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FISCAL SERVICE

SCOTLAND'S PROSECUTION SERVICE

Guidelines issued by the Lord Advocate to the Chief Constable concerning liberation of offenders by police relating to the 26th UN climate change conference of the parties ("COP26") to be held 31 October 2021 – 12 November 2021

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Introduction

1. These guidelines are intended to provide assistance to police officers as to the approach to be taken, in the context of the UN Climate Change Conference of the Parties (COP26), in connection with the liberation of offenders by Police Scotland. They provide a framework within which police officers may exercise a degree of discretion as to the appropriate course of action in each case.
2. For the purpose of these guidelines the definition of a 'COP26 offence' is an offence which comprises conduct from which it can be inferred, either from its location, its motivation, and/or surrounding circumstances, that it is connected with the COP26.
3. Where a person has been arrested in relation to a 'COP26 offence', police officers should apply the following guidelines which are adapted from the current Lord Advocate's Guidelines on Liberation by the Police.

General Principles

4. At all times that a person is in police custody, police officers must have regard to that person's right to liberty under Article 5 of the European Convention on Human Rights and must consider whether it is reasonable or necessary to keep that person in custody.
5. There is a specific duty in terms of section 50 of the Criminal Justice (Scotland) Act 2016 ("2016 Act") to take every precaution to ensure that a person is not unreasonably or unnecessarily held in police custody. This must be considered in every case and the reasons why a person was not released should be fully recorded.
6. In order for a police officer to decide to keep an individual in police custody there must be reasonable grounds that the person has committed an offence and keeping the person in custody must be necessary and proportionate for the purposes of bringing the person before a court or otherwise dealing with the person in accordance with the law (section 14(1) 2016 Act).
7. When considering whether it is necessary and proportionate to keep an individual in custody, a police officer may have regard to -:
 - (a) whether their presence is reasonably required to enable the offence to be investigated fully,
 - (b) whether the person would be likely to interfere with witnesses or evidence, or otherwise obstruct the course of justice, and

(c) the nature and seriousness of the offence. (section 14(2) of the 2016 Act)

8. An arrested person should not be detained unnecessarily and, where it is decided not to liberate that person, it is essential that the reasons are set out in the antecedents/history section of the police report to the Procurator Fiscal. As these reasons will also influence the Procurator Fiscal's decision as to whether to oppose bail, it is important that the reporting officer should give as much detail as possible and, where necessary, should do so by reference to these guidelines.
9. Where it has been decided not to liberate an arrested person on the basis that s/he is believed to have carried out other COP26 related offences and/or has been previously liberated on bail for a COP26 related offence, full details of those previous offence(s) must be set out in the police report, including details of any incidents which occurred in other jurisdictions, in particular elsewhere in the United Kingdom.
10. Any decision not to liberate a person must be regularly reviewed where the person is detained in custody longer than 24 hours. If the reason for the detention in custody no longer remains (where, for example, an address has been provided and confirmed, or the identity of the person is confirmed) the officer should consider releasing the person at that time.

Persons not officially accused

11. Where there are ongoing enquiries, a person arrested but not officially accused should only be kept in custody if it is not appropriate to release the person unconditionally or on investigative liberation subject to appropriate conditions in terms of section 16 of the 2016 Act. Officers should take the following factors into account when considering whether it is appropriate to keep an individual in custody where there are ongoing enquiries:
 - the nature of the offence - if the investigation is not likely to result in solemn proceedings and/or does not involve vulnerable victims or witnesses then it is not likely to be appropriate to keep an individual in custody whilst enquiries are ongoing.
 - any significant risk posed to victims, witnesses or the public if the person is liberated
 - the nature of the further enquiries required and the realistic timescales for completing those enquiries.

