



SCOTTISH POLICE STATION INTERVIEW TRAINING COURSE GUIDE

SUPRALAT training on Scottish Police Station Interviews

Background materials

Contents:

1. Introduction and background
2. The 2016 Act Secs 31-44 explained
3. Links to further sources

1. Introduction and Background

The law on Scotland on the arrest and questioning of persons suspected of committing an offence changed radically on 24th January 2018 when most of the provisions set out in Chapter 1 of the Criminal Justice (Scotland) Act 2016 (2016 Act) came into force. There are some broad similarities between the new provisions and the procedure set out in the Criminal Procedure (Scotland) Act 1995 sections 14-17A, as amended by the Criminal Procedure (Legal Assistance Detention and Appeals) (Scotland) Act 2010 (2010 Act). The maximum period that a person may be kept in police custody remains at 12 hours unless an extension of 12 hours has been granted, the person has been charged with an offence or they have been arrested for being in breach of bail conditions. There are several innovations in the 2016 Act which are summarised below.

The 2010 Act was passed as emergency legislation in response to the decision of the UK Supreme Court in *Cadder v H.M. Advocate* [2010] UKSC 43 and came into force on 30 October 2010. In *Cadder*, the UK Supreme Court applied the decision in *Salduz v Turkey* (2009) 49 EHRR 19¹ in which the Grand Chamber had held that a detainee was to have access to a lawyer from the time of their first interrogation unless there were compelling

¹ Module 1 EU Resources



reasons arising from the particular circumstances of the case that made the presence of a lawyer impracticable.

The upshot of *Cadder* was that evidence of admissions of a detainee subjected to questioning without access to legal advice was held as a general rule to be inadmissible. As result of the decision, the Crown Office and Procurator Fiscal Service was required to discontinue a large number of cases.

In the immediate aftermath of the decision in *Cadder*, the then Cabinet Secretary for Justice commissioned a review of Scottish Law and Practice, which it was felt would best be conducted independently of Scottish Ministers. The Review chaired by Lord Carloway reported in November 2011. The provisions explained in this paper stem from the Carloway recommendations and the findings from two consultations carried out in 2011 and 2012.

The issue came before the UK Supreme Court once again in *Ambrose v Harris* [2011] UKSC 43. The High Court of Justiciary referred three cases concerning whether the Crown's reliance on evidence obtained from police questioning other than at a police station prior to the person having had access to legal advice breached his rights. The court held (Lord Kerr dissenting) that it was a question of fact in each case. Much depended on the extent to which the police's suspicions had focused on the person being questioned and whether the questions would be likely to elicit an incriminating response. If so, then answers obtained without the person being advised of their right to have access to legal advice would be inadmissible.

The principal changes can be summarised as follows:

- The distinction between detention and arrest first introduced in the Criminal Justice (Scotland) Act 1980 was abolished.
- The police must carry out a custody review after the person has been in police custody for 6 hours and again if the 12-hour period is extended after 6 hours of that period has elapsed, to ascertain that it is necessary for the person to continue to be in police custody. The police may apply to the court to seek authorisation to interview



a person after they have been officially accused of committing the alleged crime i.e. they have been charged with an offence.

And of greatest relevance to this training exercise:

- A person who is in police custody or has attended a police station voluntarily for the purpose of being interviewed has the right to have a solicitor present while being interviewed. Therefore, unless the person has consented to being interviewed without having a solicitor present, the police officer must not commence the interview until the solicitor is present and the solicitor must not be denied access to the person at any time during which they are being interviewed by the police.
- The 2016 Act precludes certain vulnerable groups, i.e. children, those aged 16 and 17 and subject to compulsory supervision and those suffering from mental disorder from consenting to being interviewed without a solicitor being present.

The key legislative provisions are set out in sections 31-44 of the 2016 Act which are contained in Chapters 4 and 5 of Part 1 of the 2016 Act.

Table 1 shows the arrangement of Chapters 4 and 5.

Table 1

Chapter 4	Police Interview
Sections 31-33	Rights of suspects
Section 34	Questioning following arrest of persons not officially accused
Sections 35-37	Authorisation by the court to interview a person officially accused and arrest to facilitate questioning
Chapter 5	Rights of suspects in police custody
Sections 38-41	Intimation and access to another person



Section 42 (not yet in force)	Support for vulnerable persons
Sections 43-44	Intimation and access to a solicitor

Definitions of key terms

“Officially accused” s63 of the 2016 Act

A person is officially accused if a constable charges the person with an offence or the procurator fiscal initiates proceedings.

“Police custody” s64 of the 2016 Act

A person is in police custody from the time they are arrested by a constable until they are released from custody, appear before a court, are transferred in accordance with the law into the custody of person who is not a constable or a member of police staff, or the Principal Reporter directs that the person continue to be kept in a place of safety.

