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SCOTTISH STATUTORY INSTRUMENTS

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**2017 No. 345 (C. 25)**

**CRIMINAL PROCEDURE**

**The Criminal Justice (Scotland) Act 2016 (Commencement  
No. 5, Transitional and Saving Provisions) Order 2017**

<i>Made</i>	- - - -	<i>24th October 2017</i>
<i>Laid before the Scottish Parliament</i>	- - - -	<i>26th October 2017</i>
<i>Coming into force</i>	- -	<i>25th January 2018</i>

The Scottish Ministers make the following Order in exercise of the powers conferred by section 117(2) and (3) of the Criminal Justice (Scotland) Act 2016<sup>(1)</sup> and all other powers enabling them to do so.

**Citation and commencement**

**1.** This Order may be cited as the Criminal Justice (Scotland) Act 2016 (Commencement No. 5, Transitional and Saving Provisions) Order 2017 and comes into force on 25th January 2018.

**Interpretation**

**2.—(1)** In this Order—

“constable” means—

- (a) a constable within the meaning given by section 62 of the 2016 Act; and
- (b) a member of the staff of the Police Investigations and Review Commissioner designated under paragraph 7B of schedule 4 of the Police, Public Order and Criminal Justice (Scotland) Act 2006<sup>(2)</sup>—
  - (i) to take charge of any investigation on behalf of the Commissioner; or
  - (ii) to assist a member of the Commissioner’s staff designated to take charge of such an investigation.

“detained” means detained under section 14 of the 1995 Act, and “detention” is to be construed accordingly;

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<sup>(1)</sup> 2016 asp 1.

<sup>(2)</sup> 2006 asp 10. Paragraph 7B of schedule 4 was inserted by the Police and Fire Reform (Scotland) Act 2012 asp 8 schedule 7(1) paragraph 33(17)(c).

“the 1995 Act” means the Criminal Procedure (Scotland) Act 1995(3);

“the 2016 Act” means the Criminal Justice (Scotland) Act 2016;

“the appointed day” means the day appointed by article 3.

(2) For the purposes of this Order, a person is in police custody from the time the person is arrested or detained by a constable until any one of the events mentioned in paragraph (3) occurs.

(3) The events are—

- (a) the person is released from custody;
- (b) the person is brought before a court in accordance with any enactment or rule of law or the terms of any warrant;
- (c) the Principal Reporter makes a direction under section 65(2)(b) of the Children’s Hearings (Scotland) Act 2011(4) that the person continue to be kept in a place of safety.

### **Appointed day**

3. 25th January 2018 is the day appointed for the coming into force of the provisions of the 2016 Act specified in column 1 of the table in the schedule (the subject matter of which is described in the corresponding entry in column 2).

### **Persons arrested or detained before appointed day- transitional and saving provisions**

4.—(1) This article applies in relation to a person who is arrested or detained by a constable before the appointed day, and remains in police custody at the beginning of the appointed day following that arrest or detention.

(2) Sections 3 to 34, 38 to 41, 43, 44 and 55 of the 2016 Act do not apply in relation to any matter arising from that arrest or detention.

(3) Despite the coming into force of schedule 2 paragraphs 4, 27, 28, 31, 35, 36, 37, 39 and 40 of the 2016 Act in accordance with article 3, the following provisions continue to have effect on and after the appointed day as they did immediately before that day in relation to any matter arising from that arrest or detention:—

- (a) section 4 of the Trespass (Scotland) Act 1865(5);
- (b) section 8A(2)(a) of the Legal Aid (Scotland) Act 1986(6);
- (c) section 6D(2A) of the Road Traffic Act 1988(7);
- (d) sections 14 to 15A, 17, 17A, 18, 18B, 18D, 19AA, 22, 22ZA, 22ZB, 42(3), (7) and (8), 43 and 135(3) of the 1995 Act(8);

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(3) 1995 c.46. Section 14 was amended by the Police, Public Order and Criminal Justice (Scotland) Act 2006 (asp 10) section 81(6) and the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (asp 15) (“the 2010 Act”) sections 1(2) and 3(1).

(4) 2011 asp 1. Section 65(2) is amended by schedule 2 paragraph 40(a)(ii) of the 2016 Act.

(5) 1865 c.56 (28 & 29 Vict). Section 4 was amended by the Criminal Justice Act 1982 (c.45), section 77 and schedule 15 paragraph 1.

(6) 1986 c.47. Section 8A was inserted by the 2010 Act section 2(3) and amended by S.I. 2011/1739 article 3; the Scottish Civil Justice Council and Criminal Legal Assistance Act 2013 (asp 3) sections 17 and 23(4); and the Crime and Courts Act 2013 (c.22) schedule 21 paragraph 50(1).

