

Criminal Justice (Scotland) Act 2016

PART 1

ARREST AND CUSTODY

CHAPTER 5

RIGHTS OF SUSPECTS IN POLICE CUSTODY

Intimation and access to another person

38 Right to have intimation sent to other person

- (1) A person in police custody has the right to have intimation sent to another person of—
 - (a) the fact that the person is in custody,
 - (b) the place where the person is in custody.
- (2) Intimation under subsection (1) must be sent—
 - (a) where a constable believes that the person in custody is under 16 years of age, regardless of whether the person requests that it be sent,
 - (b) in any other case, if the person requests that it be sent.
- (3) The person to whom intimation is to be sent under subsection (1) is—
 - (a) where a constable believes that the person in custody is under 16 years of age, a parent of the person,
 - (b) in any other case, an adult reasonably named by the person in custody.
- (4) Intimation under subsection (1) must be sent—
 - (a) as soon as reasonably practicable, or
 - (b) if subsection (5) applies, with no more delay than is necessary.
- (5) This subsection applies where an appropriate constable considers some delay to be necessary in the interests of—
 - (a) the investigation or prevention of crime,
 - (b) the apprehension of offenders, or

- (c) safeguarding and promoting the wellbeing of the person in custody, where a constable believes that person to be under 18 years of age.
- (6) In subsection (5), "an appropriate constable" means a constable who—
 - (a) is of the rank of sergeant or above, and
 - (b) has not been involved in the investigation in connection with which the person is in custody.
- (7) The sending of intimation may be delayed by virtue of subsection (5)(c) only for so long as is necessary to ascertain whether a local authority will arrange for someone to visit the person in custody under section 41(2).
- (8) In this section and section 39—

"adult" means person who is at least 18 years of age,

"parent" includes guardian and any person who has the care of the person in custody.

Commencement Information

II S. 38 in force at 25.1.2018 by S.S.I. 2017/345, art. 3, sch. (with art. 4)

39 Right to have intimation sent: under 18s

- (1) This section applies where a constable believes that a person in police custody is under 18 years of age.
- (2) At the time of sending intimation to a person under section 38(1), that person must be asked to attend at the police station or other place where the person in custody is being held.
- (3) Subsection (2) does not apply if—
 - (a) a constable believes that the person in custody is 16 or 17 years of age, and
 - (b) the person in custody requests that the person to whom intimation is to be sent under section 38(1) is not asked to attend at the place where the person in custody is being held.
- (4) Subsections (5) and (6) apply where—
 - (a) it is not practicable or possible to contact, within a reasonable time, the person to whom intimation is to be sent by virtue of section 38(3),
 - (b) the person to whom intimation is sent by virtue of section 38(3), if asked to attend at the place where the person in custody is being held, claims to be unable or unwilling to attend within a reasonable time, or
 - (c) a local authority, acting under section 41(9)(a), has advised against sending intimation to the person to whom intimation is to be sent by virtue of section 38(3).
- (5) Section 38(3) ceases to have effect.
- (6) Attempts to send intimation to an appropriate person under section 38(1) must continue to be made until—
 - (a) an appropriate person is contacted and agrees to attend, within a reasonable time, at the police station or other place where the person in custody is being held, or

- (b) if a constable believes that the person in custody is 16 or 17 years of age, the person requests that (for the time being) no further attempt to send intimation is made.
- (7) In subsection (6), "an appropriate person" means—
 - (a) if a constable believes that the person in custody is under 16 years of age, a person the constable considers appropriate having regard to the views of the person in custody,
 - (b) if a constable believes that the person in custody is 16 or 17 years of age, an adult who is named by the person in custody and to whom a constable is willing to send intimation without a delay by virtue of section 38(5)(a) or (b).
- (8) The reference in subsection (4)(a) to its not being possible to contact a person within a reasonable time includes the case where, by virtue of section 38(5)(a) or (b), a constable delays sending intimation to the person.

Commencement Information

I2 S. 39 in force at 25.1.2018 by S.S.I. 2017/345, art. 3, sch. (with art. 4)

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

- (1) Access to a person in police custody who a constable believes is under 16 years of age must be permitted to—
 - (a) a parent of the person,
 - (b) where a parent is not available, a person sent intimation under section 38 in respect of the person in custody.
- (2) Access to a person in police custody who a constable believes is 16 or 17 years of age must be permitted to a person sent intimation under section 38 in respect of the person in custody where the person in custody wishes to have access to the person sent intimation.
- (3) Access to a person in custody under subsection (1) or (2) need not be permitted to more than one person at the same time.
- (4) In exceptional circumstances, access under subsection (1) or (2) may be refused or restricted so far as the refusal or restriction is necessary—
 - (a) in the interests of—
 - (i) the investigation or prevention of crime, or
 - (ii) the apprehension of offenders, or
 - (b) for the wellbeing of the person in custody.
- (5) A decision to refuse or restrict access to a person in custody under subsection (1) or (2) may be taken only by a constable who—
 - (a) is of the rank of sergeant or above, and
 - (b) has not been involved in the investigation in connection with which the person is in custody.
- (6) In this section, "parent" includes guardian and any person who has the care of the person in custody.