Section 31 of the 2016 Act sets out the information to be given to a suspect before an interview takes place. Where a person is in police custody, having been arrested with or without a warrant, or is attending voluntarily at a police station for the purpose of being interviewed, not more than one hour before the constable carries out the interview, the person must be informed of

- the general nature of that offence;
- that they are under no obligation to say anything other than to give their name, address, date of birth, place of birth and nationality;
- the right under section 32 to have a solicitor present during the interview; and,
- if they are in police custody as opposed to attending voluntarily, their rights as set out in sections 38-44.

Section 32 of the 2016 Act makes it clear that a person in police custody or attending voluntarily for the purpose of being interviewed has the right to have a solicitor present while they are being interviewed. At first glance the section appears unequivocal. It states that



unless the person consents to being interviewed without having a solicitor present, a constable **must not** begin to interview the person about the offence until the person's solicitor is present, and that the person's solicitor must not be denied access to the person at any time while a constable is interviewing the person about the offence.

However, section 32 contains the proviso that the constable may in **exceptional circumstances** (emphasis added) proceed to interview the person without a solicitor being present if it is necessary to interview the person without delay in the interests of the investigation or the prevention of crime or the apprehension of offenders. Decisions to authorise interviews without a solicitor being present must be made by an officer of or above the rank of sergeant who has not otherwise been involved in the investigation.

Such decisions will presumably depend greatly on the facts and circumstances of each case. The section does not make any special provision for the recording of the independent officer's reasons for the decision to authorise the interview.

However, the Police Service of Scotland Solicitor Access Guide 3.14.5 indicates that such decisions will normally be made by the Custody Review Inspector (CRI), who is required to document the rationale for the decision on the Police Interview Rights of Suspects form (PIRoS). In practice there may be challenges to the admissibility of evidence of police interviews conducted where it is disputed that the conditions of section 32(4) were met in any given case.

Where the person consents to being interviewed without a solicitor being present, the time at which the consent was given and any reason given for waiving the right to have a solicitor present must be recorded.

It remains to be seen the extent, if any, to which persons in custody might be 'encouraged' to consent to being interviewed without a solicitor being present.

See for example *H.M. Advocate v Hawkins* 2017 HCJ 79 decided before the 2016 Act came into force. The accused was interviewed by the police about an allegation of rape. He had



been advised by a solicitor prior to the interview to make no comment. On three separate occasions during an interview lasting 82 minutes, he was asked to reconsider that advice. The interviewing officer also suggested that the solicitor was not fully aware of the evidence and had simply given 'standard advice' thus effectively undermining the advice and by extension, the professional capability of the solicitor in the eyes of the accused. After the third approach, the accused made incriminating comments.

Lady Scott ruled that the evidence had been unfairly obtained; the statements made could not properly be described as voluntary and were inadmissible.

Section 33 of the 2016 Act precludes certain persons from consenting to be interviewed without a solicitor being present. In effect they are statutorily disabled from consenting to something which would almost certainly run counter to their own best interests. Persons under the age of 16, aged 16 or 17 and subject to a compulsory supervision order made under the Children's Hearing (Scotland) Act 2011, or 16 or over but who, owing to mental disorder, appear to a constable to be unable to understand sufficiently what is happening or communicate effectively with the police may not so consent. In limited circumstances those aged 16 or 17 who are not subject to supervision or suffering from mental disorder may consent to being interviewed without a solicitor being present, but not without the prior consent of a relevant person, defined as a person who is entitled to access the person or, where the person is not in police custody someone who is at least 18 and reasonably named by the interviewee.

This section has the potential to be problematic. Section 32 prohibits the police from conducting an interview unless the person has consented to being interviewed without one. Those persons described in section 33 may not consent to being so interviewed. Even though the person may not consent to being interviewed without a solicitor being present, the 2016 Act makes no provision for situations where a person who cannot give their consent to being interviewed without a solicitor being present, refuses to instruct a solicitor.



Sections 35 and 36 of the 2016 Act means that it is now possible for a person who has been charged, or 'officially accused of committing the offence', to be questioned about the offence. Prior authorisation for this must be granted by the court. It may be given even after the person has made a first appearance in court. Under section 35(2) of the 2016 Act a single judge of the High Court or a sheriff, may, on the application of the prosecutor or a constable, authorise a constable to question a person about an offence after the person has been officially accused of committing the offence. The court must be satisfied that allowing the person to be questioned is necessary in the interests of justice. In so deciding, the court must take into account: the seriousness of the offence; the extent to which the person could have been questioned earlier; and, where they could have been questioned earlier, the court must consider whether it could reasonably have been foreseen at that time that the information might be important to proving or disproving that the person has committed an offence. The implication is that authorisation should not normally be given if the police failed or neglected to question the person when they had the opportunity during

The 12-hour period.

