behind Part 4 provisions is to provide legal certainty for the police, additional to other existing powers, for example, in regard to child protection. It is not the case that officers will have no ability to respond to a range of concerning but less serious incidents if the test in section 23 is not met. As part of their general duties to prevent crime and maintain order, they will still be able to engage with a child under 12 who is involved in 'low level' harmful behaviour. Much of good community policing depends on officers interacting with children and young people in a manner which does not rely on their formal criminal justice powers of arrest, custody etc.
5. In terms of the police's ability to take a child to a place of safety where the 'high bar' test is not met, depending on the situation and what they want to do in response, the police already have a choice of powers under child protection legislation and at common law. Those powers are:
6. Section 56 of the Children's Hearings (Scotland) Act 2011 - provides the police with a power to take a child to a place of safety:

(1) A constable may remove a child to a place of safety and keep the child there if—

(a) the constable is satisfied—

(i) of the matters mentioned in section 39(2)(a), and

(ii) that the removal of the child is necessary to protect the child from the harm mentioned there or from further harm, and

(b) it is not practicable in the circumstances for an application for a child protection order to be made to or considered by the sheriff.

(2) As soon as practicable after a constable removes a child under this section, the constable must inform the Principal Reporter.

(3) The child may not be kept in a place of safety under this section for a period of more than 24 hours.

(4) The child may not be kept in a place of safety under this section if—

(a) a child protection order is in force in respect of the child, or

(b) an application has been made to the sheriff for a child protection order or to a justice of the peace for an order under section 55 on the basis of the facts before the constable and that application has been refused.

(5) The Principal Reporter may, by giving notice to the constable, require the constable to release the child if—

(a) the Principal Reporter is satisfied that the conditions for placing the child in a place of safety under this section are no longer satisfied, or

(b)the Principal Reporter is satisfied that it is no longer in the best interests of the child to be kept in a place of safety

7. The matters referred to in s39 (2) (a) of the 2011 Act are:

there are reasonable grounds to believe that—

(i)the child has been or is being treated in such a way that the child is suffering or is likely to suffer significant harm,

(ii)the child has been or is being neglected and as a result of the neglect the child is suffering or is likely to suffer significant harm,

(iii)the child is likely to suffer significant harm if the child is not removed to and kept in a place of safety, or

(iv)the child is likely to suffer significant harm if the child does not remain in the place at which the child is staying (whether or not the child is resident there),

8. The exercise of the s56 power is covered by regulations which, in particular, require that after the child has been taken to a place of safety, the police are to regard the need to safeguard the welfare of the child as the paramount consideration. The s56 power is restricted to circumstances where there is an immediate risk of harm to the child. Where the risk is not immediate, other powers in the 2011 Act would be used – child protection order powers or the power of a Justice of the Peace to make an emergency order under s55.

9. Following commencement of the Bill, there will be powers for the police to deal with a child under 12 who is at immediate risk of causing significant harm to others (s23 of the ACR Bill) and if there is a significant risk of harm or neglect to the child themselves (s56 of the 2011 Act).

10. Police Scotland's Standard Operating Procedure (SOP) on Child Protection² sets out further on powers and duties in relation to child protection as follows: "having identified or having been made aware of a child protection concern, the Officer dealing with the incident, in conjunction with their supervisor, is responsible for assessing the level of risk to the child or any other children. All measures that can be taken to reduce that level of risk should be considered."

11. "Where it is considered necessary to remove a child from harm or risk of harm consideration may be given to invoking statutory powers under the Children's Hearings (Scotland) Act 2011, to apply for a CPO or, in an emergency situation, to remove a child to a place of safety".

² <https://www.scotland.police.uk/assets/pdf/151934/184779/child-protection-sop>

12. “A distinction must be drawn between removing a child to a place of safety and voluntarily placing them, temporarily, with alternative carers. Where children are left unattended, or where their parent, guardian or carer is incapable of looking after them, it may be necessary to place the child in the temporary care of a family member or other suitable person, (rather than invoking statutory measures under the Children’s Hearing (Scotland) Act 2011).”

13. Section 20 of the Police and Fire Reform (Scotland) Act 2012 sets out general duties in statute for police constables:

1) It is the duty of a constable—

(a) to prevent and detect crime,

(b) to maintain order,

(c) to protect life and property,

(d) to take such lawful measures, and make such reports to the appropriate prosecutor, as may be needed to bring offenders with all due speed to justice,

(e) where required, to serve and execute a warrant, citation or deliverance issued, or process duly endorsed, by a Lord Commissioner of Justiciary, sheriff, justice of the peace or stipendiary magistrate in relation to criminal proceedings, and

(f) to attend court to give evidence.

