

EXPLANATORY MEMORANDUM TO
THE CRIMINAL JUSTICE (SCOTLAND) ACT 2016 (CONSEQUENTIAL
PROVISIONS) ORDER 2018

2018 No. 46

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Scotland Office and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

- 2.1 The purpose of this Order is to enable the full delivery of the policy set out in Parts 1 and 2 of the Criminal Justice (Scotland) Act 2016 (“the 2016 Act”) which introduces reforms to modernise and enhance the efficiency of the Scottish criminal justice system. It makes provisions in regard to police powers and rights of suspects whilst in police custody, to criminal procedure, and to powers of stop and search. The Order also amends provisions relating to cross border powers.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 None.

Other matters of interest to the House of Commons

- 3.2 The territorial application of this instrument includes Scotland.

4. Legislative Context

- 4.1 The 2016 Act received Royal Assent on 13th January 2016 having been passed by the Scottish Parliament on 8th December 2015.
- 4.2 The basis of the 2016 Act stretches back to 2010, when the UK Supreme Court ruled in *Cadder v HM Advocate* [2010] UKSC 43 that the way in which police in Scotland detained suspects was incompatible with the European Convention on Human Rights (ECHR). In response to the Supreme Court’s decision, emergency legislation was passed in the Scottish Parliament and an Order was made in the UK Parliament under section 104 of the Scotland Act 1998. However, in an effort to ensure that the Scottish justice system continued to be fit for purpose and that it met the appropriate balance of protecting the rights of accused persons with victims of crime, the Lord Justice Clerk, Lord Carloway, was asked to carry out an independent review of criminal law and practice in Scotland. Lord Carloway published his findings in November 2011. Some of the provisions in the 2016 Act were developed from the review’s recommendations and are also reflected in this Order.
- 4.3 Many of the reforms brought forward by the 2016 Act give rise to the need to amend the law elsewhere in the UK and/or make provision in relation to Scotland where the reforms apply to reserved matters. Both are beyond the competence of the Scottish Parliament, hence the requirement for an Order under Section 104 of the Scotland Act 1998 which allows the UK Government to make legislative changes which are necessary or expedient in consequence of an Act of the Scottish Parliament.

5. Extent and Territorial Application

- 5.1 The extent of this instrument is set out in article 3 of the Order and varies among Scotland only; England and Wales and Scotland only; England and Wales and Northern Ireland only; and the whole of the United Kingdom.
- 5.2 The territorial application of this instrument is Scotland only with the exception of article 5 and Schedule 1 which have application in the whole of the United Kingdom.

6. European Convention on Human Rights

- 6.1 The Secretary of State for Scotland, the Rt Hon David Mundell MP, has made the following statement regarding Human Rights:

“In my view the provisions of the Criminal Justice (Scotland) Act 2016 (Consequential Provisions) Order 2018 are compatible with the Convention rights.”

7. Policy background

What is being done and why

- 7.1 The 2016 Act introduces reforms to modernise and enhance the efficiency of the Scottish Criminal Justice system. It aims to embed best practice and promote streamlining by, for instance, removing parallel systems of arrest and detention and creating one package of rights for suspects, with enhanced rights for juveniles and vulnerable adults.
- 7.2 This Order makes provisions in consequence of the 2016 Act about arrests effected both in Scotland, and outside Scotland, in connection with crimes committed in Scotland and the investigation of Scots law crimes and extradition matters in Scotland. Provision is also made about persons in police custody in Scotland by virtue of sections 313 to 318 of the Armed Forces Act 2006.
- 7.3 The main provisions in the Order are as follows:
- In regard to Schedule 1, the Criminal Justice and Public Order Act 1994 (‘the 1994 Act’), section 136-140, as amended by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 (Consequential Provisions) Order 2011, provides that a police officer within the UK carries his/her police powers with them throughout the UK. The new power of arrest for police officers in Scotland, contained in section 1 of the 2016 Act, will have implications for legislation and practice within the other jurisdictions of the UK. Provisions in Schedule 1 will ensure that **cross-border enforcement** and assistance continues to work effectively. The Order will, for example, ensure that, where a Scottish warrant is executed in England, Wales or Northern Ireland, provisions in the 2016 Act on arrest procedure and rights of suspects will apply.
 - Detention, as distinct from arrest, was a feature of Scottish police procedure that is abolished by the 2016 Act. This detention power was followed by the power to arrest suspects once a sufficiency of evidence existed to charge the suspect with an offence. Schedule 1 to the Order removes references to police detention powers, reflecting the change under the 2016 Act to a single power of arrest on suspicion of having committed a crime, similar to the powers in England and Wales under PACE (Police and Criminal Evidence Act 1984) legislation.