Modifications etc. (not altering text)

- C1 S. 40 applied (12.2.2019 for specified purposes, 13.8.2020 in so far as not already in force) by Counter-Terrorism and Border Security Act 2019 (c. 3), s. 27(1)(g), Sch. 3 para. 40(2)(c) (with s. 25(9)); S.I. 2020/792, reg. 2(g)
- C2 S. 40 applied (with modifications) (20.12.2023) by National Security Act 2023 (c. 32), s. 100(1), **Sch. 6 para. 17(2)(c)** (with s. 97); S.I. 2023/1272, reg. 2(a)

Commencement Information

I3 S. 40 in force at 25.1.2018 by S.S.I. 2017/345, art. 3, sch. (with art. 4)

41 Social work involvement in relation to under 18s

- (1) Intimation of the fact that a person is in police custody and the place where the person is in custody must be sent to a local authority as soon as reasonably practicable if—
 - (a) a constable believes that the person may be subject to a supervision order, or
 - (b) by virtue of subsection (5)(c) of section 38, a constable has delayed sending intimation in respect of the person under subsection (1) of that section.
- (2) A local authority sent intimation under subsection (1) may arrange for someone to visit the person in custody if—
 - (a) the person is subject to a supervision order, or
 - (b) the local authority—
 - (i) believes the person to be under 16 years of age, and
 - (ii) has grounds to believe that its arranging someone to visit the person would best safeguard and promote the person's wellbeing (having regard to the effect of subsection (4)(a)).
- (3) Before undertaking to arrange someone to visit the person in custody under subsection (2), the local authority must be satisfied that anyone it arranges to visit the person in custody will be able to make the visit within a reasonable time.
- (4) Where a local authority arranges for someone to visit the person in custody under subsection (2)—
 - (a) sections 38 and 40 cease to have effect, and
 - (b) the person who the local authority has arranged to visit the person in custody must be permitted access to the person in custody.
- (5) In exceptional circumstances, access under subsection (4)(b) may be refused or restricted so far as the refusal or restriction is necessary—
 - (a) in the interests of—
 - (i) the investigation or prevention of crime, or
 - (ii) the apprehension of offenders, or
 - (b) for the wellbeing of the person in custody.
- (6) A decision to refuse or restrict access to a person in custody under subsection (4)(b) may be taken only by a constable who—
 - (a) is of the rank of sergeant or above, and
 - (b) has not been involved in the investigation in connection with which the person is in custody.

- (7) Where a local authority sent intimation under subsection (1) confirms that the person in custody is—
 - (a) over 16 years of age, and
 - (b) subject to a supervision order,

sections 38 to 40 are to be applied in respect of the person as if a constable believes the person to be under 16 years of age.

- (8) Subsection (9) applies where a local authority might have arranged for someone to visit a person in custody under subsection (2) but—
 - (a) chose not to do so, or
 - (b) was precluded from doing so by subsection (3).
- (9) The local authority may—
 - (a) advise a constable that the person to whom intimation is to be sent by virtue of section 38(3) should not be sent intimation if the local authority has grounds to believe that sending intimation to that person may be detrimental to the wellbeing of the person in custody, and
 - (b) give advice as to who might be an appropriate person to a constable considering that matter under section 39(7) (and the constable must have regard to any such advice).
- (10) In this section, "supervision order" means compulsory supervision order, or interim compulsory supervision order, made under the Children's Hearings (Scotland) Act 2011.

Commencement Information

I4 S. 41 in force at 25.1.2018 by S.S.I. 2017/345, art. 3, sch. (with art. 4)

Changes to legislation:

Criminal Justice (Scotland) Act 2016, Cross Heading: Intimation and access to another person is up to date with all changes known to be in force on or before 21 June 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations.

View outstanding changes

Changes and effects yet to be applied to the whole Act associated Parts and Chapters:

Act expiry of affecting provision 2022 asp 8, sch. para. 15 by S.S.I. 2023/360 reg.
2(a)

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 38(7)(a) words renumbered as s. 38(7)(a) by 2024 asp 5 s. 15(6)(a)
- s. 38(7)(b) and word inserted by 2024 asp 5 s. 15(6)(b)
- s. 41(1A) inserted by 2024 asp 5 s. 15(7)(b)