(2) When taking lawful measures in pursuance of subsection (1)(d), a constable must take every precaution to ensure that a person charged with an offence is not unreasonably or unnecessarily detained in custody.

14. Additionally, section 19 provides:

(1) A constable has—

(a) all the functions conferred on a constable by virtue of this or any other enactment or by rule of law,

(b) all the powers and privileges of a constable throughout Scotland.

(2) A constable who is the chief constable, a deputy chief constable, an assistant chief constable or a local commander also has all the additional functions conferred on such a constable by virtue of this or any other enactment or by rule of law.

15. As indicated above, police also have powers to keep children safe from harm without needing to take a child below the age of criminal responsibility to a place of safety. Wider provisions for stop and search of children and young people which have been clarified in an agreed Code of Practice published by the Scottish Government³ and would still apply.
16. It is worth noting that, under the Code, when a child is searched, police must have the child's well-being as a primary consideration in deciding whether to proceed and to conduct any searches in a way which minimises potential distress.
17. Under section 25 of the Bill, any existing power the police have to search without warrant on suspicion of an offence will continue to apply to a child under the ACR if their suspected behaviour would have amounted to the offence had they been over the ACR. Where there is no existing power to search without warrant, section 26 of the Bill will allow the police to apply for a court order permitting search of the child. In either case, searches will be carried out in accordance with the Code.
18. On the specific point about the legal authority to take child to a place of safety for low-level behaviour, once the age is raised, the position is as exists now – the police have no authority to take a child by force to a place of safety unless other tests and statutory responsibilities, as set out above, are met.
19. The police do not need any specific new statutory power to take a child home to their primary carer with their consent, . Section 23 does not change anything in this respect. There are therefore powers under common law for the police to intervene by taking a child home in any situation, so long as the child is willing to accompany them. Child protection powers to take a child to a place of safety, which would enable this to happen against the child's will, have been discussed above.
20. In instances below the threshold set out in section 23 where a child will now be under the age of criminal responsibility, unless there is consent, there not be power to use force to take the child home against their will, unless it is a child protection matter in which case section 56 of the 2011 Act could be engaged. However, if the child was intent on running off rather than going home it would be likely that the police would contact their parent/carer if their identity had already been established.
21. Sufficient powers exist in both statute and common law to allow police officers, beyond the scope of what is in this bill, to address for children under the age of 12 the need to take a child to a place of safety where an officer considers there are wider child welfare and protection considerations

³ <https://www2.gov.scot/Resource/0051/00517814.pdf>

22. Other duties and powers exist which still allow officers to act to intervene, prevent harmful behaviour and keep a child safe from harm, as set out in the guide to use of stop and search powers.
23. What the bill and indeed, existing powers do not allow for is a power to use force to take a child to a place of safety when they are doing something below the threshold in section 23, regardless of whether their behaviour would have been an offence if they were above the ACR.
24. The Bill reflects the Advisory Group's recommendation – informed by the police powers group led by the Police themselves - that the power should only be available in truly serious cases, and adds to additional and continuing powers.

Measures proposed to be added to the bill by way of amendment at Stage 3

25. Proposed **amendment 148** would transfer the scope of the place of safety power into the guidance being provided for through government amendment 109. This would mean that section 23 would then not have the force of a legal obligation to restrict the application of this specific power only to the 'high bar' circumstances set out in statute.
26. The statutory guidance is designed to set out how the statutory power should be applied in practice. All partner agencies with a role and an interest in the effective operation of all the powers in Part 4 of the Act will be invited to contribute to the development of that guidance. The police will be under a duty to "have regard to" the guidance.
27. The power to remove a child to a place of safety is a deprivation of liberty and any provision of use of that power would need extremely careful consideration in respect of Article 5 of the European Convention on Human Rights, particularly in respect of young children. Any interference with liberty must have a clear legal basis , as provided in the Bill as introduced.
28. **Government amendment 157** clarifies that the power to take a child to a place of safety under section 23 does not affect any other power by virtue of which a constable may take a child to a place of safety, to reassure the police that they can continue to act to keep children safe using all of their existing powers.
29. **Amendment 109** inserts new provision after section 24 requiring the Scottish Ministers to produce guidance on section 23 and states that guidance may, in particular, cover:
 - Co-operation between those persons and bodies required to have regard to the guidance, with a view to ensuring that a range of places of safety is available. This is to make sure that there are alternatives to police stations in practice, in both rural and urban areas, and both during the day and at night,
 - Processes to ensure that the number of occasions when it is not reasonably practicable to use an alternative to a police station is minimised,

- Processes to ensure that the needs of the individual child are taken into account when identifying a place of safety,
- The keeping of children in police cells- this would include guidance on the rare sorts of circumstances in which this could be justified, the need to keep time in a cell to a brief “cooling-off period”, etc.