(7) 1988 c.52. Section 6D was inserted by the Railways and Transport Safety Act 2003 (c.20) schedule 7 paragraph 1 and amended by the Serious Organised Crime and Police Act 2005 (c.15) section 154(1) to (3).

(8) Sections 14A and 14B were inserted by the 2010 Act section 3(2). Section 15 was amended by the Crime and Punishment (Scotland) Act 1997 (c.48) section 62(1) and schedule 1 paragraph 21(2) and the 2010 Act section 1(3). Section 15A was inserted by the 2010 Act section 1(4). Section 17A was inserted by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002 (asp 9) schedule 1 paragraph 2 and amended by the Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5) schedule 1 paragraph 3(b) and the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) schedule 7 paragraph 29. Section 18 was amended by the Crime and Punishment (Scotland) Act 1997 section 47(1)(a) and (d) and schedule 3; the Crime and Disorder Act 1998 (c.37) section 119 and schedule 8 paragraph 117(1); the Criminal Justice (Scotland) Act

- (e) schedule 8 paragraphs 18, 20(1) and 27 of the Terrorism Act 2000(9);
- (f) sections 65, 66, 68, 69 and 72 of the Children's Hearings (Scotland) Act 2011(10).

(4) Despite the coming into force of section 54 of the 2016 Act in accordance with article 3, the power of a constable at common law to arrest a person to whom this article applies in respect of an offence while the person remains in police custody following the arrest or detention referred to in paragraph (1) continues to have effect on and after the appointed day.

(5) But the power referred to in paragraph (4) continues to have effect only for the purpose of immediately charging the person with an offence.

### **Undertakings- saving provision**

5.—(1) This article applies where a person is liberated on a written undertaking under section 22 or 43(1) of the 1995 Act before the appointed day.

(2) Sections 22(1F) and (1G), 22ZA and 22ZB of that Act or (as the case may be) section 43(6) and (7) of that Act continue to have effect in relation to that undertaking on and after the appointed day as they did immediately before that day.

### **Arrest under section 1 following detention- transitional provision**

6.—(1) This article applies where a person arrested under section 1 of the 2016 Act has previously

- (a) been detained in relation to the same offence as that in respect of which the person is arrested, or in relation to an offence arising from the same circumstances as that offence; and
- (b) left police custody following that detention.

(2) No authorisation for keeping the person in custody may be given under section 7 of that Act.

### **Voluntary interviews- transitional and saving provision**

7. Where a person attends at a police station or other place voluntarily for the purpose of being interviewed by a constable, and that interview begins before the appointed day—

- (a) section 31(1), (2)(a) to (c) and (4) and section 32 of the 2016 Act do not apply in respect of that interview;
- (b) section 15A of the 1995 Act continues to have effect in relation to that interview after the beginning of the appointed day as it did immediately before that day.

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2003 (asp 7) section 55(2); the Police, Public Order and Criminal Justice (Scotland) Act 2006 (asp 10) section 83(1) and schedule 6 paragraph 4(2); the Criminal Justice and Licensing (Scotland) Act 2010 section 77(2) and schedule 7 paragraph 30; the Police and Fire Reform (Scotland) Act 2012 (asp 8) schedule 7 paragraph 12(3) and the Protection of Freedoms Act 2012 (c.9) schedule 1 paragraph 6(2). Sections 18B and 18D were inserted by the Criminal Justice and Licensing (Scotland) Act 2010 sections 78 and 79. Section 19AA was inserted by the Police, Public Order and Criminal Justice (Scotland) Act 2006 section 77(2) and amended by the Anti-social Behaviour, Crime and Policing Act 2014 (c.12) schedule 11 paragraph 51. Section 22 was amended by the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6) section 7 and the Criminal Justice and Licensing (Scotland) Act 2010 schedule 7 paragraph 34. Sections 22ZA and 22ZB were inserted by the Criminal Justice and Licensing (Scotland) Act 2010 section 55. Section 42 was amended by the Criminal Justice and Licensing (Scotland) Act 2010 section 52(3). Section 43 was amended by the Crime and Punishment (Scotland) Act 1997 section 55(2) and (3). Section 135 was amended by the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 section 7(3) and schedule 1 paragraph 17.

(9) 2000 c.11. Schedule 8 paragraph 18 was amended by the Anti-social Behaviour, Crime and Policing Act 2014 (c.12) schedule 9 paragraph 5(12). Paragraph 20 was amended by the Anti-terrorism, Crime and Security Act 2001 (c.24) section 89(3) and (4) and the Protection of Freedoms Act 2012 (c.9) schedule 10.

