



Criminal Justice (Scotland) Act 2016

2016 asp 1

PART 1

ARREST AND CUSTODY

CHAPTER 5

RIGHTS OF SUSPECTS IN POLICE CUSTODY

Modifications etc. (not altering text)

- C1** Pt. 1 Ch. 5 applied (with modifications) by 1994 c. 33, s. 137D(3)(b) Sch. 7B Pt. 2 (as inserted (31.1.2017 for specified purposes, 1.3.2018 in so far as not already in force) by [Policing and Crime Act 2017 \(c. 3\)](#), s. 116(1)(3), 183(1)(5)(e), [Sch. 16](#); S.I. 2018/227, art. 2(f))
- C2** Pt. 1 applied (with modifications) by 2003 c. 20, s. 31A (as inserted (25.1.2018) by [The Criminal Justice \(Scotland\) Act 2016 \(Consequential Provisions\) Order 2018 \(S.I. 2018/46\)](#), art. 2(2)(a)(f), [Sch. 2 para. 2](#) (with art. 6))
- C3** Pt. 1 applied (with modifications) by 1994 c. 33, s. 137ZA (as inserted (25.1.2018) by [The Criminal Justice \(Scotland\) Act 2016 \(Consequential Provisions\) Order 2018 \(S.I. 2018/46\)](#), art. 2(2)(a)(f), [Sch. 1 para. 4](#) (with art. 5(2)))
- C4** Pt. 1 Chs. 1-6 applied (with modifications) (25.1.2018) by [The Criminal Justice \(Scotland\) Act 2016 \(Consequential Provisions\) Order 2018 \(S.I. 2018/46\)](#), art. 2(2)(a)(f), [Sch. 3 Pt. 3](#) (with art. 7, Sch. 3 Pts. 5, 6)
- C5** Pt. 1 applied (with modifications) by 2004 c. 20, s. 56A (as inserted (25.1.2018) by [The Criminal Justice \(Scotland\) Act 2016 \(Consequential Provisions\) Order 2018 \(S.I. 2018/46\)](#), art. 2(2)(a)(f), [Sch. 2 para. 3](#) (with art. 6))
- C6** Pt. 1 Chs. 1-6 applied (with modifications) (25.1.2018) by [The Criminal Justice \(Scotland\) Act 2016 \(Consequential Provisions\) Order 2018 \(S.I. 2018/46\)](#), art. 2(2)(a)(f), [Sch. 3 Pt. 2](#) (with art. 7, Sch. 3 Pts. 5, 6)
- C7** Pt. 1 applied (with modifications) by 1987 c. 4, s. 2D (as inserted (25.1.2018) by [The Criminal Justice \(Scotland\) Act 2016 \(Consequential Provisions\) Order 2018 \(S.I. 2018/46\)](#), art. 2(2)(a)(f), [Sch. 2 para. 1](#) (with art. 6))
- C8** Pt. 1 Chs. 1-6 applied (with modifications) (25.1.2018) by [The Criminal Justice \(Scotland\) Act 2016 \(Consequential Provisions\) Order 2018 \(S.I. 2018/46\)](#), art. 2(2)(a)(f), [Sch. 3 Pt. 4](#) (with art. 7, Sch. 3 Pts. 5, 6)

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- C9** Pt. 1 Chs. 1-6 applied (with modifications) (25.1.2018) by [The Police Investigations and Review Commissioner \(Application and Modification of the Criminal Justice \(Scotland\) Act 2016\) Order 2017 \(S.S.I. 2017/465\)](#), arts. 14
- C10** Pt. 1 applied (with modifications) (25.1.2018) by [The Criminal Justice \(Scotland\) Act 2016 \(Consequential Provisions\) Order 2018 \(S.I. 2018/46\)](#), art. 2(2)(a)(f), **Sch. 4** (with art. 8)

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.

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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.

