

CRIMINAL JUSTICE (SCOTLAND) ACT 2016

EXPLANATORY NOTES

OVERVIEW OF THE ACT

Part 1 – Arrest and Custody

Chapter 1 – Arrest by police

Arrest without warrant

Section 1 – Power of a constable

15. **Section 1** sets out new powers of a police constable to arrest, without a warrant, a person suspected of having committed or to be committing an offence in Scotland. (Note, however, that the arrest regime under section 41(1) of the Terrorism Act 2000 is unaffected by this Act (see section 59)).
16. **Section 1(1)** provides that a constable (defined in section 62) who has reasonable grounds to suspect that a person has committed or is committing an offence may arrest that person without a warrant.
17. **Section 1(2)** qualifies the power of a constable to arrest a person without warrant for having committed an offence which is not punishable by imprisonment. Not only must a constable have reasonable grounds for suspecting the person, the constable must also be satisfied that the “interests of justice” would not be met if the person was not immediately arrested for the offence. Section 1(3) sets out factors that may be relevant in applying the “interests of justice” test referred to in section 1(2).
18. **Section 1(4)** provides clarity that an offence is only to be considered as not punishable by imprisonment in terms of subsection (2) if, as a matter of general application, a person, when convicted, cannot be sentenced to imprisonment. This means that the power operates even where the particular person arrested may not be imprisoned (due, most likely, to the person’s age).

Section 2 – Exercise of the power

19. **Section 2** sets out how the power of arrest set out in section 1 can be exercised.
20. **Section 2(1)** provides that a person may be arrested under section 1 multiple times for the same offence (e.g. a person may be arrested, questioned and released and subsequently arrested again if, for example, further evidence comes to light).
21. **Section 2(2)** clarifies that the power to arrest again does not apply to persons who have been “officially accused” (defined in section 63) of having committed the offence or an offence arising from the same circumstances. For example, where the police have a warrant to arrest a person, they cannot use the power of arrest to do so.
22. **Section 2(3)** creates a requirement that a constable who is not in uniform must show his or her identification, as soon as reasonably practicable, when requested to do so by a person being arrested.

Procedure following arrest

Section 3 – Information to be given on arrest

23. **Section 3** specifies the information which must be provided by a constable, as soon as is reasonably practicable, to an arrested person. The information will normally be provided immediately upon arrest.

Section 4 – Arrested person to be taken to police station

24. **Section 4** sets out the requirement on a constable to take an arrested person to a police station as soon as is reasonably practicable after arrest (if not arrested there). By virtue of section 45 a constable may use reasonable force when doing so.
25. **Section 4(2)** provides circumstances as to when the duty to take the person to the police station can cease to apply prior to arrival at a police station. It further provides that the person must in those circumstances be released from custody.
26. **Section 4(3)** also clarifies that the requirement to take the person to the police station will also cease to apply if, before arriving at a police station, that person is released under the provisions contained within section 25(2) or 28(3A) of the 1995 Act.

Section 5 – Information to be given at police station

27. **Section 5** sets out the information that must be provided to a person taken to a police station under arrest and to those arrested whilst at a police station.
28. In particular, section 5(2) and (3) set out various matters that the arrested person must be informed of, as soon as reasonably practicable, e.g. their right not to say anything other than to provide information relating to their name, address etc.; their rights to have intimation sent, and to have access, to solicitors and, where appropriate, persons such as parents or other persons capable of giving support; and their rights under Articles 3 and 4 of Directive 2012/13/EU of the European Parliament and of the Council, including, for example, a letter of rights which contains basic information to assist persons in understanding their rights.

Section 6 – Information to be recorded by police

29. **Section 6** details the information which must be recorded by a constable when a person is arrested under section 1.
30. **Section 6(1)** provides a list of the information to be recorded in respect of all arrests.
31. **Section 6(2)(a)** requires a constable who has released a person from custody under section 4(2) to record the reasons why that constable formed the opinion that there are no reasonable grounds for suspecting that the person committed the offence for which they were arrested. Section 6(2)(b) to (5) specifies the information that must be recorded in relation to a person arrested and held in police custody (defined in section 64) but not officially charged with an offence e.g. the time the person is informed of his right to silence under section 5 and right of intimation to another person and a solicitor under sections 38 and 43; the timing and outcome of a police decision on whether to authorise their continued custody; the time and outcome of any review of continued custody; the time a person is released from custody on conditions or charged.

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.

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

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.

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

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

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

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.
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.

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.

Chapter 6 – Police powers and duties

Powers of police

Section 45 – Use of reasonable force

144. **Section 45** enables a constable to use reasonable force to effect an arrest and when taking a person in custody to any place.

Section 46 – Common law power of entry

145. **Section 46** makes clear that any existing powers of a constable to enter any premises for any purposes are not affected by this Act. Those powers remain.

Section 47 – Common law power of search etc.

146. **Section 47(1)** similarly preserves any existing powers of a constable in relation to a person arrested and charged, for example, to search them, seize items in their possession and place them in an identification parade (this list is not exhaustive).

Section 48 – Power of search etc. on arrest

147. **Section 48** makes clear that the powers described in section 47(2) which can be exercised by a constable in relation to a person after arrest and charge can also be exercised between a person's arrest and the person being charged.

