

Consultation on regulations to modify Part 1 of the Criminal Justice (Scotland) Act 2016 to deal with arrests which do not relate to criminal offences and arrests under warrant

Consultation Paper

October 2016



Scottish Government
Riaghaltas na h-Alba
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Consultation Paper

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[October] 2016

1. FOREWORD BY THE CABINET SECRETARY FOR JUSTICE



Part 1 of the Criminal Justice (Scotland) Act 2016¹ will reform and modernise the system for arrest and custody procedures in Scotland. It will ensure that Scotland is at the forefront of human rights practice in the questioning, arrest and detention of suspects.

The Act contains procedures and protections which will apply to all arrests. While the majority of arrests are of people suspected of a criminal offence, there are arrests for other reasons - for example an arrest for a breach of a protective court order or a witness arrested under warrant to ensure they attend court. For these arrests, not all the procedures and protections set out in the Act are appropriate.

For this reason, it was set out during the passage of the Bill that some limited modification to the procedures was needed. It is my intention to set out these modifications in regulations under section 60 of the Act.

This public consultation is to allow adequate consideration to be given prior to the regulations being laid before Parliament. I look forward to hearing your views.

Michael Matheson
Cabinet Secretary for Justice

¹ <http://www.legislation.gov.uk/asp/2016/1/contents/enacted>

2. INTRODUCTION

2.1 The Criminal Justice (Scotland) Act 2016 (Part 1) “(CJ(S)A)” represents a significant change to the system for arresting and holding people in custody. The new arrest and custody process will provide a clear balance between the proper investigation of offences and the protection of suspects’ rights whilst in police custody. The Scottish Government are working closely with Police Scotland and other stakeholders to bring Part 1 into force in 2017. This consultation is part of that process.

2.2 The CJ(S)A contains procedures and protections which will apply to all arrests. While the majority of arrests are of people suspected of a criminal offence, there are arrests for other reasons - for example an arrest for a breach of a protective court order or a witness arrested under warrant to ensure they attend court. For these arrests, not all the procedures and protections set out in the Act are appropriate. Two examples of necessary modifications to the CJ(S)A are given below

(i). **Arrests other than on suspicion of criminal offences- information about the offence:** The CJ(S)A sets out the information to be given to a person upon arrest and this includes the nature of the suspected offence. With these types of arrests, where there is no offence suspected, the regulations which are explained below introduce a modification to the information that has to be given to the arrested person.

(ii) **Arrests under warrant or under specific legislation: where a person can be taken when arrested:** The CJ(S)A sets out that an arrested person must be taken to a police station, and this is not appropriate for certain types of arrest. For these arrests, these regulations enable the police to retain the flexibility to take an arrested person to the place indicated on the warrant or in legislation (for example a court or prison) without first going to a police station.

2.3 The necessary changes can be made by regulations under section 60 of the CJ(S)A, which allows the Scottish Ministers to modify or dis-apply sections of Part 1 of the CJ(S)A to persons arrested otherwise than under the new power of arrest under section 1.

2.4 The purpose of this consultation is to seek feedback on how Part 1 of the CJ(S)A should apply to non-offending arrests, including certain warrant arrests. This will be used to shape the final regulations made under section 60. A draft set of regulations is included in **Annex D**. The regulations will be subject to parliamentary scrutiny by way of the affirmative procedure.

3. Arrests which do not relate to criminal offences

Why are these regulations needed?

3.1. Regulations are required to ensure the enhanced rights brought in through the CJ(S)A also apply to people arrested other than on suspicion of an offence, but with

appropriate modifications. Minor modifications are required to ensure these arrests fit within the new arrest and custody system introduced by the CJ(S)A, but otherwise the draft regulations propose no change to the way these arrests are dealt with currently by the police and courts.

3.2 If regulations are not produced then the rights a person is entitled to whilst in police custody would be derived both from Part 1 of the CJ(S)A and the specific statutes detailed below. Some of the provisions in Part 1 of the CJ(S)A assume the arrested person is suspected of a criminal offence. Some of the rights in the Acts listed below in paragraph 3.5 do not take account of new safeguards provided under Part 1.

3.3 There are also rules about bringing people before the courts after they have been arrested, which are set out in the legislation listed below in paragraph 3.5. Many of the provisions within Part 1 will also apply and some tailoring will need to be done to Part 1 to accommodate these special types of arrest and adjust how the original legislation interacts with Part 1. This will ensure that there is as much consistency of approach as possible when bringing a person before the courts and protecting their rights within police custody before they get there.

Which arrests will be affected by the regulations?

3.4 The police can arrest people who are not suspected of criminal offences when a power of arrest is attached by a court to a protective interdict or other court order. The power of arrest allows the police to arrest a person who breaches an interdict or court order even though this is a civil law matter.