Where a warrant has been granted to arrest the person or the person has already appeared in court in relation to the offence, they must be given the opportunity to make representations before the court can grant authorisation. When granting authorisation, the court must specify the period for which questioning is authorised, and any other conditions as the court considers necessary to ensure that allowing the proposed questioning is not unfair to the person. The court's decision to grant or refuse authorisation is final. The questioning must take place either before the expiry of the period specified by the court, or before the trial in respect of the offence commences. The court may grant a warrant, which must specify the maximum period for which the person may be held for the arrest of the person in order to facilitate questioning. The warrant must specify the maximum period for which the person may be held under it.⁵

The arrested person's rights when in custody

Section 38 provides that person who is in custody has the right to have intimation sent as soon as reasonably practicable, or with no more delay than is necessary, to an adult



reasonably named by that person, of the fact that they are in custody and where they are being held. Intimation must be sent to a parent where the constable believes that the person is under the age of 16 regardless of whether they want intimation to be sent or not. A constable of the rank of sergeant or above, who has not previously been involved in the investigation may delay intimation where it is considered necessary in the interests of: the investigation or prevention of crime; apprehension of offenders; or, safeguarding and promoting the wellbeing of the person in custody where a constable believes the person is under the age of 18. In the latter case, case, delay may only be for as long as is required to ascertain whether the local authority will arrange for someone to visit the person in custody.

Section 39 makes additional provision for intimation to be made to parents or the local authority if appropriate for those believed to be under 18 years of age.

By virtue of sections 40 and 41, if the constable believes the person in custody is less than 16 years of age, a parent, or if they are not available, a person sent intimation under sec 38 must be allowed access to the child. If the person is 16 or 17 then access must be granted to the person if the person in custody wishes it. Again, access may be refused or restricted in exceptional circumstances in similar terms to those set out on section 32.

If the constable believes that the person in custody may be subject to a supervision order, or the constable has delayed intimation under sec 38 (1) in the interests of securing the wellbeing of the person aged 16 or 17, intimation of the fact that the person is in police custody and the place where they are in custody must be sent to a local authority as soon as reasonably practicable. The local authority may arrange for someone to visit the person in custody if they are under supervision, or it believes the person is under the age of 16 and has grounds to believe arranging to have someone visit would best promote and safeguard the welfare of the child. However the local authority should only undertake to send someone if they will be able to make the visit within a reasonable time. Again access can be refused or restricted but only if considered necessary by a constable of the rank of sergeant or above who is not involved in the inquiry for the same reasons set out in section 32. Where a person in police custody is believed to be 16 or over and due to mental disorder, including learning disability, appears to be unable to understand sufficiently what is happening or communicate



effectively with the police, the constable must ensure that intimation of the fact that the person is in custody and where is communicated, as soon as is reasonable practicable, to a person who can help the person understand what is happening and facilitate effective communication between the person and the police.

Section 43

Any person who is in police custody has the right to have intimation sent as soon as is reasonably practicable to a solicitor of any or all of several key pieces of information, namely:

- The fact that they are in custody;
- Where they are being held;
- That they require the assistance of the solicitor;
- If they have been officially accused of an offence;
- If they are to be released from custody;
- Or, if not, the court before which they are to be brought and when.

Section 44

A person who is in police custody has a right to a private consultation with a solicitor at any time, but in exceptional circumstances the exercise of the right may be delayed where a constable of or above the rank of sergeant who is not involved in the investigation considers it necessary in the interests of the investigation, or prevention of crime or the apprehension of offenders. A consultation includes a consultation by phone.

Additional Materials

The Carloway Review Report and Recommendations

<https://www.gov.scot/Topics/archive/reviews/CarlowayReview> accessed 16th September 2018

Law Society of Scotland Police Station Interview Advice and Information from the Law Society of Scotland <https://www.lawscot.org.uk/media/8819/police-station-advice-and-information-march-2015-section-f-division-advice.pdf>



Police Scotland Standard Operating Procedure

<http://www.scotland.police.uk/assets/pdf/151934/184779/criminal-justice-scotland-act-2016-arrest-process-sop> accessed 16 September 2018

Police Service of Scotland Solicitor Access Guidance

<https://www.slab.org.uk/common/documents/PoliceScotland/1.SolicitorAccessGuidance.pdf> accessed 16 September 2018

Scottish Government, Letter of Rights

<https://www.gov.scot/Resource/0053/00530265.pdf> accessed 16th September 2018

Scottish Government, Reforming Scots Criminal Law and Practice: The Carloway Report, A Scottish Government Consultation Paper

<https://www.gov.scot/Resource/0039/00396483.pdf> accessed 16th September 2018

Scottish Parliament, Criminal Justice (Scotland) Bill Policy Memorandum

[http://www.parliament.scot/S4_Bills/Criminal%20Justice%20\(Scotland\)%20Bill/b35s4-introd-pm.pdf](http://www.parliament.scot/S4_Bills/Criminal%20Justice%20(Scotland)%20Bill/b35s4-introd-pm.pdf) accessed 16th September 2018