

CRIMINAL JUSTICE (SCOTLAND) ACT 2016

EXPLANATORY NOTES

OVERVIEW OF THE ACT

Part 1 – Arrest and Custody

Chapter 4 – Police interview

Person officially accused

Section 35 – Authorisation for questioning

102. Section 35 introduces a regime to allow the court to authorise a constable to question an accused person after the person has been officially accused of an offence or offences.
103. Subsection (1) confirms that the court may authorise a constable to carry out questioning once this stage has been reached. There is no provision for any other person, such as a prosecutor, to be so authorised.
104. Subsections (2) and (3) set out the circumstances in which the court can allow this questioning to take place. These provisions are designed to ensure that this power is exercised proportionately, having regard both to the rights of the accused person and to the public interest in gathering evidence in respect of an alleged criminal offence.
105. Thus subsection (2) provides that the court needs to be satisfied that the proposed questioning is in the interests of justice.
106. Subsection (3) sets out further factors which the court must take into account when deciding whether or not to authorise an application for questioning.
107. Subsection (5) applies where a court has granted an application to authorise questioning after the case has called in court, either having been commenced by means of a warrant, or where the accused has appeared in court. In those circumstances, subsection (4) gives the accused person the right to be heard by the court before any decision on the application is made. The person can be represented by a solicitor for these purposes, if the person wishes. It follows that the person has no similar right to be heard in respect of an application about a case which has not yet called in court.
108. Subsection (6) applies where the court has decided to grant the application and authorise questioning. In that event, subsection (6)(a) provides that the court must specify the length of time during which a constable may question the accused person. Subsection (6)(b) allows, but does not require, a court to place other conditions on the questioning to ensure that it is not unfair to the accused person. This might, for example, mean a restriction on the subject matter about which the accused person can properly be questioned.
109. Subsection (7) provides that there is no right of appeal against the decision of a court either to grant or refuse authorisation, or against any conditions imposed by the court under subsection (6)(b).

110. Subsection (8) defines the word “court” for the purposes of this section.

Section 36 – Authorisation: further provision

111. Section 36 makes further provision in respect of questioning after a person has been officially accused of an offence.
112. Subsection (1) sets out who may make an application for authorisation. Where the case against the accused person has called in court in terms of section 35(5), subsection (1)(a) provides that the application must be made by a prosecutor; otherwise the application should be made by a constable (subsection (1)(b)). In the former case, though, even if the application is granted, the questioning will be carried out by a constable, in terms of section 35(1); the prosecutor’s limited right to question an accused person at the inception of solemn proceedings only (generally known as “judicial examination”) is abolished by section 78 of this Act.
113. Subsection (2) defines “prosecutor” for the purposes of subsection (1).
114. Subsection (3)(a) gives the High Court of Justiciary the power to prescribe, in an Act of Adjournal, the form in which a written application seeking authorisation must be made; and a written application should closely follow that form. Subsection (3)(b), by requiring an applicant to include details of any previous applications for authorisation to question the accused person, either about the same offence, or about another offence arising out of the same circumstances, will ensure that the court has information about any such previous applications.
115. Subsection (4) sets out when authorisation to question the accused person comes to an end: either when the period stipulated by the court under section 35(6)(a) expires; or, when the trial of the accused person starts. Subsection (5) defines when a trial is deemed to have started for this section.
116. Subsection (6) defines “authorisation” and “offence” for the purposes of this section.

Section 37 – Arrest to facilitate questioning

117. Where the police wish to question someone who has been officially accused of an offence, section 37 provides that it will be open to the court to grant a warrant for the arrest of the accused person so the person can be detained for the purposes of questioning.
118. Subsection (1) provides that, when granting authorisation for questioning, a court can grant a warrant for the accused person’s arrest if it is expedient to do so.
119. Subsection (2) protects the accused person from indefinite detention, by requiring that if the court grants an application for a warrant it must put a time limit on the period for which the person can be detained to be questioned. Subsection (3) makes provision as to when the accused person’s detention, under a warrant granted in terms of this section, must come to an end.
120. Subsection (4) clarifies when an accused person’s detention under a warrant granted in terms of this section starts, making it possible to determine when the period specified in section 37(3)(a) has expired.
121. Subsections (5)(a) and (b) put it beyond doubt that a warrant under this section does not operate to recall or affect the operation of any bail order that the accused person might be on, whether in the same proceedings or not. While the accused person is in custody, having been detained and arrested on the warrant, subsection 24(5)(b) of the 1995 Act, which makes it a condition of bail that the accused does not commit an offence while on bail, remains in force. This means that if the person commits an offence while detained in custody under a warrant granted in terms of this section, it would be a breach of that

*These notes relate to the Criminal Justice (Scotland) Act 2016
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condition of bail. Once the accused person's detention ends, the bail order applies in full, including any conditions attached to that order.

122. Similarly, subsection (5)(c) makes it clear that, where an accused person has been liberated on an undertaking in terms of section 25(2)(a) of this Act, the terms and conditions of the undertaking remain in force where a warrant is granted for the accused person, and continue in force after arrest and detention on that warrant.