30. **Amendment 109** also makes clear that the Chief Constable and each local authority must have regard to the guidance and that before issuing guidance Scottish Ministers must consult the chief constable, each local authority and such other persons as they consider appropriate, thus setting out on the face of the bill the expectations placed on not just the police, but also local authorities in terms of the role that guidance will play in operational matters.
31. Additionally, amendments **109A** and **109B** make clear that the guidance should cover what constitutes ‘significant harm’ and the circumstances in which a constable may take a child to a place of safety. The development of guidance will be a key piece of work in planning implementation and will guide the use of the new power thereafter. For example, the guidance could point to what would not constitute significant harm; and to expand upon the other powers that officers might use to take a child to a place of safety when the appropriately high threshold for invoking powers under s23 is not met.
32. Finally, amendment 145 to provide for review of the operation of the Act generally would provide an opportunity to monitor and evaluate the new powers at section 23 in operation and consider any findings or recommendations arising in the report from that review which will be laid before Parliament,
33. **The police will still retain other powers to take a child to a place of safety following the introduction of the Bill where that is appropriate.** Amendment 157 makes that current position more explicit . What will certainly change is that, because they are not committing an offence, the police will not be able to arrest these children.

Conclusion

34. The practical implementation of the bill will require close ongoing attention with partners. In addition to raising the age of criminal responsibility the bill also provides for the needs and interests of those who need to investigate crime and in particular, harmful behaviour by children, and to give assurance to victims of harmful behaviour and the wider community.
35. Instances involving children under 12 in what will now be considered as significant harm are, and will remain, small in number. The important measures brought into law to allow those to continue to be investigated must be proportionate, and align with the overall decriminalising thrust of the Bill.
36. Scottish Ministers have been clear throughout the bill process that raising the age of criminal responsibility must also be meaningful, and be experienced by both children and responsible agencies as different, child-centred and trauma-

informed, delivering on the recommendations of the advisory group as set out above.

37. The provisions at Part 4 seek to achieve this, the police have powers in statute and common law to allow them to respond to incidents which previously would have been considered criminal behaviour and to take a child to a place of safety where tests are met.
38. The thoughtful and child centred policing that goes on currently every day in communities to keep children and others safe from harm will be able to continue. Time will be needed to draft appropriate guidance, operational guidelines and put in place appropriate training, practice and systems changes before Part 4 can safely be commenced.

Youth Justice:

Background Information on GIRFEC, Whole System Approach and EEI

Police Scotland strategic and bill engagement

Police Scotland, as a key partner agency for the bill's measures, were involved in significant preparatory work the Bill, They have been represented on the delivery groups on investigations, victims, disclosure and general principles.

Police are also key partners in wider work on youth justice. They are represented on the Children's Hearings Improvement Partnership and Youth Justice Improvement Board, both of which have considered ACR matters. It was also discussed at the National Youth Justice Advisory Group and police have supported meetings with local authority Whole System Approach leads.

The Whole System Approach, Early and Effective Intervention and Children's Hearings

(from ' A Guide to Youth Justice in Scotland: Policy, Practice and Legislation - Centre for Youth and Criminal Justice, June 2018)

The primary role of youth justice in Scotland is to improve life chances for children and young people, and to work with children, their families and communities to prevent offending and re-offending. The approach to children involved in offending is guided by GIRFEC (Getting it Right for Every Child), recognising that these are children first and foremost.

Youth Justice services in Scotland should seek to minimise the number of children and young people in the Criminal Justice System and formal processes, including the Children's Hearings System, through support for timely and effective interventions which prevent further offending by addressing its underlying causes, and improve life chances. Where this is not possible the aim should be to support children through the Children's Hearings System (CHS) to ensure their welfare remains a key consideration.

Police Standard Operating Procedure 2018 and 2016-20 Strategy

The Police Scotland standard operating procedure around children acknowledges the full continuum of harm and offending along with the full age range of children:

<https://www.scotland.police.uk/assets/pdf/151934/184779/offending-by-children-sop>

In addition, Police Scotland's 2016-20 Children and Young People Strategy emphasises engagement , early intervention and proportionality in their approach to children, risk, harm and offending..

