

# SMOKING PROHIBITION (CHILDREN IN MOTOR VEHICLES) (SCOTLAND) ACT 2016

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### *The structure of the Act*

4. The Act has seven sections and a schedule. Sections 1 and 2 comprise the main provisions of the Act. Section 3 covers powers granted to authorised officers of a local authority. Section 4 deals with interpretation, section 5 with regulations, section 6 with commencement and section 7 sets out the Act's short title.
5. The schedule sets out the details of the fixed penalty notice (FPN) regime.

#### *Section 1 – Offence of smoking in a motor vehicle with children*

6. **Section 1** sets out the offence created by the Act. With one exception, the offence is committed in any situation where an adult (i.e. person aged 18 or over) smokes in a private motor vehicle when a child (i.e. person under the age of 18) is also present in the vehicle and the vehicle is in a public place.
7. The exception is set out in subsection (2). This provides that the offence is not committed if the vehicle is designed or adapted for use as living accommodation (a motorhome for example), is parked, and is being used as living accommodation (for example, by a member of a Travelling community, or by a holiday-maker).
8. Subsection (3) deals with the penalty for committing the offence in subsection (1) which, on summary conviction, is a fine not exceeding level 3 on the standard scale (currently £1,000). In practice, fixed penalties are liable to be offered as an alternative to prosecution; therefore any such fine is only likely to be incurred if a fixed penalty is not paid or accepted, a decision is then made to prosecute the person concerned for the section 1 offence, and the person is then convicted in the sheriff or Justice of the Peace Court (which would decide the amount of the fine, up to the maximum allowable, according to the facts and circumstances).

#### *Section 2 – Fixed penalties*

9. This section introduces the schedule to the Act, which describes the arrangements for fixed penalties for offences under section 1. The provisions of the schedule are described in greater detail below.

#### *Section 3 – Powers to enter and require information*

10. **Section 3** empowers an authorised officer of a local authority to enter and search a parked private motor vehicle within the area of the local authority in order to check whether an offence under section 1 has been or is being committed. Subsection (2) makes it an offence for an individual, reasonably believed by an authorised officer of a local authority to have committed an offence under section 1 or to have information

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relating to such an offence, to fail without reasonable excuse to provide their name and address when requested to do so by that officer. The penalty for an offence committed under subsection (2) is a fine not exceeding level 3 on the standard scale.

#### ***Section 4 – Interpretation***

11. **Section 4** sets out definitions of key terms used in the Act. Reading these definitions together means that “private motor vehicle” excludes motor cycles, scooters and mobility aids which are steered by means of handlebars attached to the front wheel. Public transportation vehicles (including taxis and private hire vehicles) are also excluded since smoking in them is already an offence under the Smoking, Health and Social Care (Scotland) Act 2005, which prohibits smoking in enclosed public spaces. Several of the definitions contained in section 4 (“car”, “private motor vehicle” and “public transportation vehicle”) are based on those in the Prohibition of Smoking in Certain Premises (Scotland) Regulations 2006 (made under the 2005 Act). These definitions are used to define the scope of the private vehicles exemption under the 2005 Act/2006 Regulations, and are also used to determine what is a “private motor vehicle” falling within the scope of the offence under section 1 of the Act.
12. Subsection (3) allows the Scottish Ministers to alter, by regulations, certain definitions contained in subsection (1), namely “car”, “private motor vehicle” and “public transportation vehicle”. As stated above, these definitions are based on counterparts in the 2006 Regulations which are amendable by subordinate legislation. It is desirable, therefore, to provide powers for Ministers to be able to adjust the relevant definitions in this Act so that an alignment can be maintained with corresponding definitions under the 2005 Act.

#### ***Section 5 – Regulations***

13. Subsection (1) gives the Scottish Ministers powers to make any incidental, supplementary, consequential, transitional, transitory or saving provisions that may be required, for example, as a result of alterations to definitions in section 4(1).
14. Subsection (2) sets out which regulations under the Act are subject to the affirmative procedure (that is, those that require approval by resolution of the Parliament). Subsection (3) sets out which regulations are subject to the negative procedure (that is, those that may be annulled by resolution of the Parliament).

#### ***Section 6 – Commencement***

15. **Section 6** provides for the commencement of the Act. Those provisions conferring power to make regulations relating to the details of the fixed penalty regime (paragraphs 11 and 12 of the schedule) are among those brought into force immediately after Royal Assent so that the regulations can be in place by the time the main provisions are brought into force (by regulations made by the Scottish Ministers).