(10) Section 66 was amended by S.S.I. 2013/211 schedule 1 paragraph 20(7).

### **Post-charge questioning- transitional provision**

**8.**—(1) Despite the coming into force of sections 35 to 37 of the 2016 Act in accordance with article 3, the court may not authorise questioning under section 35(1) of a person in respect of an offence where paragraph (2) or (3) applies.

(2) This paragraph applies where the person was officially accused of the offence before the appointed day.

(3) This paragraph applies where—

- (a) the person was arrested or detained in respect of the offence before the appointed day and remained in police custody at the beginning of the appointed day following that arrest or detention; and
- (b) the application for authorisation is made by a constable.

### **Statements by accused- transitional provision**

**9.** Section 109 of the 2016 Act applies only in respect of a statement made in the course of questioning where the course of questioning begins on or after the appointed day.

### **Live television links- saving provision**

**10.** Despite the coming into force of section 110(2)(b) of the 2016 Act in accordance with article 3, any arrangements made under section 80(1) of the Criminal Justice (Scotland) Act 2003<sup>(11)</sup> before the appointed day continue to have effect on and after that day, and section 80(2) to (5) continue to apply in relation to any such arrangements as they did immediately before that day.

St Andrew's House, Edinburgh  
24th October 2017

*MICHAEL MATHESON*  
A member of the Scottish Government

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(11) 2003 asp 7.

## SCHEDULE

Article 3

<i>Column 1</i> <i>Provisions of the 2016 Act</i>	<i>Column 2</i> <i>Subject matter</i>
Section 1	Power of arrest
Section 2	Exercise of the power
Section 3	Information to be given on arrest
Section 4	Arrested person to be taken to police station
Section 5	Information to be given at police station
Section 6	Information to be recorded by police
Section 7	Authorisation for keeping in custody
Section 8	Information to be given on authorisation
Section 9	12 hour limit: general rule
Section 10	12 hour limit: previous period
Section 11	Authorisation for keeping in custody beyond 12 hour limit
Section 12	Information to be given on authorisation under section 11
Section 13	Custody review
Section 14	Test for sections 7, 11 and 13
Section 15	Medical treatment
Section 16 and schedule 1	Release on conditions
Section 17	Conditions ceasing to apply
Section 18	Modification or removal of conditions
Section 19	Review of conditions
Section 20	Information to be given if sexual offence
Section 21	Person to be brought before court
Section 22	Under 18s to be kept in place of safety
Section 23	Notice to parent that under 18 to be brought before court
Section 24	Notice to local authority
Section 25	Liberation by police
Section 26	Release on undertaking
Section 27	Modification of undertaking
Section 28	Rescission of undertaking
Section 29	Expiry of undertaking

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<i>Column 1 Provisions of the 2016 Act</i>	<i>Column 2 Subject matter</i>
Section 30	Review of undertaking
Section 31	Information to be given before interview
Section 32	Right to have solicitor present
Section 33	Consent to interview without solicitor
Section 34	Questioning following arrest
Section 35	Authorisation for post-charge questioning
Section 36	Authorisation: further provision
Section 37	Arrest to facilitate questioning
Section 38	Right to have intimation sent to other person
Section 39	Right to have intimation sent: under 18s
Section 40	Right of under 18s to have access to other person
Section 41	Social work involvement in relation to under 18s
Section 43	Right to have intimation sent to solicitor
Section 44	Right to consultation with solicitor
Section 45	Use of reasonable force
Section 46	Common law power of entry
Section 47	Common law power of search etc.
Section 48	Power of search etc. on arrest
Section 49	Taking drunk persons to designated place
Section 50	Duty not to detain unnecessarily
Section 51	Duty to consider child's wellbeing
Section 52	Duties in relation to children in custody
Section 53	Duty to inform Principal Reporter
Section 54	Abolition of pre-enactment powers of arrest
Section 55	Abolition of requirement to charge
Section 56 and schedule 2	Consequential modification
Section 57	Code of practice about investigative functions
Section 58	Disapplication in relation to service offences
Section 59	Disapplication in relation to terrorism offences
Section 97	Publication of prosecutorial test
Section 109	Statements by accused
Section 110(1) and (2)(b)	Live television links

## EXPLANATORY NOTE

*(This note is not part of the Order)*

This Order brings into force various provisions of the Criminal Justice (Scotland) Act 2016 (“the 2016 Act”).

Article 2 contains provisions required for the interpretation of the Order.

Article 3 brings into force, on 25th January 2018, the provisions of the 2016 Act specified in the schedule of the Order.

