

*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

2017 No.

**CRIMINAL PROCEDURE
POLICE**

**The Criminal Justice (Scotland) Act 2016 (Modification
of Part 1 and Ancillary Provision) Regulations 2017**

Made - - - - 2017
Coming into force - - 25th January 2018

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⁽¹⁾ 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 2017 and come into force on 25th January 2018.

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)”.

(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.
- (3) For the avoidance of doubt, the powers of arrest conferred by the following enactments are (for the purposes of this Part) powers to arrest otherwise than in respect of an offence—
 - (a) sections 6D and 7(5A) of the Road Traffic Act 1988(2);
 - (b) section 40 of the Prisons (Scotland) Act 1989(3);
 - (c) sections 19(6), 19AA(12) and 28(1) of the 1995 Act(4);

(2) 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). Section 7(5A) was inserted by the Deregulation Act 2015 (c.20) schedule 11 paragraph 3(5).

(3) 1989 c.45. Section 40 was amended by the Prisoners and Criminal Proceedings (Scotland) Act 1993 (c.9) schedule 5 paragraph 6(7), the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40) schedule 4 paragraph 75(5) and the Criminal Justice (Scotland) Act 2003 (asp 7) section 23(2).

(4) 1995 c.46. Section 19 was amended by the Crime and Punishment (Scotland) Act 1997 (c.48) sections 47(2) and 48(1) and schedule 3; the Criminal Justice (Scotland) Act 2003 (asp 7) section 55(3); the Police, Public Order and Criminal Justice (Scotland) Act 2006 (asp 10) section 77(3); the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) schedule 7 paragraph 31 and the Police and Fire Reform (Scotland) Act 2012 (asp 8) schedule 7 paragraph 12(7). 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 28 was amended by the Criminal Procedure (Amendment) (Scotland) Act 2004 (asp 5) schedule 1 paragraph 9 and the Criminal Proceedings etc. (Reform) (Scotland) Act 2007 (asp 6) section 3(2).

- (d) section 4(1) of the Protection from Abuse (Scotland) Act 2001⁽⁵⁾;
- (e) section 5 of the Extradition Act 2003⁽⁶⁾;
- (f) section 28 of the Adult Support and Protection (Scotland) Act 2007⁽⁷⁾.

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—

(5) 2001 asp 14.

(6) 2003 c.41. Section 5 was amended by the Armed Forces Act 2006 (c.52) schedule 16 paragraph 201.

(7) 2007 asp 10.

- (i) a constable, nor
- (ii) a member of police staff appointed under section 26(1) of the Police and Fire Reform (Scotland) Act 2012⁽⁸⁾”.

Ancillary provision

- 3. The schedule contains modifications of other enactments.

St Andrew’s House,
Edinburgh
Date

Name
A member of the Scottish Government

⁽⁸⁾ 2012 asp 8.

SCHEDULE

Regulation 3

ANCILLARY PROVISION

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

1. Section 17 of the Matrimonial Homes (Family Protection) (Scotland) Act 1981(9), 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(10) 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
 - (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”;

(9) 1981 c.59. Section 17 was amended by the Criminal Procedure (Consequential Provisions) (Scotland) Act 1995 (c.40) (“the 1995 Act”) schedule 4 paragraph 37 and the Family Law (Scotland) Act 2006 (asp 2) (“the 2006 Act”) schedule 2 paragraph 4(3). It was repealed by the 2006 Act schedule 3, subject to the saving provision contained in S.S.I. 2006/212 article 13.

(10) 1995 c.36. Section 78 was amended by the 1995 Act schedule 4 paragraph 97(7) and the Police and Fire Reform (Scotland) Act 2012 (asp 8) schedule 7 paragraph 11(2).

- (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⁽¹¹⁾ 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⁽¹²⁾, 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)”.

Modification of S.S.I. 2006/212

- 5.—**(1) Article 13 of the Family Law (Scotland) Act 2006 (Commencement, Transitional Provisions and Savings) Order 2006⁽¹³⁾ 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 and paragraphs 1 and 4 of the schedule of the Criminal Justice (Scotland) Act 2016 (Modification of Part 1 and Ancillary Provision) Regulations 2017.”.

⁽¹¹⁾ 2001 asp 14.

⁽¹²⁾ 2004 c.33. Section 116 was repealed by the 2006 Act schedule 3, subject to the saving provision contained in S.S.I. 2006/212 article 13.

⁽¹³⁾ S.S.I. 2006/212.

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

- 6.—(1) The Adult Support and Protection (Scotland) Act 2007(14) 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.
-

EXPLANATORY NOTE

(This note is not part of the Regulations)

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

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

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

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

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

(14) 2007 asp 10.

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

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

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

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

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

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