<https://www.scotland.police.uk/about-us/police-scotland/strategic-planning/children-young-people-our-approach/>

GIRFEC

GIRFEC encourages earlier intervention by professionals to avoid crisis situations, ensuring that children get the help they need when they need it.

Whole System Approach (WSA) – ‘specialised GIRFEC’

WSA involves putting in place streamlined and consistent planning, assessment and decision making processes for young people who offend, ensuring they receive the right help at the right time.

Many young people involved in offending behaviour could and should be diverted from statutory measures, prosecution and custody through early intervention and robust community alternatives.

WSA works across all systems and agencies.:

Early and Effective Intervention (EEI)

The first essential element of WSA is EEI, which means Early and Effective Interventions for low level offences, offering support and advice to young people in order to address need and change behaviour.

Features of EEI

(2008 Preventing Offending: Framework for Action – endorsed by ACPOS)

‘Where the need for intervention has been identified, relevant agencies must act promptly, and in line with what other agencies are doing, to provide responses that are timely, proportionate, effective and that inspire community confidence

An early and effective response will support the child to engage with services, including universal services such as education, youth work and healthcare, to address identified needs. In this context responses will:

- Relate directly to the needs and behaviour of the young person.
- Take account of impact on others, and make reparation and restoration where appropriate.
- Support parental and child responsibility.
- Be appropriate, proportionate, timely and fair.

EEI disposals :

- Police direct measures
- Current support meaning no additional measures are required
- Single agency support – through social work, education, health

- Referral for a targeted intervention – e.g. restorative justice, substance misuse work
- No further action - for a number of reasons it may be appropriate to take no further action in response to a specific offence
- Referral to Scottish Children’s Reporter Administration (SCRA) –where compulsory measures of care may be considered necessary.
- In exceptional circumstances it may be appropriate to refer a young person to COPFS

Dealing with harm via non-offence grounds in children’s hearings system

Under section 61 of the Children’s Hearings (Scotland) Act 2011, a constable has a duty to provide information to the Children’s Reporter ‘where a constable considers—

- (a) that a child is in need of protection, guidance, treatment or control, and
- (b) that it might be necessary for a compulsory supervision order to be made in relation to the child.

(2) The constable must give the Principal Reporter all relevant information which the constable has been able to discover in relation to the child.’

Grounds for referral to the Reporter exist that do not rely on an offence ground or suspect status. 4 of the 17 grounds are clearly applicable to children below the current, or any new, age of criminal responsibility where their conduct is of concern.

- (a) the child is likely to suffer unnecessarily, or the health or development of the child is likely to be seriously impaired, due to a lack of parental care;
- (e) the child is being, or is likely to be, exposed to persons whose conduct is (or has been) such that it is likely that—

(i) the child will be abused or harmed, or

(ii) the child’s health, safety or development will be seriously adversely affected,

- (m) 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,
- (n) the child is beyond the control of a relevant person.

All of these referral grounds are currently, and will remain, available to police and other agencies to refer children to the Reporter should the bill be passed. They apply to all children from birth, so do not rely on the age of criminal responsibility.

6 May 2019

Your Ref:

Our Ref:

Maree Todd BPA/MSP
Minister for Children and Young People
Ministear airson Clann agus Òigridh
St Andrew's House,
Regent Road,
Edinburgh
EH1 3DG



**POLICE
SCOTLAND**

Keeping people safe

POILEAS ALBA

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Dear Minister,

AGE OF CRIMINAL RESPONSIBILITY (SCOTLAND) BILL 2018 (2018 BILL)

I would like to thank you for your most recent correspondence of 5th May 2019.

This provides further background to the Scottish Government policy and the legislative rationale for the provisions as drafted in section 23. My ACR Project Team and I have further considered those points today and would offer the following in response:

- Advisory Group on MACR – You have described some of that work being the driver for the creation of section 23. The recommendation referenced was a broader, strategic recommendation to create an investigatory power for police officers to respond, including when there was no parental cooperation. The work of the Advisory Group was complex, in particular in considering the different points of view in relation to police powers. I note this complexity was referenced later in the police powers section of that report which states:

“The recommendations in this section are just that. Group members wanted to highlight areas of potential concern, and specific areas where the benefits of having a power would need to carefully balanced against any potential disadvantages to children. The recommendations relating to the role of the Police take into account that a range of models could be employed, and that wider consultation is required in order to fully explore which would work best for children under the age of 12.” Para 4.22