Persons officially accused

12. Where a person is in custody having been arrested without warrant and is charged with an offence, a constable may -:
- (a) detain in custody so that they may be brought before a court not later than the first lawful day after the accused was charged with an offence by a constable.
 - (b) liberate on a written undertaking to appear at a specified court at a specified time; or
 - (c) liberate for report. (section 25 of the 2016 Act)

Reasons for detaining a person in police custody

13. The police should not liberate on an undertaking, or for report, any person charged with a COP26 related offence where -:
- (a) the accused is a danger to the public or themselves.
 - (b) the accused is likely to interfere with witnesses.
 - (c) the offence is alleged to have been committed while the accused was on bail for a COP26 related offence.
 - (d) the offence is alleged to have been committed while the accused was on probation, community service, deferred sentence or licence for a COP26 related offence.
 - (e) there is reason to believe that the accused will abscond or leave the country and the offence is likely to merit solemn proceedings.
 - (f) the identity of the accused is in doubt or the identity of the accused must first be ascertained in order to determine whether bail is likely to be opposed for some other reason e.g. the existence of previous convictions.
 - (g) in any case where the offending is likely to justify solemn proceedings where the provisions of section 23D of the Criminal Procedure (Scotland) Act 1995 apply.

Undertakings

14. If the circumstances do not justify detention in custody, the accused should be liberated on an undertaking to appear in court at an early date, rather than liberation for report, where:

- (a) a co-accused has been detained in custody but there is no justification for keeping all accused in custody (with the undertaking being to appear in court on the same day as those accused detained in custody).
 - (b) the accused would normally have been detained in custody but because of exceptional personal or other circumstances (which must be highlighted in any report) this is not deemed to be appropriate.
 - (c) there is a need to bring the case to court without delay, for example, cases involving child victims or cases in which animals have been retained as productions or witnesses (particularly from a foreign jurisdiction but not including police officers from England and Wales) are likely to become unavailable.
 - (d) the accused has a primary address out with the United Kingdom. Where possible, the undertaking should specify a court date which pre-dates the date on which the accused intends to leave the United Kingdom.
15. In terms of section 26 of the 2016 Act it may be appropriate to impose conditions in addition to the standard terms of any undertaking. These conditions may include conditions that a person does not commit an offence, does not interfere with a witness, evidence, or otherwise obstruct the course of justice, does not behave in a manner which causes, or is likely to cause, alarm or distress to witnesses, and/or any further condition that a constable considers necessary and proportionate for the purpose of ensuring that any conditions imposed under paragraph (a) are observed. [Authorisation of an officer of the rank of sergeant/inspector must be obtained as appropriate in terms of section 26(5) of the 2016 Act.]
16. Any condition, in addition to the standard terms of any undertaking, for example, potential exclusion from a discrete geographical area, depending upon concerns about the individual or the overall security position, should relate to the particular accused or the nature of offending involved and should be necessary to secure that the undertaking is complied with, including preventing further offending, in particular offending relating to COP26.
17. In cases involving serious offending by an accused person with a primary address outwith the United Kingdom, it may be appropriate to impose a condition that the accused person surrender their passport/other travel document. In such circumstances, the undertaking must specify a court date which pre-dates the date on which the accused intends to leave the United Kingdom, where possible.

18. Police officers should be cognisant of the fact that, notwithstanding the right of a person to ask that undertaking conditions are reviewed by a Sheriff (section 30 of the 2016 Act), there will be no judicial oversight of conditions attaching to an undertaking until a person appears before a court. In these circumstances, it is imperative that any condition attached to an undertaking should be easily understood by any person to whom it applies. It will be good practice to provide a map, or similar, to a person where that will be of assistance to a person in facilitating their compliance with any condition.

Children

19. The Lord Advocate's Guidelines to the Chief Constable on the Reporting to Procurators Fiscal of offences alleged to have been committed by children apply to COP26 offences. Children can be released on investigative liberation and undertakings. However, the necessity and proportionality of imposing conditions on a child must be considered carefully before applying any liberation condition to a child. Full and detailed reasoning for the imposition of such conditions must be recorded.

Special arrangements

20. Officers should bear in mind the need to deploy interpreters in appropriate cases and the requirement to consider consular access for arrested persons from overseas.

Application

21. This part of these guidelines is intended to have general application only in relation to persons arrested for COP26 related offences. The circumstances of individual cases may justify action which is at variance with the guidelines. Officers must always be prepared to exercise discretion, although any significant departure from these guidelines will require explanation and justification in the report and should, in cases of difficulty, be discussed with the Procurator Fiscal. Special arrangements for on-call fiscals will apply during the COP26 summit. Full details will be available through Police Scotland Criminal Justice Services.