3.5 A court can attach a power of arrest to protective interdicts or court orders granted under the following legislation:

- **Adult Support and Protection (Scotland) Act 2007²** (section 25)
This allows the court to attach a power of arrest to a banning order or temporary banning order. These orders are designed to protect the rights of adults at risk of harm and can:
 - prohibit the subject from being in a specific place or area,
 - prohibit the subject from removing property from a specified area, and
 - impose other such measures in order to protect the property of the adult at risk of harm.

- **Children (Scotland) Act 1995³** (section 78)
This allows the court to attach a power of arrest to an order excluding a person from a child's family home (an 'exclusion order').

- **Protection from Abuse (Scotland) Act 2001⁴** (section 1)
This allows the court to attach a power of arrest to interdicts granted to protect individuals from abuse.

² <http://www.legislation.gov.uk/asp/2007/10/part/1/crossheading/banning-orders>

³ <http://www.legislation.gov.uk/ukpga/1995/36/part/III/chapter/3/crossheading/exclusion-orders>

⁴ <http://www.legislation.gov.uk/asp/2001/14/contents>

- **Matrimonial Homes (Family Protection)(Scotland) Act 1981**⁵ (section 15)
This **section** enabled the court to attach a power of arrest to interdicts granted to protect individuals from abuse by their spouse. This section of the 1981 Act has been repealed and replaced by powers in the Protection from Abuse (Scotland) Act 2001. This means that no new powers of arrest can be created under this section, however interdicts previously granted under this Act remain valid and enforceable.⁶
- **Civil Partnership Act 2004**⁷ (section 114)
This section enabled the court to attach a power of arrest to interdicts granted to protect individuals from abuse by their civil partners. This section of the 2004 Act has been repealed. This means that no new powers of arrest can be created under this section. however interdicts previously granted under this 2004 Act remain valid and enforceable. It is not thought that any interdicts/powers of arrest made under this section are in existence.

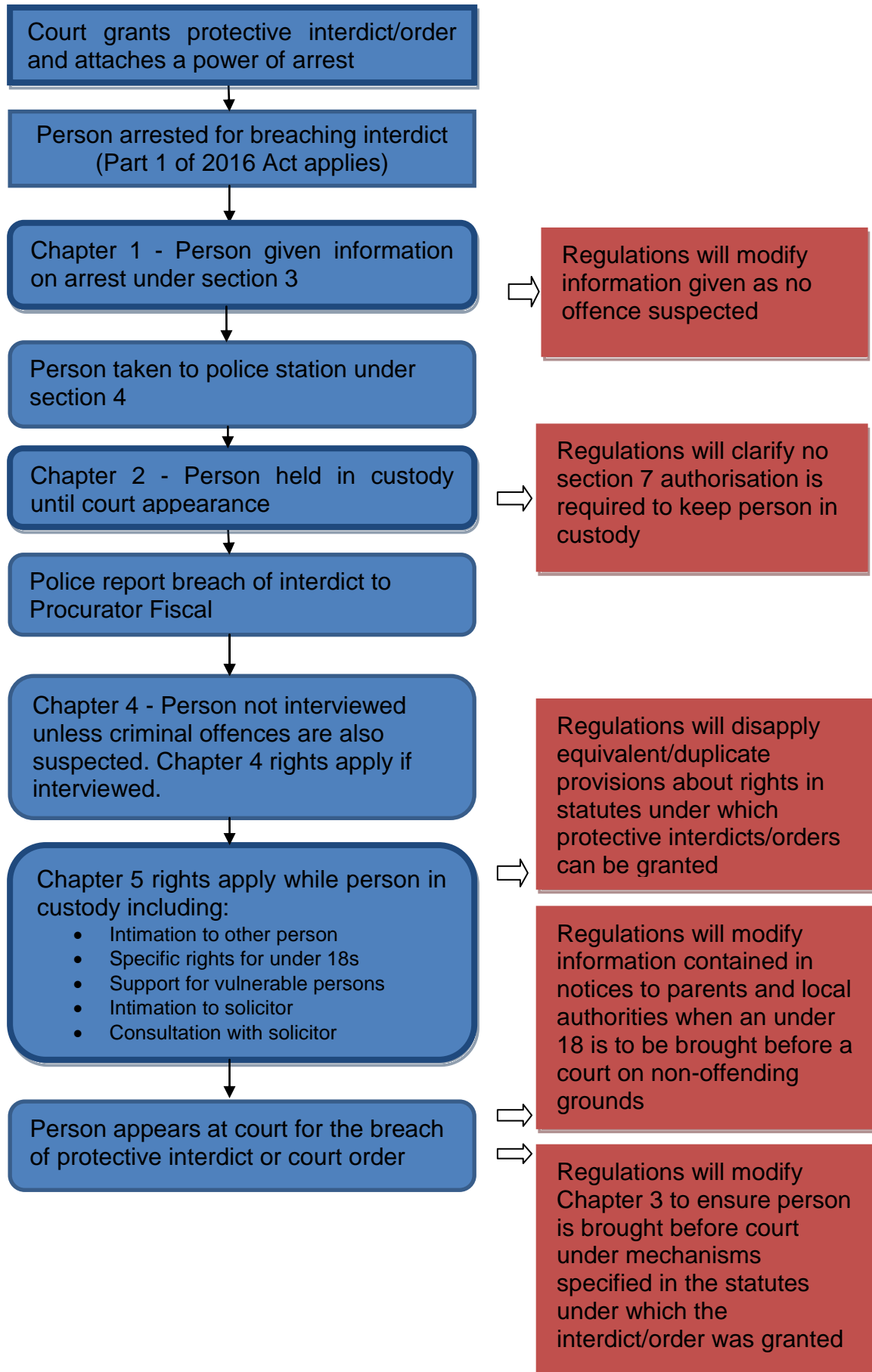
⁵ <http://www.legislation.gov.uk/ukpga/1981/59/contents>