I'm sure you will agree with me that the Advisory Group could only provide a framework for, the then, future legislation. The detailed work has now been undertaken by your Bill Team and further enhanced by the scrutiny of the Scottish Parliament. Throughout that process, over the last 10 months, my ACR Project Team have been consistent and clear with your officials regarding their concerns in respect of the drafting of section 23. It is noteworthy that those concerns go to the heart of the note of caution set out three years ago by the Advisory Group, namely, "*....the benefits of having a power would need to be carefully balanced against any potential disadvantages to children.*" It is the point where balance is achieved in a genuinely child-centred way that our interpretations differ.

- The impact of Section 23 on other statutory powers & police procedures to take a child to a place of safety – As I stated in my letter of Friday, 03 May, we are only aware of two such statutory powers, section 56 of the Children's Hearing (Scotland) Act 2011, which relates to emergency child protection powers and Section 22 of the Criminal Justice (Scotland) Act 2016 which applies to criminal procedure for children over the age of criminal responsibility.

In relation to current procedures, section 23 does not currently exist so when/if enacted it will change the legislative landscape which our officers must consider and comply with.

- Common Law Powers – I would welcome further clarification on what common law powers are being referenced in the summary paper and how the Scottish Government envisage they could be applied to the types of scenarios we have previously set out to you and your officials?
- Consent – As you may be aware, this has been explored in other policing contexts in recent years, not least of which, Stop and Search powers. This has highlighted that it is not competent to rely on consent from a child under 12 years of age as it cannot be considered as informed consent. We would welcome your view on this principle for such young children and how this impacts on our officers ability to "do the right thing"?
- Child Protection Powers – The powers you describe are emergency powers which are also used in the most high risk cases. It is highly unlikely that these will be relevant in the types of cases described, which sit below the high bar test Section 23 will cover.

We also note with interest that you appear to reference the absence of relevant powers in paragraph 20 of the summary paper provided yesterday (page 8). You state in that paragraph

".....if the child was intent on running off rather than going home it would be likely that the police would contact their parent/carer if their identity had already been established."

I'm sure you will understand that this response prompts the question from my officers – what do we do if we do not have consent and/or we do not know their identity. The scenario you describe appears to confirm that our officers would have no power to respond. You will appreciate that this is at the core of our concerns. What reaction can we expect if we go to a child's home address (assuming we know them in the first place) and inform the child's parent(s) that the child has just either been witnessed or accused of some form of harmful behaviour. The parent would be entirely justified in asking where their child was. Not to mention the perspective of any witnesses or victims present if a child has been witnessed causing such harm and officers present merely let them walk away.

I note your comments regarding ECHR, however, I would reference you back to the comments by the original Advisory Group which highlighted the need for balance. It can be similarly stated that there is a need for a rights balance with such young children. As I stated in my letter last week, children's rights are at the core of police ethics. We do not want to stop them going about their normal day to day lives. Equally, however, we want to keep them safe, particularly such young children who are subject to the provisions in this legislation. We must balance their right to be safe, to privacy, to liberty, etc. The key is balance.

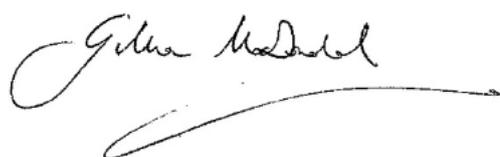
I am clear that Police Scotland's role in this process is merely to provide our professional opinion from our unique role in society. Our intention in highlighting these concerns is to ensure that the decisions now taken are fully informed regarding their consequences on the powers our officers will have (or no longer have) to respond to the harm caused by younger children. As long as the parliament is satisfied that the changes this brings are in line with the policy intention and fully understand the consequences, that is all that Police Scotland seek to achieve.

Policing will adapt and follow the new role created by this legislation in relation to young children and continue to deliver high quality policing to our communities. However, it is essential that communities are made fully aware of the changes before their introduction so that they are informed of the changes this will bring to the manner in which our officers can respond when a young child is suspected of causing the type of harm we have outlined in previous scenarios.

My team and I remain available to support and advise your work both now and through implementation of the 2018 Bill.

I hope this is helpful.

Your sincerely,

A handwritten signature in black ink, appearing to read 'Gillian MacDonald', with a long horizontal flourish extending to the right.

Gillian MacDonald
Assistant Chief Constable