#### ***Schedule – Fixed penalty for offence under section 1***

16. The schedule makes detailed provision about FPNs. Paragraph 1 defines the circumstances in which FPNs may be given, and who may issue the notices (that is, an authorised officer of a local authority (sub-paragraph (1)) or a police constable (sub-paragraph (2))). The fixed penalty is an alternative to prosecution – that is, it allows the offender to pay a modest amount in return for avoiding any risk of a criminal conviction and a potentially much higher fine.
17. **Paragraph 2** allows the Scottish Ministers to set, by regulations, the maximum period between an offence being committed and a FPN being issued.
18. **Paragraph 3** prescribes the content of the FPN, which must describe the circumstances of the alleged offence. It must also state the amount of the penalty, details of when

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and how it can be paid (payment must be made to the local authority for the area in which the offence was committed) and the consequences of failing to do so (i.e. the risk of prosecution). The FPN must also provide contact details for a person to whom representations about it may be made. This is to allow the person to whom it is issued to challenge the FPN if, for example, he or she denies committing the offence or believes there were extenuating circumstances.

19. [Paragraph 4](#) sets the amount of the fixed penalty as £100 and the period in which it must be paid as 29 days. The 29-day period allows a full four weeks to pay the fixed penalty, not including the day on which the offence was committed. Both the amount and the period are variable by regulations under paragraph 12 (see below), and there is a discretionary power for a local authority to extend the period for payment in an individual case.
20. [Paragraph 5](#) sets out the consequences of payment and non-payment of a fixed penalty. It provides that no proceedings (i.e. prosecution) can be commenced within the 29-day period, nor may proceedings be commenced or continued after that period has ended if payment has been made during it, or if the local authority has accepted payment after that time. Sub-paragraph (4) sets out what is to count as sufficient evidence of payment having been made.
21. [Paragraph 6](#) enables a recipient of a FPN to request a hearing in relation to the offence. The request must be made in writing to the local authority and submitted within 29 days of the FPN being issued. The local authority which is to hold the hearing must notify the procurator fiscal that a request for a hearing has been made. The period between submission of the written request and receipt by the requester of the outcome of the hearing does not count towards the 29-day period for payment.
22. [Paragraph 7\(1\)](#) provides for the withdrawal of a FPN where the local authority considers that it ought not to have been given – including on the basis of representations made by the person to whom the FPN was issued, and considered by the local authority under paragraph 7(3). Paragraph 7(2) explains the consequences of withdrawal of a FPN.
23. [Paragraph 8](#) provides that FPNs are to be treated as withdrawn once any proceedings are under way. This means that the person prosecuted will no longer have the opportunity of avoiding conviction by paying £100.
24. [Paragraph 9](#) provides for the recovery of unpaid fixed penalties. After the expiry of the 29-day period for payment the local authority can recover the unpaid penalty in the same way as a sum of money in respect of which decree has been granted in civil proceedings.
25. [Paragraph 10\(1\)](#) enables an individual who disputes the local authority's attempt to recover an unpaid penalty to apply to the sheriff for a declaration that the fixed penalty cannot be recovered under paragraph 9 as payment was made on time, or that there was an undue delay in the local authority's response to the individual's request for a hearing. Paragraph 10(2) provides that the sheriff may declare whether or not payment was made on time, or whether a hearing was validly requested and took place within a reasonable time and, therefore, whether or not the penalty is enforceable.
26. [Paragraph 11\(a\)](#) gives the Scottish Ministers the power to make regulations regarding the application by local authorities of fixed penalties paid under the schedule (for example, to provide that a proportion of the revenue be used to offset the administrative costs involved). Paragraph 11(b) gives the Scottish Ministers the power to make regulations regarding arrangements for the preparation and publication of statements of account relating to fixed penalties. Regulations under paragraph 11(a) are subject to the affirmative procedure; regulations under paragraph 11(b) are subject to the negative procedure (see section 5).
27. [Paragraph 12](#) provides the Scottish Ministers with powers to make regulations prescribing the circumstances in which a FPN may not be issued, to provide for and

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alter the approved methods of payment of penalties, to amend the fixed penalty amount, and to alter the time period in which payment must be made. Any such regulations are subject to the affirmative procedure (see section 5).