

CRIMINAL JUSTICE (SCOTLAND) ACT 2016

EXPLANATORY NOTES

OVERVIEW OF THE ACT

Part 1 – Arrest and Custody

Chapter 4 – Police interview

Rights of suspects

Section 31 – Information to be given before interview

85. Section 31 applies to a person who is either in police custody (defined in section 64) or has voluntarily attended a police station, or other place, for the purpose of being interviewed by the police.
86. It requires a constable to inform a person suspected of committing an offence of their rights at the most one hour before any interview commences. These rights are:
- the right to be informed of the general nature of that offence,
 - the right not to say anything other than to provide the person's name, address, date of birth, place of birth and nationality;
 - the right to have a solicitor present during any interview; and
 - if the person is being held in police custody, the rights detailed in Chapter 5, namely: the right to have another person informed that the person is in custody, the right to have a solicitor informed that the person is in custody and the person's right of access to a solicitor whilst in custody.
87. Subsection (3) provides that if a person has already exercised their right to have another person or solicitor informed of their custody, then the police are not required to inform the person of these rights a second time.
88. For the purpose of this section, a constable is not to be regarded as interviewing a person about an offence merely by asking for the person's name, address, date of birth, place of birth and nationality. As such, a constable does not have to inform the person of their rights, as detailed at subsection (2), before asking the person for these details.
89. Subsection (5) provides that, if a person is being interviewed as authorised by section 35 of the Act (which permits the court to authorise a constable to question someone who has been officially accused of an offence), the person must be told before the start of the interview about any conditions attached by the court when authorising the questioning. This will always include a specified period of time for which questioning is authorised, and may also include conditions imposed by the court to ensure that allowing the questioning is not unfair.

Section 32 – Right to have solicitor present

90. This section provides for the right of a person reasonably suspected of committing an offence to have a solicitor present during police interview. It applies to a person who is either in police custody or has voluntarily attended a police station, or other place, for the purpose of being interviewed by a constable.
91. **Section 32(3)** provides that unless a person has consented to be interviewed without a solicitor present, a constable must not start to interview the person about the alleged offence until a solicitor is present and must not deny the solicitor access to the person at any time during interview.
92. Under subsection (4), a constable may in exceptional circumstances start to interview the person without a solicitor present if satisfied it is necessary to interview the person without delay in the interests of the investigation or prevention of crime, or the apprehension of offenders. This is a high test and may only be authorised by a constable of the rank of sergeant or above who has not been involved in the investigation of the offence about which the person is to be interviewed. If a solicitor becomes available during such time as the police are interviewing a person, the solicitor must be allowed access to that person.
93. For the purpose of this section, a constable is not to be regarded as interviewing a person about an offence merely by asking for the person's name, address, date of birth, place of birth and nationality. As such, a constable does not have to wait for a solicitor to be present before asking a person for these details.
94. Subsection (7)(a) and (b) provides for a record to be made of the time at which a person consents to be interviewed without a solicitor present and any reason the person gives for waiving the right to have a solicitor present. A person may revoke their consent at any time and in such a case the police must record the time at which a person requests that intimation is sent to a solicitor and the time that intimation is sent (section 6(2)(d) and (e)).

Section 33 – Consent to interview without solicitor

95. Subsection (2)(a) provides that a person under 16 years of age may not consent to be interviewed without a solicitor present.
96. Subsection (2)(b) provides that a person aged 16 or 17 and subject to a compulsory supervision order or an interim compulsory supervision order made under the Children's Hearings (Scotland) Act 2011 may not consent to be interviewed without a solicitor present.
97. Subsection (2)(c) provides that a person aged 16 years and over and, owing to a mental disorder (as defined in subsection (6)(a)), is considered by a constable to be unable to understand sufficiently what is happening or to communicate effectively with the police, may not consent to be interviewed without a solicitor present.
98. Subsections (3), (4) and (5) provide that a person who is 16 or 17 years of age and not subject to a compulsory supervision order or interim compulsory supervision order or suffering from a mental disorder may consent to be interviewed without a solicitor present with the agreement of a "relevant person". If the person aged 16 or 17 years is in police custody, a "relevant person" means any person who could by virtue of section 40(2) visit the person. If the person aged 16 or 17 is not in police custody, a "relevant person" means a person who is at least 18 years of age and is reasonably named by the 16 or 17 year old.

Person not officially accused

Section 34 – Questioning following arrest

99. **Section 34** enables a constable to question a person following arrest provided the person has not been officially accused of the offence (i.e. charged with the offence by the police or where a prosecutor has started proceedings in relation to the offence), or an offence arising from the same circumstances. The person has the right, however, not to answer any questions but must provide the police with their name, address, date of birth, place of birth and nationality.
100. Subsection (3) makes clear that the provisions of this section do not imply a limit on the ability of the police to question a person about other matters (including offences) unrelated to the offence for which they were arrested.
101. Under subsection (5), the use, in evidence, of any answers given by a person during questioning is subject to the laws on admissibility.

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 condition of bail. Once the accused person’s detention ends, the bail order applies in full, including any conditions attached to that order.

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

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.