

CRIMINAL JUSTICE (SCOTLAND) ACT 2016

EXPLANATORY NOTES

OVERVIEW OF THE ACT

Part 1 – Arrest and Custody

Chapter 5 – Rights of suspects in police custody

Intimation and access to another person

Section 38 – Right to have intimation sent to other person

123. **Section 38** affords a person in police custody the right to have someone else informed that the person is in police custody and where they are being held in custody.
124. This intimation must be sent as soon as reasonably practicable after the person arrives at a police station unless a delay is considered necessary in the interests of the investigation or prevention of crime, the apprehension of offenders or safeguarding and promoting the wellbeing of the person (subsection (5)). Authorisation to delay intimation must 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. Where such a delay is required, it should be for no longer than necessary (subsection (4)(b)). The sending of intimation may be delayed by virtue of subsection (5)(c) only for so long as necessary to ascertain whether a local authority will arrange for someone to visit the person in custody under section 41(2).
125. If a constable believes that the person in police custody is under 16 years of age, under subsections (2)(a) and (3)(a), a parent must be informed, regardless of whether the person requests that intimation be sent. The definition of a parent for this section and section 39 includes a guardian and any other person who has the care of the person (subsection (8)).

Section 39 – Right to have intimation sent: under 18s

126. Under this section, if a constable believes that a person in police custody is under 18 years of age, the person sent intimation under section 38 must be asked to attend at the police station or other place where the person is being held (subsection (2)). For those under 16 years this means a parent of the person and for those aged 16 and 17 years, an adult named by them (section 38(3)). The requirement in subsection (2) does not apply if a constable believes that the person in police custody is 16 or 17 years of age and has requested that the person notified under section 38 should not be asked to attend (subsection (3)).
127. If a constable believes that a person in police custody is under 18 years of age and finds that the person to whom intimation is to be sent is not contactable within a reasonable time or claims to be unable or unwilling to attend in a reasonable time, or a local authority has advised against sending intimation to that person, then intimation must be sent to another appropriate person. An “appropriate person” for these purposes might be a parent or guardian or carer or a duty social worker from the local authority.

128. Where the person in police custody is believed to be under 16, attempts to send intimation must continue until an “appropriate person” is contacted and agrees to attend at the police station or other place the person is being held within a reasonable time. For these purposes, an “appropriate person” means a person the police consider appropriate having regard to the views of the person in police custody.
129. Where the person in police custody is believed to be 16 or 17 years of age, attempts to send intimation must continue until an “appropriate person” is contacted and agrees to attend at the police station or other place the person is being held within a reasonable time or the person in custody requests that, for the time being, no further attempts be made. For these purposes an “appropriate person” means an adult who is named by the person in custody and to whom a constable is willing to send intimation without delay.
130. Subsection (8) provides that, where the police delay sending intimation by virtue of section 38(5)(a) or (b) (which allows the police to delay sending intimation where the person to be contacted is someone the police fear will compromise the investigation or the apprehension of offenders), they must endeavour to contact another appropriate person in accordance with subsection (4)(a).

Section 40 – Right of under 18s to have access to other person

131. **Section 40** provides for children under 18 years of age in police custody to have access to another person.
132. Under subsection (1) all children under 16 years of age in police custody must have access, in the first instance, to any parent (defined in subsection (6) to include guardians and carers) to provide support. Subsection (1)(b) ensures that where a parent is not available, the child has access to another appropriate adult sent intimation under section 38, subject to the caveats in section 40(4).
133. Subsection (2) provides similar rights of access for those aged 16 or 17 years. However, in this case the adult granted access to the 16 or 17 year old does not have to be their parent (in line with section 38, which allows this age group to request that intimation be sent under that section to an adult other than their parent). As explained in section 39, intimation may be sent to more than one person. Subsection (3) provides that access need not be permitted to more than one person, subject to the caveats in section 40(4). Authorisation to restrict access under this section 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.

