

CRIMINAL JUSTICE (SCOTLAND) ACT 2016

EXPLANATORY NOTES

OVERVIEW OF THE ACT

Part 1 – Arrest and Custody

Chapter 3 – Custody: person officially accused

Person to be brought before court

Section 20 – Information to be given if sexual offence

59. [Section 20\(1\)](#) contains the criteria that are to be applied to establish whether a person falls within this section. The person must have been arrested in respect of a warrant for a sexual offence to which section 288C of the 1995 Act applies or, if arrested without warrant and since being arrested, have been charged by a constable for a sexual offence to which section 288C of the 1995 Act applies.
60. [Section 20\(2\)](#) contains the information that a person who falls within the criteria contained within subsection (1) must be given. The person must be informed that certain hearings in the course of their case may only be conducted by a lawyer. The person must also be given notice that it is in their interests to engage the professional assistance of a solicitor at, or for the purposes of those hearings, and if the person does not engage the assistance of a solicitor then the court will do so.

Section 21 – Person to be brought before court

61. [Sections 21\(1\)](#) and [\(2\)](#) provide that, wherever practicable, persons kept in custody after being arrested under a warrant or arrested without a warrant and subsequently charged with an offence by a constable, must be brought before a court by the end of the next court day. For example, a person arrested at 11pm on a Tuesday and charged with an offence at 2am on the Wednesday would be due in court not later than the end of the court's sitting on the Thursday.
62. [Section 21\(3\)](#) provides for persons to be considered to be brought before a court if appearing by television link.

Section 22 – Under 18s to be kept in a place of safety prior to court

63. [Section 22](#) provides that persons under 16 and those aged 16 and 17 subject to compulsory supervision orders who are being brought to court in accordance with [section 21\(2\)](#) are only kept in a police station in the circumstances prescribed in [subsection \(3\)](#) and a constable of the rank of inspector or above has certified accordingly.

Section 23 – Notice to parent that under 18 to be brought before court

64. [Section 23](#) makes provision for circumstances where a person who is under 16 or is aged 16 or over and subject to a supervision order is to be brought before a court in

accordance with section 21(2) or released from police custody on an undertaking given under section 25(2)(a). It provides that a parent of that person (if one can be found) must be informed (a) of the court before which the person is to be brought, (b) of the date on which the person is to be brought before the court, (c) of the general nature of the offence which the person has been officially accused of committing and (d) that the parent's attendance at the court may be required under section 42 of the 1995 Act. The requirement to give such information may be dispensed with if a constable believes that it would be detrimental to the wellbeing of the person being brought before the court or released on undertaking (subsection(3)).

Section 24 – Notice to local authority that under 18 to be brought before court

65. **Section 24** sets out the circumstances when a local authority has to be advised of the following information: the court before which the person is to be brought, the date the person is to be brought before the court and the general nature of the offence which the person has been officially accused of committing. There are two sets of circumstances which require the local authority to be notified. Firstly, where a person who is (i) under 16 years, (ii) 16 or 17 years of age and subject to either a compulsory supervision order or an interim compulsory supervision order or (iii) believed to be 16 or 17 years of age and has declined the right to have intimation sent under section 38 is brought before a court in accordance with section 21(2). Secondly, where a person is under 16 or 17 years and subject to compulsory supervision is released from police custody on an undertaking given under section 25(2)(a).
66. Subsection (5) defines “appropriate local authority” as the local authority in the area where the court sits.

Police liberation

Section 25 – Liberation by police

67. **Section 25(1)** and (2) provide that where a person is in custody having been charged with an offence, the police may: release that person on an undertaking under section 26, release the person without an undertaking or refuse to release. (Note the provisions do not apply where a person is in custody by virtue of a warrant granted under section 37(1)). It is also relevant to note that under section 50 a constable must take every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody.
68. **Section 25(3)** provides that where a person is in police custody on a warrant as contained within sub-section (1)(b), the person will not be allowed to be released without an undertaking as provided for in sub-section (2)(b).
69. **Section 25(4)** provides that a constable will not be liable to any claim because of a refusal to release a person from custody under subsection (2)(c).

Section 26 – Release on undertaking

70. Again, in considering whether to release a person on an undertaking the police will be mindful of their obligations under section 50 of the Act (duty not to detain unnecessarily). Section 26(1) provides for a person to be released from police custody on an undertaking given under section 25(2)(a) only if they sign that undertaking.
71. **Section 26(2)** specifies the terms of an undertaking and section 26(3) provides for the conditions and the further conditions which may be imposed. With regard to those further conditions, these are illustrated by subsection (4), with paragraph (a) setting out the type of further conditions that only a constable of the rank of inspector or above may impose. Any other condition may be imposed by a constable of the rank of sergeant or above.

72. **Section 26(6)** provides that the requirement imposed by an undertaking to attend at court and comply with conditions are to be taken to be liberation conditions for the purposes of schedule 1 on breach of liberation conditions. 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 27 – Modification of undertaking

73. **Section 27(1)** enables the procurator fiscal by notice (effected as set out in section 27(3)) to modify an undertaking given under section 25(2)(a), either by changing the time or place of the court hearing or removing or altering a condition in the undertaking. The manner of citation may be effected, for example, by delivering the notice personally or leaving it at the person's home.

Section 28 – Rescission of undertaking

74. **Section 28(1)** enables the procurator fiscal to rescind an undertaking under section 25(2)(a) regardless of whether the person who gave it is to be prosecuted.
75. **Section 28(2)** clarifies that the rescission takes effect at the end of the day the notice is sent to the person who gave the undertaking.
76. **Section 28(3)** provides that notice under subsection (1) must be effected in a manner by which citation may be effected under section 141 of the 1995 Act.
77. **Section 28(4)** provides a constable with a power of arrest if the constable has reasonable grounds for believing that the person is likely to fail to comply with the terms of an undertaking as contained within section 25(2)(a).
78. **Section 28(5)** provides that, when a person is arrested under subsection (4) or is arrested otherwise than in accordance with the undertaking, as in subsection (6), the undertaking is rescinded and the person is deemed to be in custody, as if charged with the original offence for which an undertaking was given.
79. **Section 28(7)** provides that reference contained within subsections (4) and (6)(b) regarding the terms of the undertaking also refer to any undertaking modified by notice made under section 27(1) or by a sheriff under section 30(3)(b).

Section 29– Expiry of Undertaking

80. **Section 29(1)** provides that an undertaking under section 25(2)(a) is deemed to have expired in two circumstances: either at the end of the day when the person was required to have appeared at court, or at the end of the day when a person appears at court having been arrested on a warrant for failing to appear as required by the terms of the undertaking.
81. **Section 29(2)** has the effect that; an undertaking expires if a person has been arrested under a warrant and appears in court because they have not attended court as required, then the undertaking expires at the end of the day of that court appearance.
82. **Section 29(3)** explains that the references in subsection (1)(a) and (2)(a) to the terms of the undertaking include those modified by the procurator fiscal under section 27(1)

Section 30 – Review of undertaking

83. **Section 30(1)** enables a person subject to an undertaking to apply to the sheriff for review.
84. **Section 30(2)** provides that the sheriff must provide the procurator fiscal with an opportunity to make representations with regard to the review. Section 30(3) provides

*These notes relate to the Criminal Justice (Scotland) Act 2016
(asp 1) which received Royal Assent on 13 January 2016*

that the sheriff may either remove a condition or impose any alternative condition that the sheriff considers to be necessary and proportionate.