⁶ The **Family Law (Scotland) Act 2006**, repealed the arrest regimes in both the **Matrimonial Homes (Family Protection)(Scotland) Act 1981** and **Civil Partnership Act 2004**. It replaced them with a general attachment of a power of arrest to any interdict for protection against abuse within the **Protection of Abuse (Scotland) Act 2001**

⁷ <http://www.legislation.gov.uk/ukpga/2004/33/part/3/chapter/4>

Proposed modification

3.6 The summary below sets out how the proposed regulations will amend part 1 of the CJ(S)A for arrest for breach of protective interdict/court order with further explanation following.



Chapter 1 – Arrest by Police (sections 3 to 6)

3.7 Chapter 1 of the CJ(S)A makes provision about the information an arrested person must be given upon arrest and on arrival at a police station. When a suspect for a criminal offence is arrested they are informed of the offence for which they have been arrested, but there is no criminal offence involved when a person is arrested for breach of interdict.

3.8 A modification is proposed to so that a person would only be told about the nature of the offence they have been arrested for if indeed they had been arrested for a criminal offence. The police will still be under a duty to provide the other information contained within section 3. This includes the requirement for the person to be told that they are under arrest and the reason they have been arrested. The other information that a person is told on arrest will remain the same as for those arrested for criminal offences such as their rights regarding solicitor intimation and access under sections 43 and 44 of the CJ(S)A.

Chapter 2 – Custody: Person not officially accused (sections 7 to 19)

3.9 Chapter 2 of the CJ(S)A contains stringent tests that must be applied to decide whether it is necessary and proportionate to keep a suspect in police custody whilst a criminal offence is being investigated. When someone is arrested on other grounds, there is no on-going criminal investigation and none of the tests contained within Part 1 should apply. This is because the person is in police custody for the purposes of appearing before a court to answer for the alleged breach of interdict or other court order.

3.10 A modification to section 7 of the CJ(S)A is proposed to clarify that none of the tests contained within chapter 2 will apply to arrests which do not relate to criminal offences.

Chapter 3 – Custody: Person officially accused (sections 20 to 30)

3.11 Chapter 3 of the CJ(S)A provides mechanisms for either putting someone before the courts or liberating them once they have been charged with an offence. Each of the Acts listed in paragraph 3.5 have bespoke mechanisms which allow for arrested persons to be put before the courts. A modification is proposed to allow these existing mechanisms to still apply.

3.12 Modifications are also proposed in relation to under 18s arrested under powers attached to protective interdicts and orders. The protective interdicts and orders listed above do not have the additional protections contained in the CJ(S)A in place for those under 18. These additional protections will ensure:

- appropriate information about the arrest of under 18s is included in notices to parents and local authorities under sections 23 and 24 of the CJ(S)A.
- Minor modifications of the provisions in sections 22 to 24 CJ(S)A will ensure that their wording extends to non-offence arrests of young people.

Chapter 4 - Police Interview (sections 31 to 37)

3.13 Chapter 4 of the CJ(S)A contains provisions relating to the rights of suspects before and during a police interview. People who are arrested under powers which do not relate to criminal offences do not require a police interview unless the police are also investigating criminal matters.

3.14 The rights in chapter 4 only apply when a person is to be interviewed so there is no need to disapply it in the regulations.

3.15 There are often other criminal matters that are alleged by complainers in addition to the breach of interdict or order. For example in many domestic abuse cases there are also allegations of stalking (section 39 Criminal Justice and Licensing (Scotland) Act 2010), breach of the peace and on some occasions assault. In these instances the criminal offence would take precedence over the non-criminal interdict or order and the whole of Part 1 would apply to the criminal arrest. A police interview could be required in these situations depending on the evidence available and in that case the rights in Chapter 4 would apply.