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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)

- C11** 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\(g\)](#)
- C12** 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—

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- (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

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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](#))

Vulnerable persons

42 Support for vulnerable persons

- (1) Subsection (2) applies where—
 - (a) a person is in police custody,
 - (b) a constable believes that the person is 16 years of age or over, and
 - (c) owing to mental disorder, the person appears to the constable to be unable to—
 - (i) understand sufficiently what is happening, or
 - (ii) communicate effectively with the police.
- (2) With a view to facilitating the provision of support of the sort mentioned in subsection (3) to the person as soon as reasonably practicable, the constable must ensure that intimation of the matters mentioned in subsection (4) is sent to a person who the constable considers is suitable to provide the support.
- (3) That is, support to—
 - (a) help the person in custody to understand what is happening, and
 - (b) facilitate effective communication between the person and the police.
- (4) Those matters are—
 - (a) the place where the person is in custody, and
 - (b) that support of the sort mentioned in subsection (3) is, in the view of the constable, required by the person.
- (5) In this section—
 - (a) “mental disorder” has the meaning given by section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003,
 - (b) the references to the police are to any—
 - (i) constable, or
 - (ii) person appointed as a member of police staff under section 26(1) of the Police and Fire Reform (Scotland) Act 2012.

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Modifications etc. (not altering text)

- C13** S. 42 modified by 2007 c. 11, s. 87(2B)(d) (as inserted (31.1.2017 for specified purposes) by [Policing and Crime Act 2017 \(c. 3\)](#), s. 183(1)(5)(e), [Sch. 17 para. 9\(2\)](#))
- C14** S. 42 modified by 2013 c. 22, Sch. 21 para. 42B(5) (as inserted (31.1.2017 for specified purposes) by [Policing and Crime Act 2017 \(c. 3\)](#), s. 183(1)(5)(e), [Sch. 17 para. 10\(3\)](#))
- C15** S. 42 modified by 2013 c. 22, Sch. 21 para. 42D(4) (as inserted (31.1.2017 for specified purposes) by [Policing and Crime Act 2017 \(c. 3\)](#), s. 183(1)(5)(e), [Sch. 17 para. 10\(3\)](#))
- C16** S. 42 modified by 2007 c. 11, s. 87(2D)(c) (as inserted (31.1.2017 for specified purposes) by [Policing and Crime Act 2017 \(c. 3\)](#), s. 183(1)(5)(e), [Sch. 17 para. 9\(2\)](#))

Commencement Information

- I5** S. 42 in force at 10.1.2020 by [S.S.I. 2019/363](#), [art. 3\(a\)](#) (with [art. 4](#))

Intimation and access to a solicitor

43 Right to have intimation sent to solicitor

- (1) A person who is in police custody has the right to have intimation sent to a solicitor of any or all of the following—
- (a) the fact that the person is in custody,
 - (b) the place where the person is in custody,
 - (c) that the solicitor's professional assistance is required by the person,
 - (d) if the person has been officially accused of an offence—
 - (i) whether the person is to be released from custody, and
 - (ii) where the person is not to be released, the court before which the person is to be brought in accordance with section 21(2) and the date on which the person is to be brought before that court.
- (2) Where the person requests that intimation be sent under subsection (1), the intimation must be sent as soon as reasonably practicable.

Modifications etc. (not altering text)

- C17** S. 43(1) applied (with modifications) by 1995 c. 46, s. 28A(3) (as inserted (25.1.2018) by [Criminal Justice \(Scotland\) Act 2016 \(asp 1\)](#), s. 117(2), [sch. 2 para. 30](#); [S.S.I. 2017/345](#), [art. 3](#), [sch.](#))

Commencement Information

- I6** S. 43 in force at 25.1.2018 by [S.S.I. 2017/345](#), [art. 3](#), [sch.](#) (with [art. 4](#))

44 Right to consultation with solicitor

- (1) A person who is in police custody has the right to have a private consultation with a solicitor at any time.
- (2) In exceptional circumstances, the person's exercise of the right under subsection (1) may be delayed so far as that is necessary in the interests of—
- (a) the investigation or the prevention of crime, or
 - (b) the apprehension of offenders.

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- (3) A decision to delay the person's exercise of the right under subsection (1) 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.
- (4) In subsection (1), “consultation” means consultation by such method as may be appropriate in the circumstances and includes (for example) consultation by telephone.

Commencement Information

I7 S. 44 in force at 25.1.2018 by [S.S.I. 2017/345](#), [art. 3](#), [sch.](#) (with [art. 4](#))

Changes to legislation:

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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\(7\)\(b\)](#)