Section 49 – Taking drunk persons to designated place

148. **Section 49(1)** allows the police to take a person who is deemed to be drunk to a designated place (as designated by the Scottish Ministers) to be cared for instead of arresting the person for an offence. By using this power it does not, however, require the person to remain unwillingly at such a place nor does it prevent a constable from subsequently arresting the person.

Duties of police

Section 50 – Duty not to detain unnecessarily

149. **Section 50** provides that a constable must ensure that a person is not unreasonably or unnecessarily held in police custody.

Section 51 – Duty to consider child's wellbeing

150. **Section 51** states that in making decisions to arrest a child (defined for this section in subsection (3) as a person under 18 years of age), hold a child in police custody, interview a child about an offence which the child is suspected of committing, or charge a child with an offence, a constable must treat the need to safeguard and promote the well-being of the child as a primary consideration. This does not mean that the interests of the child are the only consideration or that they are, in all cases, the most important consideration. For example, the need to protect others may prevail.

Section 52 – Duties in relation to children in custody

151. **Section 52** states that a child who is in police custody at a police station should, so far as practicable, be prevented from associating with any adult who is officially accused of committing an offence unless a constable believes it would be detrimental to the child's wellbeing to prevent them from associating with that particular adult (subsection (2)).

Section 53 – Duty to inform Principal Reporter if child not being prosecuted

152. **Section 53** applies where a person is being kept in a place of safety (as defined in subsection (5)) in accordance with section 22(2) when it has been decided not to prosecute the person for any relevant offence (as defined in subsection (4)) but a constable has reasonable grounds for suspecting that the person has committed a relevant offence. The Principal Reporter must be informed as soon as reasonably practicable that the person is being kept in a place of safety until the Principal Reporter makes a direction under section 65(2) of the Children’s Hearings (Scotland) Act 2011.

Chapter 7 – General

Common law and enactments

Section 54 – Abolition of pre-enactment powers of arrest

153. **Section 54** provides that the only power of arrest which the police have to bring a person into police custody comes from Section 1 of this Act and Section 41(1) of the Terrorism Act 2000.

Section 55 – Abolition of requirement for constable to charge

154. **Section 55** provides that a constable does not have to charge a suspect with a crime at any time and abolishes any rule of law that requires such a charge to be made.

Section 56 – Consequential modification

155. **Section 56** introduces schedule 2 to the Act which contains details of changes to existing legislation as a consequence of Part 1. Paragraph 313 provides further detail in regard to Schedule 2.

Code of practice about investigative function

Section 57 – Code of practice about investigative functions

156. **Section 57** requires the Lord Advocate to issue a code of practice on the matters set out in subsection (1) and to keep such a code of practice under review.
157. **Section 57(3)** sets out that the code will apply to the Police Service of Scotland and such other bodies specified in the code who report offences to the procurator fiscal.
158. **Section 57(4)** contains a requirement for the Lord Advocate to publicly consult on the code and subsection (5) identifies the persons or groups that the Lord Advocate is required to consult when preparing the code.
159. **Section 57(6)** obliges the Lord Advocate to lay a copy of the code of practice before the Scottish Parliament.
160. **Section 57(7) and (8)** contain provisions relating to the legal status of the code and the effect of a breach of the code of practice.

Disapplication of Part

Section 58 – Disapplication in relation to service offences

161. **Section 58** clarifies that service offences are not included in this Part. Service offences are those offences committed by service personnel under the Armed Forces Act 2006.

Section 59 – Disapplication in relation to terrorism offences

162. **Section 59** provides that Part 1 of the Act, dealing with arrest and custody, does not apply to persons arrested under section 41(1) of the Terrorism Act 2000.

Powers to modify Part

Section 60 – Further provision about application of Part

163. **Section 60** provides that the Scottish Ministers may by regulations modify Part 1 to either provide that some or all of it applies to persons to whom it otherwise does not apply because of sections 58 and 59, or to dis-apply some or all of it so that it does not operate in relation to people who have been arrested otherwise than under section 1.

Section 61 – Further provision about vulnerable persons

164. **Section 61** allows the Scottish Ministers to modify, by regulations, the provisions which provide that those aged over 16 and who have a mental disorder are unable to consent to being interviewed without a solicitor being present.
165. **Section 61** allows the modification of the description of vulnerable persons in relation to whom support is to be sought, and allows modification of the definition of the type of support to be sought for vulnerable persons as currently set out under section 33. The Scottish Ministers will also be able to specify, for the purposes of section 42, those persons to be considered suitable for providing the support mentioned in section 42, including by reference to training, qualifications and experience.
166. **Section 61** also enables the Scottish Ministers to modify those provisions in sections 33 and 42 which provide definitions of certain relevant terms, in particular references to the police and the term “mental disorder”.
167. The effect of Section 61 is to allow the Scottish Ministers to alter the conditions under which sections 33 and 42 apply and the nature of the support referred to in section 42, and to make further provisions about that support.

Interpretation of Part

Section 62 – Meaning of constable

168. **Section 62** defines the meaning of constable for the purposes of this Part.

Section 63 – Meaning of officially accused

169. **Section 63** defines the meaning of the term “officially accused” for the purposes of this Part.

Section 64 – Meaning of police custody

170. **Section 64** defines the meaning of police custody for the purposes of this Part.