
EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations modify Part 1 of the Criminal Justice (Scotland) Act 2016 in relation to its application to people who have been arrested by the police on a legal basis other than section 1 of the Act. Part 1 sets out the processes and procedures that are to be followed when the police arrest someone. Various amendments to other legislation which are consequential on the Part 1 modifications or on the Act itself are contained in the schedule.

Section 1 of the Act gives a police constable the power to arrest someone without a warrant on the strength of a suspicion that the person has committed an offence. But there are various other statutory powers under which a constable can arrest a person without a warrant. And a person may also be arrested by a constable under a court-granted warrant.

Sections 3 and 6 of the Act are framed in terms which presuppose that a person who has been arrested by a constable will have been arrested in respect of an offence. Paragraphs (2) and (4) of regulation 2 modify those sections to accommodate cases in which a person has been arrested on some other basis.

Section 4(1) of the Act requires that a person who has been arrested by a constable be taken as quickly as is reasonably practicable to a police station. However, some warrants and legislative provisions may require that a person arrested under their auspices be taken to a place specified in the warrant or legislation. This may result in a tension between the instruction in the warrant or legislation and the duty under section 4(1) to take everyone who has been arrested by a constable to a police station. To defuse any such tension, regulation 2(3)(a) amends section 4 of the Act relieving the police of the duty to take an arrestee to a police station where the arrestee is taken somewhere else instead in accordance with the terms of a warrant or an enactment.

Section 4(2) of the Act requires the police to release someone from custody without taking the person to a police station (as subsection (1) would otherwise require) if, before arriving at a police station, the person ceases to be suspected of the offence for which he or she was arrested. Section 4(2) is not relevant to a case in which the person was not arrested on the basis that he or she was suspected of committing an offence. Regulation 2(3)(b) therefore disapplies section 4(2) in such cases.

Chapter 2 of the Act sets out the rules under which someone can be arrested and held in custody for a limited period despite not being charged with an offence. The purposes for having this limited period during which a person can be held in custody without charge are to enable the police to question the person about the offence which the person is suspected of committing, and to give the police time to investigate the offence without leaving the suspected offender at large. These purposes are apparent from the terms of section 14 of the Act, which sets out the test which must be met if someone is to be kept in custody without charge. Chapter 2 of the Act is not relevant in a case where someone has been arrested otherwise than in respect of an offence. Accordingly, regulation 2(5) makes clear that it does not apply in such a case.

Section 21 of the Act requires that a person who has been arrested by a constable be brought before a court (assuming that the person has not been released from custody under section 25). Under section 21 as enacted, the requirement to bring anyone arrested before a court in cases where the arrest is effected under a warrant applies from the moment of arrest. Only a limited exception is provided in the case of a person arrested under a warrant granted under section 37. This exception does not cover other situations in which it would not be appropriate to require a person arrested under a warrant to be brought before a court. For example, a warrant may be granted to arrest a person so that samples can be taken from him or her. Regulation 2(6)(a) modifies section 21 so that

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the requirement to bring an arrested person before a court only applies in relation to persons arrested under those warrants which are granted for the purpose of bringing an accused before a court.

Regulation 2(6)(b) disapplies the requirement to bring an arrested person before a court under section 21 of the Act in the case of persons arrested without a warrant otherwise than in respect of an offence. Those statutes which give constables the power to arrest people without a warrant otherwise than in respect of an offence make their own provision requiring that people arrested under the powers they confer be brought before a court (see, for example, section 5 of the Protection from Abuse (Scotland) Act 2001). The consequential amendments in the schedule ensure that these provisions are applied to all such cases in place of section 21.

Sections 22 to 24 and 43 of the Act are framed on the basis of two assumptions. First, that the legal basis in respect of which someone who has been arrested will be brought before a court is section 21(2) of the Act. And, second, that a person who is to be brought before a court will have been officially accused of committing an offence. For the reasons set out above, these assumptions will not be sound in certain cases. Regulation 2(7) makes provision about how the sections in question apply in those cases.

Many of the provisions of Part 1 of the Act bear to apply to persons who are in police custody, as defined by section 64. Section 64 states that a person is in police custody from the moment of arrest until one of the events mentioned in section 64(2) occurs. Paragraph (8) of regulation 2 adds events to the list in section 64(2) so that it accommodates certain ways in which someone who has been arrested otherwise than under section 1 may cease to be in police custody.

Those arrested otherwise than under section 1 will have the rights conferred by Chapter 5 of Part 1 of the Act (intimation to another person, intimation to and right of consultation with solicitor etc.). Amendments in the schedule remove competing rights granted under earlier legislation in respect of those arrested under various special statutory powers.