Chapter 5 – Rights of suspects in police custody (sections 38 to 44)

3.16 Chapter 5 of the CJ(S)A deals with the rights of a person whilst in police custody. These are rights given to all people arrested regardless of whether the arrest relates to a criminal offence. They include the right to have intimation of a person's arrest given to another person and also to a solicitor. Chapter 5 also contains specific intimation, access rights and duties for the police in relation to children.

3.17 The Acts listed above listed in paragraph 3.5 also set out rights for people arrested under powers attached to interdicts and court orders. It is necessary to clarify whether these rights or the Part 1 rights should apply. The Part 1 rights are enhanced versions of the same rights. For example Part 1 includes enhanced rights for persons under 18 and new access rights whilst they are in police custody. There are also special provisions for under 18's in relation to intimation and consultation rights to solicitors⁸. Whilst it cannot be excluded it is anticipated that limited examples of children being arrested on these grounds will be rare.

3.18 Amendments are proposed to ensure that the rights in Chapter 5 will replace the rights set out in the individual Acts listed above. This will allow for a consistent approach to be taken by the police when persons are being given their rights at the police station.

Chapter 6 – Police powers and duties (sections 45 to 53)

3.19 Chapter 6 deals with the general powers and duties of the police when carrying out their functions in relation to arrest. It includes duties to ensure that people are not detained unnecessarily and duties in relation to the wellbeing of

⁸ <http://www.legislation.gov.uk/asp/2016/1/part/1/chapter/5/enacted>

children whilst in police custody. It is considered that these duties should apply when arresting people otherwise than in relation to criminal offences. No amendments are required to achieve this.

Chapter 7 – General (sections 54 to 64)

3.20 Chapter 7 deals with various topics including the regulatory powers contained within section 60 of the CJ(S)A to modify and dis-apply Part 1 to accommodate non-offending arrests.

3.21 Section 64 which deals with police custody will require to be modified in light of the proposed regulations. A modification will allow for a person to be deemed released from police custody when they are released to an establishment where an enactment entitles them to be taken such as a prison.

Question 1 - Do you agree that Part 1 of the Criminal Justice (Scotland) Act 2016 needs to be modified to deal with people arrested for breach of protective interdicts and other court orders?

Question 2 - If yes, do you believe that the modifications outlined above are appropriate?

Question 3 - Do you agree that the protections in sections 22, 23 and 24 of the 2016 Act should apply to a child arrested on non-offending grounds and held for court?

4. Arrests under a Warrant and other statutory arrest powers: Where a person can be taken upon arrest

Requirement to take arrested person to a police station

4.1. It is also proposed that Part 1 should be modified so as to provide flexibility regarding where a person arrested on a warrant should be taken upon arrest. Section 4 of the CJ(S)A requires that all arrested persons should be taken to a police station as soon as reasonably practicable. This is not always appropriate or necessary with some arrests on warrant.

Warrants for arrest of witnesses

4.2 Warrants can be issued for the arrest of witnesses who fail to appear at court. The main reason for issuing the warrant is to secure the witness's attendance at court in a timely fashion. A requirement to take them to a police station, process them and then take them to court may not be helpful in this situation. It may however be necessary to take the person to a police station if they are arrested after the court closes and they require to be held in police custody until the court re-opens. In some cases the witness may later be dealt with for contempt of court but this will only happen after the witness attends court and if the Sheriff or Judge decides on this course of action.

4.3 Under the current arrangements within the CJ(S)A witnesses arrested for failing to appear at court would have to go through the custody process at the police station prior to being taken to court. It would be useful to create flexibility within section 4 to allow witnesses to be taken directly to court in circumstances where the Sheriff or Judge directs this to happen.

Other arrests

4.4 There are other arrest warrants and statutory powers of arrest that require persons to be taken elsewhere other than a police station or indeed a court. These include:

- **Criminal Law Act 1977 - Extract Conviction warrant for imprisonment in default of payment of fine⁹ (Section 38A)**
- **Prisoners and Criminal Proceedings (Scotland) Act 1993 – Revocation of licence¹⁰ (Section 17)**
- **Prisons (Scotland) Act 1989 – unlawfully at large¹¹ (Section 40)**

4.5 None of these provisions specifically require a person to be taken to a police station before being taken to the place indicated on the warrant or in legislation. In the majority of cases they should be taken directly to the place indicated in the warrant or legislation, such as a prison. In particular section 40(1) of the Prisons (Scotland) Act 1989 specifically states that the person arrested should be taken to the place in which he is required in accordance with law to be detained. There may however be circumstances for example where these other establishments are not able to receive the arrested person. This would require the police to take a person to a police station until that establishment opens again.

