

# CRIMINAL JUSTICE (SCOTLAND) ACT 2016

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## EXPLANATORY NOTES

### OVERVIEW OF THE ACT

#### **Part 1 – Arrest and Custody**

##### *Chapter 2 – Custody: person not officially accused*

#### **Keeping person in custody**

##### *Section 7 – Authorisation for keeping in custody*

- 32. [Section 7\(1\)](#) sets out the procedure for keeping a person in custody where the person has been not been arrested under a warrant or charged with an offence by a constable.
- 33. [Section 7\(2\)](#) provides that authorisation to keep the person in custody must be sought as soon as reasonably practicable after the person is arrested at a police station or arrives at a police station following arrest.
- 34. [Sections 7\(3\)](#) and [\(4\)](#) provide that authorisation to keep a person in custody may only be given by a constable of the rank of sergeant or above who has not been involved in the investigation in connection with which the person is in custody and if the test set out in section 14 is met. [Section 7\(5\)](#) provides that if authorisation is refused then the person can continue to be held in custody only if charged with an offence or the person is detained under section 28(1A) of the 1995 Act. [Section 28\(1A\)](#) allows for the detention of an arrested person in connection with a breach of bail conditions.

##### *Section 8 – Information to be given on authorisation*

- 35. [Section 8](#) provides that at the time when authorisation is given to keep a person in custody under section 7, the person must be informed of the reason they are being kept in custody and that they may only be kept in custody without charge for a period of 12 hours. That person must also be informed when authorisation is given under section 7 that a further extension of 12 hours may be authorised under section 11.

##### *Section 9 – 12 hour limit: general rule*

- 36. [Section 9](#) provides that a person may not continue to be held in custody after a continuous period of 12 hours unless that person is then charged with an offence by a constable or authorisation has been given to extend that arrest for a further 12 hours under section 11. The period of 12 hours begins at the point when authorisation to keep a person in custody is given by a constable in accordance with section 7. After the expiry of 12 hours, if the person is not charged, they must be released, perhaps conditionally, if appropriate (see section 16). A person may also be detained in custody beyond 12 hours without charge where they are held for a bail review court hearing under section 28(1A) of the 1995 Act.

***Section 10 – 12 hour limit: previous period***

37. Where a person is held in custody on more than one occasion for the same or a related offence, section 10 provides that the 12 hour maximum period of custody (set out in section 9) is reduced by any earlier period during which the person was held in custody for that offence.

***Section 11 – Authorisation for keeping in custody beyond 12 hour limit***

38. [Section 11\(1\)](#) contains provisions to allow for an extension of the time in which a person may be kept in police custody for a further 12 hours after the initial 12 hours ends.
39. [Section 11\(2\)](#) provides that the authorisation to extend that custody must be given by a constable of the rank of inspector or above who has not been involved in the investigation in connection with which the person is in custody. Authorisation to extend custody may only be given if the tests set out in section 11(3)(a) and (b) are met. Further, for a person under 18 years of age authorisation must be given by an officer of the rank of Chief Inspector or above who has not been involved in the investigation in connection with which the person is in custody.
40. [Section 11\(4\)](#) places a duty on the authorising constable to, where practicable, allow the person or if the person wishes, the person's solicitor, to make representations either orally or in writing, and to have regard to any such representations.
41. [Section 11\(5\)](#) clarifies that any authorisation to extend beyond the initial 12 hours is deemed to have been withdrawn if the person is released prior to those initial 12 hours elapsing.
42. [Section 11\(6\)](#) and (7) provide that after the expiry of the further 12 hours the person can only continue to be held in police custody if charged; but permits a person to be detained beyond 12 hours when they are held for a bail review under section 28(1A) of the 1995 Act.

***Section 12 – Information to be given on authorisation under section 11***

43. [Section 12](#) specifies the information which must be provided by a constable to an arrested person when authorisation to extend the arrest under section 11 is granted. This information will be given as soon as reasonably practicable after authorisation is given.

***Section 13 – Custody review***

44. [Section 13\(1\)](#) and (2) provide that where a person has been held in police custody for a continuous period of six hours and has not been charged with an offence, a decision must be made on whether to continue to keep that person in custody. That decision must be made as soon as reasonably practicable after the expiry of the period of six hours which started when the authorisation under section 7 was given. In making that decision, the test set out in section 14 is applied (referred to below). Under section 13(3) the decision must be made by a constable of the rank of inspector or above, who has not been involved in the investigation in connection with which the person is in custody. If the test set out in section 14 is not met, the person may continue to be held in custody only if they are charged with an offence or the person is held under section 28(1A) of the 1995 Act for a bail review. This section also provides that where an arrest has been extended under 11, and if the person remains in custody, that there must be a further 6 hour review after this extension period has begun.

***Section 14 – Test for sections 7, 11 and 13***

45. [Section 14](#) sets out the test for keeping a person in custody under sections 7(4) and 11(3)(b), and reviewing continuation of that period of custody after six hours under section 13(2).