Section 41 – Social work involvement in relation to under 18s

134. **Section 41** makes provision for a local authority to be notified of the fact that a person is in police custody (and where the person is being held), where a constable believes that the person may be subject to a supervision order or has delayed intimation by virtue of section 38(5)(c). Following intimation under subsection (1), a local authority may arrange for someone to visit the person in custody if that person is subject to a supervision order or the local authority believes the person to be under 16 years of age and arranging a visit would best safeguard and promote the person’s wellbeing. The local authority must be satisfied the visit will be made within a reasonable time before arranging the visit (subsection (3)).
135. Where a local authority arranges for someone to visit the person in custody, sections 38 and 40 cease to have effect (subsection(4)(a)) until such time as the local authority confirms that the person in custody is over 16 years and subject to a supervision order. Sections 38 and 40 will then apply as if a constable believes the person to be under 16 years of age (subsection (7)). The person who the local authority arranges to visit the person in custody must be permitted access to that person (subsection (4)(b)) unless, in exceptional circumstances, such access would affect the investigation or prevention

of crime, the apprehension of offenders or the wellbeing of the person in custody (subsection (5)).

136. Where a local authority choose not to arrange a visit or could not do so within a reasonable time, the authority may advise a constable that the person to whom intimation is to be sent under section 38(3) should not be sent intimation if the authority has grounds to believe that such intimation may be detrimental to the person in custody and may give advice as to who might be an appropriate person to a constable who is considering the matter under section 39(7). The constable must have regard to any such advice (section 41(9)). Authorisation to restrict access under this section 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.

Vulnerable persons

Section 42 – Support for vulnerable persons

137. **Section 42** makes provision to identify vulnerable adults in police custody and to provide them with support to assist communication between them and the police. In practice, this support is provided by an appropriate adult though this term is not used in the Act.
138. To ensure support is provided as soon as is reasonably practicable, subsections (1), (2) and (4) provide that, where a police constable (who may have been advised that a person is vulnerable following an initial assessment by the police custody and security officer, who is a uniformed non-warranted officer, whose duties include attending to the wellbeing of a person in their custody) considers that a person in police custody is age 16 or over and is unable, because of a mental disorder, to understand what is happening or to communicate effectively, they must make sure that an appropriate adult is told where the person is being held, (this is not always at the police station and could be, for example, at a hospital) and that they require the support of an appropriate adult.
139. Subsection (3) provides that the role of the appropriate adult is to assist a vulnerable person to understand what is happening and to facilitate effective communication between the vulnerable person and the police.
140. Subsection (5) explains that “mental disorder” is as defined in section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003 (i.e. “any mental illness, personality disorder, learning disability however caused or manifested”). It also explains that references to the police are to constables or members of police staff as provided for in section 99 of the Police and Fire Reform (Scotland) Act 2012. This ensures that a constable can delegate certain tasks, such as intimation to an appropriate adult, to a civilian member of police staff.

Intimation and access to a solicitor

Section 43 – Right to have intimation sent to solicitor

141. **Section 43** affords a person in police custody the right to have a solicitor informed, as soon as reasonably practicable after a request is made by the person in police custody, that the person is being held in police custody, where they are being held and that the professional assistance of a solicitor is required. If the person has been officially accused of an offence (i.e. charged with the offence by the police or where a prosecutor has started proceedings in relation to the offence), the person has the right to have a solicitor informed whether they are to be released from custody or, if not, of the court before which the person is to be brought and the day on which the person will be brought before court.

Section 44 – Right to consultation with solicitor

142. **Section 44** provides for the right of a person in police custody to have a private consultation with a solicitor at any time. For the purposes of this section, a consultation is defined by subsection (4) as a consultation by such means as considered appropriate, for example, by telephone.
143. Under subsection (2) the police can delay the exercise of this right only so far as necessary in the interest of the investigation or prevention of crime, or the apprehension of offenders. Authorisation to delay the right to consultation 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.