- Schedule 2 covers the effects of the 2016 Act on **‘reserved’ forces**, namely the Ministry of Defence Police (MDP), the British Transport Police (BTP) and the Civil Nuclear Constabulary (CNC). The Order amends legislation reserved to the UK Parliament to apply the provisions of the 2016 Act to members of the reserved forces exercising the powers and privileges of a constable in Scotland as if they were constables of the Police Service of Scotland.
- Schedule 3 reflects that reform of arrest and detention laws in the 2016 Act has an impact on **immigration and customs**, and revenue and customs officers, and NCA (National Crime Agency) officers operating in Scotland. Provisions are made in relation to arrest, custody, powers of search and voluntary interviews for designated customs officials and officers of Revenue and Customs, as well as for immigration officers acting upon an immigration offence or nationality offence.
- Schedule 4 covers **service offences**, and the application of the 2016 Act to the arrest and detention by civilian authorities of persons subject to service law, and to the surrender of such persons to the civilian authorities for desertion or absence without leave, under sections 313 to 318 of the Armed Forces Act 2006.
- Schedule 5 makes provision in regard to a person arrested in connection with **extradition proceedings**. These provisions regulate the taking of relevant physical data and other more intimate samples and include a new duty to destroy relevant physical data and samples as soon as possible following the final determination of the extradition proceedings in connection with which the data or samples were taken.

- 7.4 The Order also makes provision in consequence of a duty given to the Lord Advocate, under section 57 of the 2016 Act, to issue a code of practice which will apply to investigative bodies reporting criminal offences in Scotland to the Crown Office and Procurator Fiscal Service (COPFS). The concept of developing a Code arose as a result of a review of criminal procedure by Lord Bonomy, a Scottish High Court Judge, who analysed the PACE legislation in England and Wales and thought there was much to recommend it.
- 7.5 There are over one hundred Specialist Reporting Agencies (SRAs) which can submit crime reports to COPFS. While offences reported by SRAs account for only 7-9% of all criminal reports received, there is deemed to be no principled reason for not according the same protections to all persons subject to investigation for an offence as that provided by police officers, so far as reasonably practicable. The Order amends the 2016 Act to allow the Lord Advocate to specify a body in a code or make provision about criminal investigations carried out by it, where it would be outside the legislative competence of the Scottish Parliament to make provision about that body or functions which are exercisable by it.
- 7.6 Reserved forces exercising the powers and privileges of a police constable in Scotland will be also be bound by a Stop and Search Code of Practice issued under section 73 of the 2016 Act which came into force on 11 May 2017. This Code aims to promote public safety and prevent and detect crime whilst recognising that being stopped and searched is a significant intrusion into liberty and privacy. The Code sets out that use of powers must be necessary, proportionate and in accordance with the law. This Order amends the 2016 Act to ensure that UK Government and reserved bodies subject to the terms of the Code are fully consulted when any amendments to the

Code are being considered. Immigration officers, designated customs officials and officers of Revenue and Customs are placed under a duty to have regard to the code when exercising relevant functions in Scotland.

Consolidation

7.7 This order stands alone.

8. Consultation outcome

8.1 There has been no consultation exercise specific to this Order. The Scottish Government launched a consultation on implementation of the proposals leading to the 2016 Act in July 2012 which sought views on all 76 of Lord Carloway's recommendations. In particular, views on the new process of arrest on suspicion were sought to help shape thinking on the new regime.

8.2 The Crown Office and Procurator Fiscal Service will also undertake extensive consultation, including with relevant reserved bodies, in advance of the Lord Advocate issuing a Code of Practice about Investigative Functions, discussed in paragraph 7.4.

9. Guidance

9.1 This Order stands alone, and guidance is not necessary.

10. Impact

10.1 There is no impact on business, charities or voluntary bodies.

10.2 There is no impact on the public sector.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to activities that are undertaken by small businesses.

12. Monitoring & review

12.1 The Scottish Government will monitor the impacts of the related Scottish legislation. For example, the Lord Advocate must keep the Code of Practice under Section 57 of the 2016 Act, detailed above, under review and revise as appropriate. On the Stop and Search Code of Practice, section 74 of the 2016 Act requires a review to be carried out no later than two years after the code comes into effect, followed by further reviews at four year intervals. Provision is made in the Order requiring Scottish Ministers to take into account representations made by reserved forces and the Secretary of State about the timing of reviews. Consultation with various reserved interests is provided for as part of the review process.

13. Contact

13.1 Alastair Noble at the Scotland Office (telephone: 0207 270 6771 or email: Alastair.Noble@scotlandoffice.gsi.gov.uk) can answer any queries regarding the instrument.