4.6 For these types of arrests under warrant or particular legislation there are no court proceedings resulting from the arrest and the only purpose of the arrest is to take the arrested person to a place directed on the warrant or under the legislation. In these circumstances it could be considered to be an unnecessary and bureaucratic process to take them to a police station. The exception would be if the other place directed on the warrant or in the legislation was not open to receive the arrested person, in which case it would be appropriate for the person to be taken into police custody system until they could be transferred to the other place. In these situations there is no requirement for them to be in police custody any longer than is absolutely necessary, but they should be given the same rights and entitlements as any other person in police custody.

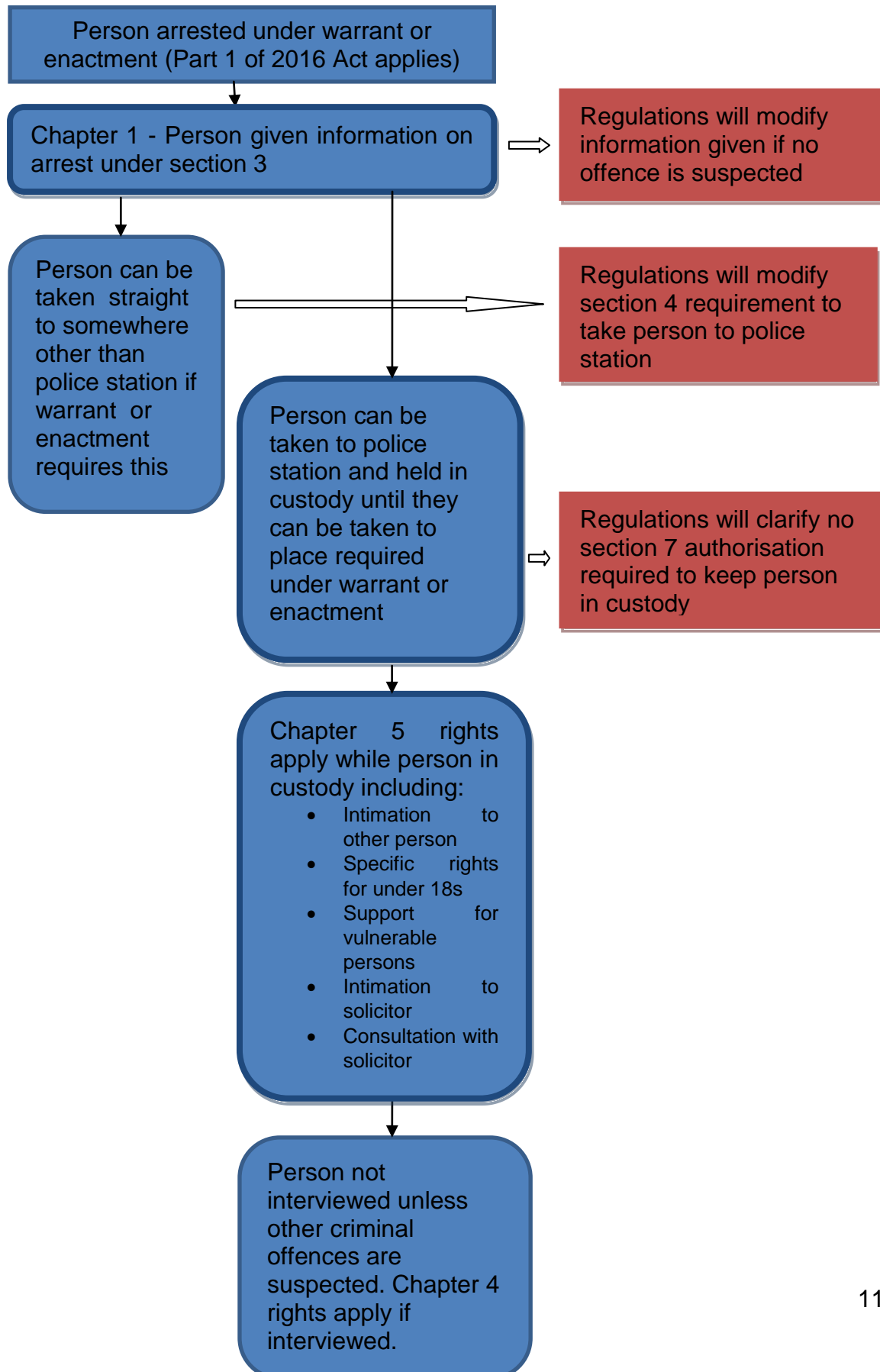
⁹ <http://www.legislation.gov.uk/ukpga/1977/45/section/38A>

¹⁰ <http://www.legislation.gov.uk/ukpga/1993/9/section/17>

¹¹ <http://www.legislation.gov.uk/ukpga/1989/45/section/40>

Proposed modification

4.7 The summary below sets out how the proposed regulations will amend part 1 of the CJ(S)A for arrest under warrant / enactment specifying the place to which the person should be taken with further explanation following.



