

CRIMINAL JUSTICE (SCOTLAND) ACT 2016

EXPLANATORY NOTES

OVERVIEW OF THE ACT

Part 2 – Search by Police

Chapter 1 – Search of person not in police custody

Lawfulness of search by constable

Section 65 – Limitation on what enables search

171. **Section 65** provides that, where a person is not in police custody, it is unlawful for a search to be carried out by a police constable without express statutory authority, or without express authority conferred by a warrant. This provision will have the effect of ending the practice of ‘consensual’ stop and search.

Section 66 – Cases involving removal of person

172. **Section 66** provides express statutory authority for constables to search a person in the circumstances where the police have a power under statute or warrant to transport a person from one place to another, or consider it necessary for the person’s care and protection to transport a person from one place to another. The search is for the purpose of safeguarding that person’s, or any other person’s, safety and well-being.

Section 67 – Public safety at premises or events

173. **Section 67** provides express statutory authority for the police to search people as a condition of entry at relevant premises and events, for the purposes of ensuring the health, safety or security of people there. This is subject to specific conditions: the premises or event must be open to members of the public, entrance must be controlled by the occupier or organiser, (so this will not apply to public marches or demonstrations), the occupier or organiser must have imposed a condition of entry that the person consents to being searched and the person must inform the constable that they consent to being searched.

Section 68 – Duty to consider child’s wellbeing

174. **Section 68** imposes a duty on a constable, when deciding whether to search a child (a person under 18) who is not in police custody, to treat the wellbeing of the child as a primary consideration.

Miscellaneous and definitions

Section 69 – Publication of information by police

175. **Section 69** imposes an obligation on Police Scotland to publish certain information on stop and search annually.

Section 70 – Provisions about possession of alcohol

176. **Section 70** allows regulations to be laid that would provide a power for the police to search children under 18 for alcohol and to search a person who is 18 or over where that person is suspected of possessing alcohol which they have supplied or intend to supply to a child. Before laying regulations, the Scottish Ministers must carry out a public consultation and send a copy of the proposed regulations to certain people. If Ministers decide to make regulations they will be subject to affirmative procedure, together with an obligation on Ministers to give reasons for making the regulations and present a summary of the consultation responses received. This section is subject to a “sunset clause” in section 71.

Section 71 – Matters as to effect of sections 65, 66 and 70

177. **Section 71** provides further detail about the commencement of certain provisions. The provisions in section 65 and 66 are required to commence on the same date that the code of practice required by section 73 first comes into effect. In addition, if no regulations are laid under the provisions in section 70 within two years of the date that the code of practice first comes into effect, the power to make regulations in section 70 will lapse, this is known as a sunset clause.

Chapter 2 – Code of practice

Making and status of code

Section 73 – Contents of code of practice

178. **Section 73** provides that Scottish Ministers must make a code of practice about the carrying out of searches and what the code must set out. The code of practice will only apply to the functions exercisable by police constables.

Section 74 – Review of code of practice

179. **Section 74** contains provisions regarding subsequent reviews and revision of the code of practice. It allows Ministers to revise the code in light of a review. The Scottish Ministers must review the code within two years of it first coming into effect. Thereafter the code must be reviewed at least every four years. When deciding when to conduct a review, Ministers must have regard to representations made by the Scottish Police Authority, the Chief Constable, or Her Majesty’s Inspectorate of Constabulary in Scotland (HMICS).

Section 75 – Legal status of code of practice

180. **Section 75** provides for the legal status of the code of practice. A court or tribunal in civil or criminal proceedings must take into account the code of practice (including, therefore, any breach of the code) when determining any questions arising in the proceedings to which the code is relevant.

Procedure applying to code

Section 76 – Consultation on code of practice

181. **Section 76** makes provisions about consultation on the code of practice. Before making a code of practice, the Scottish Ministers must consult publicly on a draft code. Subsection (2) provides that a number of persons or organisations must be consulted when preparing a draft for public consultation.

Section 77 – Bringing code of practice into effect

182. **Section 77** makes provision for bringing the code of practice into effect. A code of practice or any revised code of practice will be brought into effect on a date to be appointed by regulations. The regulations will be subject to affirmative procedure, and the code to which the regulations relate must be laid before the Parliament at the same time.