46. **Section 14(1)** provides that the test is that there are reasonable grounds for suspecting that the person has committed an offence and keeping the person in custody is necessary and proportionate for the purposes of bringing the person before a court or otherwise dealing with the person under the law. In considering what is “necessary and proportionate” regard may be had to (among others) the factors detailed in section 14(2).

### ***Section 15 – Medical treatment***

47. **Sections 15(1) and (2)** apply to a person who is taken into police custody having been arrested without a warrant, has not been charged with an offence and is at a hospital for the purpose of receiving medical treatment. They provide that authority to keep a person in custody may be given as though section 7 applies in the hospital as it does in a police station. For the purpose of calculating the 12 hour maximum period of custody set out in sections 9 and 11, account will be taken of any time during which a person is at a hospital or travelling to or from one and is being questioned by a constable (section 15(5) to (6)). The same rules apply in calculating any previous period of custody (section 10(3)).

## **Investigative liberation**

### ***Section 16 – Release on conditions***

48. **Section 16** applies where: a person is in police custody by virtue of the authorisation under section 7 (that is, where a person has been arrested without warrant and not charged, including a case where authorisation has been reviewed and continued under section 13), a constable has reasonable grounds to suspect that the person has committed a relevant offence and the period of 28 days calculated in accordance with section 17(1) (a) has not expired. As explained further below, the effect of section 16 is to enable the police to release such persons from police custody on conditions which may be applied for a maximum period of 28 days following the conditions being imposed. It follows, that a person could not be released again on investigative liberation if arrested again after those 28 days have expired. The meaning of “relevant offence” is given in subsection (6).
49. Subsection (2) provides that a constable of the rank of sergeant or above (subsection (5)) may authorise the release of a person from custody on any condition which is necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence. The meaning of “relevant offence” is given in subsection (6).
50. **Section 16(4)** ensures that any condition imposed is treated as a liberation condition for the purposes of schedule 1. This means that a breach of any condition may be penalised by a fine or a prison sentence as outlined in schedule 1 and, a breach which would be an offence were the person not subject to liberation conditions may be taken into account in sentencing for that offence.

### ***Section 17 – Conditions ceasing to apply***

51. **Section 17** provides when conditions imposed on a person under section 16(2) cease to apply: namely, (under section 18) if the condition is removed by the police by notice, if the person is arrested in connection with a relevant offence (“relevant offence” as defined by section 17(2)), if the person is officially accused of committing a relevant offence, at the end of the 28 day period or (under section 19) if the condition is removed as a result of an application for review made to a sheriff against the conditions.

### ***Section 18 – Modification or removal of conditions***

52. **Section 18** enables a constable, by notice, to modify or remove any condition imposed by the police under section 16(2). A modified condition may be more or less onerous than the condition originally set. Under section 18(2) a notice about the modification or removal of a condition must be given in writing to the person who is subject to

it and must specify the time from which the condition is modified or removed. Any modification or removal of a condition requires to be approved by a constable of the rank of an inspector or above. This power gives the police the flexibility to adjust conditions in light of changed circumstances.

53. **Section 18(3)** provides that a constable of the rank of inspector or above must keep under review whether or not there are reasonable grounds for suspecting that a person who is subject to a condition imposed under section 16(2) has committed a relevant offence (as defined in section 18(8)), and whether the condition imposed remains necessary and proportionate for the purpose of ensuring the proper conduct of the investigation into a relevant offence. If the inspector is no longer satisfied that there are reasonable grounds for suspecting that a person who is subject to a condition has committed a relevant offence, the person must be given notice of the removal of the condition. If no longer satisfied that a condition is necessary and proportionate, again the person must be given notice that the condition is being modified or removed.
54. **Section 18(6)** provides that any such notice must be given in writing to the person as soon as practicable. The notice must specify the time from which the condition is modified or removed and the time at which the duty to give the notice arose, i.e. the time at which the decision is made by an appropriate constable to remove or modify the condition.

### ***Section 19 – Review of conditions***

55. **Section 19(1)** provides that a person who is subject to a condition imposed under section 16(2) may make an application for review to a sheriff.
56. **Section 19(2)** requires the sheriff to give the procurator fiscal an opportunity to make representations before the review is determined.
57. **Section 19(3)** provides that where the sheriff is not satisfied that the condition imposed is necessary and proportionate, the sheriff may remove it or impose an alternative condition which the sheriff considers to be necessary and proportionate for that purpose.
58. **Section 19(4)** provides that a condition imposed on review by the sheriff under section 19(3) is to be regarded as having been imposed by a constable under section 16(2). This provides that the conditions set by the sheriff have the same effect and are to be taken as having taken effect when set by the police, i.e. the 28 day period is calculated from the date on which the police conditions were set. Conditions imposed by the sheriff can be modified or removed under section 18(1) in the same manner as police conditions.