Section 1 of the 2016 Act creates a power of arrest by a constable without warrant on reasonable suspicion of an offence. Section 2 makes further provision regarding its exercise. Sections 3 to 15 provide for the procedure to be followed after an arrest. Sections 16 to 19 enable the release of a suspect subject to conditions while the police investigation is continuing. Under schedule 1 (introduced by section 16), breach of such a condition is a criminal offence.

Sections 20 to 30 deal with matters arising after the individual has been charged with an offence, including first appearance in court and the police power to release the individual on an undertaking to appear in court. Schedule 1 equally applies to breach of an undertaking by virtue of section 26(6).

Sections 31 to 33, 38 to 41 and 43 to 44 deal with rights of suspects including the rights to have intimation sent to another person, to consult a solicitor and to have a solicitor present during interview. Sections 34 to 37 make provision regarding police powers of questioning, including the ability of the court to authorise post-charge questioning. Sections 45 to 53 and 55 deal with ancillary matters, while section 54 abolishes certain powers of arrest.

Section 56 introduces schedule 2, which contains modifications of enactments, including the repeal or amendment of aspects of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”). Sections 58 and 59 exclude certain matters from the scope of Part 1 of the 2016 Act.

Sections 57 and 97 require the Lord Advocate to issue a code concerning the questioning of suspects and the conduct of identification procedures and to publish a statement setting out criteria for prosecuting offences.

Section 109 provides for the admissibility in evidence of statements made by an accused while being questioned in connection with an offence.

Section 110(1) and (2)(b) make provision for an accused who is in custody to participate in proceedings by live television link. This will become possible in principle for the first calling of the case in court. The Lord Justice General will specify by direction the particular types of hearing in which an accused may appear by live link.

Article 4 of the Order makes provision relating to individuals arrested or detained before 25th January 2018 and still in police custody at the beginning of that day. Pre-existing procedures for the custody and treatment of suspects will apply to this group instead of the new provisions commenced by Article 3. The common law power of a constable to arrest such a person immediately prior to charge will continue to have effect.

Article 5 provides for the continuation of provisions of the 1995 Act about release on undertaking (otherwise repealed by the 2016 Act) in relation to individuals released before 25th January 2018.

Article 6 ensures that an individual previously detained under section 14 of the 1995 Act (repealed by the 2016 Act) can only be arrested under section 1 of the 2016 Act for the purpose of charging them with an offence, and cannot be held in custody for further pre-charge investigation.

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Article 7 preserves the old rules relating to police interviews contained in section 15A of the 1995 Act in relation to any voluntary interview beginning before 25th January 2018.

Article 8 prevents the court from authorising post-charge questioning of certain individuals who were arrested or detained before 25th January 2018.

Article 9 provides for section 109 of the 2016 Act to apply only in relation to statements made during interviews where the interview begins on or after 25th January 2018.

Article 10 preserves the provisions of section 80 of the Criminal Justice (Scotland) Act 2003 in relation to applications for live links granted under that section before 25th January 2018.

### **NOTE AS TO EARLIER COMMENCEMENT ORDERS**

*(This note is not part of the Order)*

The following provisions of the 2016 Act have been brought into force by commencement orders made before the date of this Order:

<i>Provision</i>	<i>Date of Commencement</i>	<i>Instrument No.</i>
Sections 60 to 64	17th January 2017	<a href="#">S.S.I. 2016/426</a>
Sections 65 to 69	11th May 2017	<a href="#">S.S.I. 2017/99</a>
Section 72	11th May 2017	<a href="#">S.S.I. 2017/99</a>
Section 78	17th January 2017	<a href="#">S.S.I. 2016/426</a>
Sections 79, 80 and 81(1), (2) and (5)	29th May 2017	<a href="#">S.S.I. 2017/99</a>
Section 81(3) and (4)	31st July 2017	<a href="#">S.S.I. 2017/99</a>
Section 81(6) and (7)	28th August 2017	<a href="#">S.S.I. 2017/99</a>
Sections 82 and 83	17th January 2017	<a href="#">S.S.I. 2016/426</a>
Section 84	10th March 2016	<a href="#">S.S.I. 2016/95</a>
Sections 87 to 96	17th January 2017	<a href="#">S.S.I. 2016/426</a>
Sections 98 to 101	17th January 2017	<a href="#">S.S.I. 2016/426</a>
Sections 104 to 106	17th January 2017	<a href="#">S.S.I. 2016/426</a>
Sections 110(2)(a) and 111(1)	17th January 2017	<a href="#">S.S.I. 2016/426</a>
Section 112	1st July 2016	<a href="#">S.S.I. 2016/199</a>