4.8 A modification is proposed to disapply the requirement to take all arrested individuals to a police station after arrest if the warrant or enactment the person was arrested under requires them to be taken to a particular place other than a police station and if taking the person to that place would be unnecessarily delayed by taking them to a police station first. This would provide flexibility to take a person to the place where they are meant to be, but would still allow a person to be taken to a police station when that other place is not available.

4.9 This requires a related amendment to the meaning of police custody in section 64 of the 2016 Act. This would clarify that the person would cease to be in police custody when the police hand them over to a court, hospital or prison in the situations described above.

Question 4 Do you agree that section 4 of the Criminal Justice (Scotland) Act 2016 should be modified to allow a person to be taken directly to a place other than a police station if a warrant or other enactment provides for this to happen?

Question 5 Are any other modifications required?

5. Annex A

Responding to this Consultation

We are inviting responses to this consultation by 16th January 2017

Please respond to this consultation using the Scottish Government's consultation platform, Citizen Space. You view and respond to this consultation online at

<https://consult.scotland.gov.uk/police-division/part-1-of-the-criminal-justice-scotland-act>

You can save and return to your responses while the consultation is still open.

Please ensure that consultation responses are submitted before the closing date of 16th January 2017

If you are unable to respond online, please complete the Respondent Information Form (see "Handling your Response" below) to:

Steven Tidy
Police Division
Safer Communities
St Andrew's House
Edinburgh
EH1 3DG

If you have any queries, contact Steven Tidy on 0131 244 9231

Handling your response

If you respond using Citizen Space (<http://consult.scotland.gov.uk/>), you will be directed to the Respondent Information Form. Please indicate how you wish your response to be handled and, in particular, whether you are happy for your response to be published.

If you are unable to respond via Citizen Space, please complete and return the Respondent Information Form attached included in this document. If you ask for your response not to be published, we will regard it as confidential, and we will treat it accordingly.

All respondents should be aware that the Scottish Government is subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

Next steps in the process

Where respondents have given permission for their response to be made public, and after we have checked that they contain no potentially defamatory material,

responses will be made available to the public at <http://consult.scotland.gov.uk>. If you use Citizen Space to respond, you will receive a copy of your response via email.

Following the closing date, all responses will be analysed and considered along with any other available evidence to help us. Responses will be published where we have been given permission to do so.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them

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Safer Communities
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Scottish Government consultation process

Consultation is an essential part of the policy-making process. It gives us the opportunity to consider your opinion and expertise on a proposed area of work.

You can find all our consultations online: <http://consult.scotland.gov.uk>. Each consultation details the issues under consideration, as well as a way for you to give us your views, either online, by email or by post.

Consultations may involve seeking views in a number of different ways, such as public meetings, focus groups, or other online methods such as Dialogue (<https://www.ideas.gov.scot>)

Responses will be analysed and used as part of the decision making process, along with a range of other available information and evidence. We will publish a report of this analysis for every consultation. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.



6. Annex B

Consultation on regulations to modify Part 1 of the Criminal Justice (Scotland) Act 2016 to deal with arrests which do not relate to criminal offences and arrests under warrant

RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response.

Are you responding as an individual or an organisation?

- Individual
 Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
 Publish response only (anonymous)
 Do not publish response

We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Yes

No

Question 1

Do you agree that Part 1 of the Criminal Justice (Scotland) Act 2016 needs to be modified to deal with people arrested for breach of protective interdicts and other court orders?

Comments

Question 2

If yes, do you believe that the modifications outlined above are appropriate?

Comments

Question 3

Do you agree that the protections in sections 22, 23 and 24 of the 2016 Act should apply to a child arrested on non-offending grounds and held for court?

Comments

Question 4

Do you agree that section 4 of the Criminal Justice (Scotland) Act 2016 should be modified to allow a person to be taken directly to a place other than a police station if a warrant or other enactment provides for this to happen?

Comments

Question 5

Are any other modifications required?

Comments

7. Annex C

THE SCOTTISH GOVERNMENT CONSULTATION PROCESS

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government website enabling a wider audience to access the paper and submit their responses.

Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565). All Scottish Government consultation papers and related publications (eg, analysis of response reports) can be accessed at: Scottish Government consultations (<http://www.scotland.gov.uk/consultations>).

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise, the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

10. Annex [D]

Draft Regulations laid before the Scottish Parliament under section 60(4) and section 115(2)(a) of the Criminal Justice (Scotland) Act 2016, for approval by resolution of the Scottish Parliament.

DRAFT SCOTTISH STATUTORY INSTRUMENTS

201* No.

CRIMINAL PROCEDURE

POLICE, SCOTLAND

The Criminal Justice (Scotland) Act 2016 (Modification of Part 1 and Ancillary Provision) Regulations 201*

Made-----***

Coming into force-----***

The Scottish Ministers make the following Regulations in exercise of the powers conferred by section 60(1)(b) and (2) and section 115(1) of the Criminal Justice (Scotland) Act 2016^(a) and all other powers enabling them to do so.

In accordance with section 60(4) and section 115(2)(a) of that Act, a draft of this instrument has been laid before and approved by resolution of the Scottish Parliament.

Citation and commencement

1. These Regulations may be cited as the Criminal Justice (Scotland) Act 2016 (Modification of Part 1 and Ancillary Provision) Regulations 201* and come into force on ***.

Modification of the Criminal Justice (Scotland) Act 2016

2. ___(1) The Criminal Justice (Scotland) Act 2016 is amended as follows.

(2) In section 3(b), after “arrested” insert “(if any)”.

^(a) 2016 asp 1.

(3) In section 4-

(a) after subsection (1) insert-

“(1A) But subsection (1) need not be complied with if-

- (a) either the warrant under which the person was arrested or an enactment requires that following the arrest the person be taken to a particular place (other than a police station), and
- (b) the taking of the person to that place would be unnecessarily delayed by taking the person to a police station first.”;

(b) in subsection (2)(a), after “arrested” insert “in respect of an offence”.

(4) In section 6(1), for paragraph (b) substitute-

“(b) either-

- (i) the general nature of the offence in respect of which the person is arrested, or
- (ii) if the person is arrested otherwise than in respect of an offence, the reason for the arrest.”.

(5) In section 7(1)(a), after “arrested” insert “in respect of an offence”.

(6) In section 21(1)-

- (a) in paragraph (a), for the words from “(other” to “37(1))”, substitute “granted for the purpose of having the person brought before a court in connection with an offence which the person is officially accused of committing”;
- (b) in paragraph (b), after “arrested” insert “in respect of an offence”.

(7) After section 57 insert-

“Modifications to Part as it applies in certain cases

57A Arrest without warrant otherwise than in respect of an offence

(1) In a case where-

- (a) a constable arrests a person without a warrant, and
- (b) the arrest is not in respect of an offence,

this Part applies subject to the modifications set out in section 57C.

(2) For the avoidance of doubt, where it is stated (in whatever terms) that a provision applies in the case of a person arrested without a warrant only if the arrest is in respect of an offence, subsection (1) does not cause that provision to apply in the case of a person who has been arrested otherwise than in respect of an offence.

57B Arrest under warrant other than an initiating warrant

(1) In a case where a person is arrested by a constable under a relevant warrant, this Part applies subject to the modifications set out in section 57C.

(2) For the avoidance of doubt, subsection (1) does not cause section 21(2) to apply in the case of a person arrested under a relevant warrant.

(3) In this section, “relevant warrant” means any warrant other than one granted for the purpose of having a person brought before a court in connection with an offence which the person is officially accused of committing.

57C Modifications applying by virtue of sections 57A and 57B

(1) The modifications referred to in sections 57A(1) and 57B(1) are as follows.

(2) Chapter 3 applies as though for the words “brought before a court in accordance with section 21(2)” (in each place where they occur) there were substituted “brought before a court in accordance with an enactment, rule of law or a term of the warrant under which the person was arrested”.

(3) Section 23(2) applies as though-

(a) paragraph (c) read “the reason that the person is to be brought before the court”, and

(b) paragraph (d) were omitted.

(4) Section 24 applies as though-

(a) in subsection (3)(c), for the words “officially accused” there were substituted “informed that the person is to be brought before a court”, and

(b) subsection (4)(c) read “the reason that the person is to be brought before the court”.

(5) Section 43(1) applies as though for paragraph (d) there were substituted-

“(d) if there is a requirement to bring the person before a court in accordance with an enactment, rule of law or a term of the warrant under which the person was arrested-

(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 the requirement and the date on which the person is to be brought before that court.”.

(8) In section 64(2), after paragraph (c) insert-

“(ca) the person is brought before a court in accordance with-

(i) any other enactment or rule of law which requires that a person in custody be brought before a court, or

(ii) a term of the warrant under which the person was arrested,

- (cb) the person is transferred in accordance with the law into the custody of a person who is neither-
- (i) a constable, nor
 - (ii) a member of police staff appointed under section 26(1) of the Police and Fire Reform (Scotland) Act 2012^(a), ”.

Ancillary provision

3. The modifications set out in the Schedule have effect.

Name
[A member of the Scottish Government]

St Andrew's House,
Edinburgh

^(a) 2012 asp 8.

ANCILLARY PROVISION

Modification of the Matrimonial Homes (Family Protection) (Scotland) Act 1981

1. Section 17 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981^(a), insofar as it continues to have effect despite its repeal, does so as though it were modified as follows-

- (a) in subsection (1), paragraph (b) and the word “, and” immediately preceding it were omitted;
- (b) subsection (3) were omitted;
- (c) after subsection (3) there were inserted-
 - “(3A) Subsections (4) and (5) apply when the procurator fiscal has decided that no criminal proceedings are to be taken in respect of the facts and circumstances which gave rise to the arrest under section 15(3) of this Act.”;
- (d) in subsection (4), for “subsection (1)” there were substituted “subsection (3A)”.

Modification of the Children (Scotland) Act 1995

2. Section 78 of the Children (Scotland) Act 1995^(b) is modified as follows-

- (a) in subsection (10), paragraph (b) and the word “, and” immediately preceding it are omitted;
- (b) subsection (12) is repealed;
- (c) before subsection (13) insert-
 - “(12A) Subsection (13) applies where-
 - (a) a person is brought before the sheriff under subsection (11) above; and
 - (b) the procurator fiscal has decided that no criminal proceedings are to be taken in respect of the facts and circumstances which gave rise to the arrest.”;
- (d) in subsection (13), for “a person is brought before the sheriff under subsection (11) above” substitute “this subsection applies”;
- (e) after subsection (13) insert-
 - “(13A) Subsection (14) applies where-
 - (a) a person has been liberated under subsection (7)(a) above; or
 - (b) the following conditions are met-
 - (i) a person is to be brought before the sheriff under subsection (11) above; and

^(a) 1981 c.59.

^(b) 1995 c.36.

(ii) the procurator fiscal has decided that no criminal proceedings are to be taken in respect of the facts and circumstances which gave rise to the arrest.”;

(f) in subsection (14)-

(i) for the words from the beginning to “subsection (11) above” substitute “Where this subsection applies”;

(ii) for the words from “in the case of” to “, before that” substitute “where the conditions in subsection (13A)(b) above are met, before the”.

Modification of the Protection from Abuse (Scotland) Act 2001

3.____(1) The Protection from Abuse (Scotland) Act 2001^(a) is modified as follows.

(2) In section 4-

(a) in subsection (2)-

(i) the words from “informed” to “practicable and” are omitted;

(ii) paragraph (a) is omitted;

(b) subsections (3) to (5) are repealed.

(3) In section 5-

(a) in subsection (1), from the words from the beginning to “detained” substitute “Where a person is detained under section 4(2), the”;

(b) after subsection (2) there is inserted-

“(2A) Subsections (3) to (5) apply where, on being brought before the sheriff under this section, the detained person is not accused on petition or charged on complaint with an offence in respect of the facts and circumstances giving rise to the arrest.”.

Modification of the Civil Partnership Act 2004

4. Section 116 of the Civil Partnership Act 2004^(b), insofar as it continues to have effect despite its repeal, does so as though it were modified as follows-

(a) in subsection (1), paragraph (b) and the word “, and” immediately preceding it were omitted;

(b) subsection (4) were omitted;

(c) after subsection (4) there were inserted-

“(4A) Subsections (5) to (7) apply where the procurator fiscal has decided that no criminal proceedings are to be taken in respect of the facts and circumstances which gave rise to the arrest under section 114(4).”;

(d) in subsection (5), for “subsection (1)” there were substituted “subsection (4A)”.

^(a) 2001 asp 14.

^(b) 2004 c.33.

Modification of S.S.I. 2006/212

5.__(1) Article 13 of the Family Law (Scotland) Act 2006 (Commencement, Transitional Provision and Savings) Order 2006^(a) is modified as follows.

(2) The existing text of the article becomes paragraph 1 of the article.

(3) After that paragraph, insert-

“(2) Paragraph (1) applies subject to [regulation 3 of, and paragraphs 1 and 4 of the Schedule to, the Criminal Justice (Scotland) Act 2016 (Modification of Part 1 and Consequential Modifications) Regulations 201*].”.

Modification of the Adult Support and Protection (Scotland) Act 2007

6.__(1) The Adult Support and Protection (Scotland) Act 2007^(b) is modified as follows.

(2) In section 28, subsection (2) is repealed.

(3) In section 29(1), paragraph (a) is omitted.

(4) Section 30 is repealed.

(5) Section 31 is repealed.

(6) In section 32-

(a) in subsection (1), paragraph (b) and the word “, and” immediately preceding it are omitted;

(b) in subsection (2), paragraph (b) and the word “, and” immediately preceding it are omitted.

^(a) S.S.I.2006/12.

^(b) 2007 asp 10.

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations make modifications to 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 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, paragraph 3(a) of regulation 2 makes an amendment to 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.

Subsection (2) of section 4 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. Paragraph (3)(b) of regulation 2 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, paragraph (5) of regulation 2 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. Paragraph (6)(a) of regulation 2 modifies section 21 so that 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.

Paragraph (6)(b) of regulation 2 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^(a)). The consequential amendments in the Schedule ensure that these provisions are applied to all such cases in place of section 21.

Sections 22, 23, 21 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. Paragraph (7) of regulation 2 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.

^(a) 2001 asp 14.



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