

## POLICY NOTE

### THE CRIMINAL JUSTICE (SCOTLAND) ACT 2016 (COMMENCEMENT No. 4, TRANSITIONAL, TRANSITORY AND SAVING PROVISIONS) ORDER 2017

#### SSI 2017/99 (C. 8)

1. The above instrument is made in exercise of the powers conferred by section 117(2) and (3) of the Criminal Justice (Scotland) Act 2016 (“the 2016 Act”). It is not subject to any Parliamentary procedure.

#### **Purpose of this instrument**

2. The 2016 Act introduces a number of reforms to the Scottish criminal justice system, including many of the recommendations of the Carloway Review of criminal law and practice, and of the Independent Review of Sheriff and Jury procedure by Sheriff Principal Edward F. Bowen. The provisions in the 2016 Act are being implemented in stages and are intended, *inter alia*, to modernise the law in relation to police powers and the rights of suspects, and enhance the efficiency of the justice system.
3. This instrument brings into force provisions of the 2016 Act in relation to (i) searches of persons not in police custody (commonly referred to as “stop and search”); and (ii) sheriff and jury procedure.

#### **Searches of persons not in police custody - sections 65 to 69 and section 72**

4. Chapter 1 of the 2016 Act makes provisions about searches of persons not in police custody (commonly referred to as ‘stop and search’). Section 65 provides that non-statutory (often called ‘consensual’) stop and search of a person not in police custody will become unlawful on the date that a Code of Practice made in terms of section 73 comes into effect.
5. In terms of the Stop and Search (Appointed Day) (Scotland) Regulations 2017, the Code of Practice referred to in section 73 will come into effect on 11 May 2017. It is therefore necessary to bring into force section 65, and also related sections 66, 67, 68, 69 and 72, on 11 May 2017, the date that the Code comes into effect.
6. 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.
7. 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

8. 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.
9. Section 69 provides that the Police Service of Scotland must publish specified information about people not in police custody.
10. Section 72 contains definitions of terms used in Chapter 1.

### **Sheriff and jury procedure – sections 79 – 81**

11. In relation to sheriff and jury procedure, the provisions being brought into force will impose, in every case, a duty to communicate between the prosecution and the defence. The 2016 Act changes will also change the way that cases are indicted in sheriff court solemn proceedings and modify first diet procedure to ensure that a trial diet will only be fixed by the court once it is satisfied that the case has been adequately prepared by all parties, and is likely to proceed to trial on the appointed date. Changes are also made to certain procedural time limits to facilitate the new approach, and a new form of “floating” trial diet is introduced for the sheriff court.
12. This Order brings these provisions into force on a phased basis, primarily to ensure that cases can continue to be scheduled in court diaries during the implementation phase in a way which makes best use of available court time. It does so by allowing certain aspects of the existing indictment and first diet systems to co-exist with the new processes for a short period of time.
13. The Order therefore brings the relevant provisions of the 2016 Act into force on three dates. On the first date (29 May 2017) changes to the new indicting processes and to procedural time limits are brought into force, subject to transitional arrangements. On the second date (31 July 2017) changes to the procedure at first diets are brought into force, subject to some saving provision. And from the third date (28 August 2017) the new trial procedure is commenced and all cases will operate under the indictment and first diet systems created by the 2016 Act.

#### *29 May 2017 – indictments and time limits*

14. The Order brings into force section 79 of the 2016 Act on 29 May 2017, subject to transitional provisions (discussed below). Section 79 amends section 65 of the Criminal Procedure (Scotland) Act 1995 (“the 1995 Act”) which deals with the time limits for various procedural steps in proceedings on indictment in the sheriff court. New limits are now established for the length of time which may elapse between the service of an indictment and a first diet in a case (which is now set at 11 months for sheriff court proceedings) and for the length of time a person may be kept in custody pending a first diet (110 days) and trial diet (140 days).

15. These time limits apply only in relation to indictments served on an accused on and after the commencement date.
16. Section 80 of the 2016 Act is also brought into force on 29 May 2017. This provision inserts new section 71C into the 1995 Act imposing, in cases indicted to the sheriff court where the accused is legally represented, a duty on the prosecution and the accused's legal representative to communicate with each other, and to prepare jointly a written record of their state of preparation. This written record is to be lodged with the court prior to the first diet. The duties under new section 71C apply only in relation to indictments served on an accused on and after the commencement date.
17. Section 81(1), (2) and (5) also comes into force on 29 May 2017. This makes some minor amendments to the 1995 Act in relation to the indicting process, and again these changes apply only in relation to indictments served on an accused on or after the commencement date.

#### *31 July 2017 – first diet procedure*

18. Section 81(3) and (4) of the 2016 Act is brought into force on 31 July 2017. This inserts new section 71B into the 1995 Act and makes a number of minor changes to section 71 of that Act, dealing with first diet procedure.
19. The 1995 Act presently directs that where an indictment has been served on an accused in respect of sheriff and jury proceedings, the accused must also be served with a notice requiring appearance at a first diet and a subsequent trial diet on the dates specified in the notice. Under the new provisions the accused will be served with a notice requiring attendance at a first diet only. At that first diet, the court will assess the state of preparation of the parties, assisted by the written record lodged as a consequence of section 80, above, before appointing a trial diet if the court considers it likely that the case will be ready to proceed to trial.

#### *28 August 2017 – trial procedure*

20. Section 81(6) and (7) of the 2016 Act is brought into force on 28 August 2017. This introduces a new section 83B into the 1995 Act establishing the concept of a “floating” trial diet in the sheriff court, allowing trial diets to be continued from sitting day to sitting day by a minute signed by the sheriff clerk.

#### **Transitional provisions**

21. As noted above, the policy intention underlying the approach to commencement of these provisions is to bring them into force gradually over a short period of time, to ensure that there will continue to be an efficient use of available court time.
22. First, the Crown, from 29 May 2017 to 30 July 2017, will be permitted to indict cases in the sheriff court either under the existing system (to a first diet and a trial diet) or the new system (to a first diet only).

23. New first diet processes will come into force on 31 July 2017, but the old first diet procedures are saved for the period from 31 July 2017 to 28 August 2017 for cases indicted under the existing system (to a first diet and trial diet).
24. Finally, from 29 May 2017 to 27 August 2017 the court will, when adjourning, postponing, or otherwise altering first diets and trial diets, be able to move cases from the existing procedures to the new procedures to ensure that all cases on and after 28 August 2017 are under the new procedures.
25. The Order therefore makes a number of transitional, transitory and saving provisions for these purposes and a more detailed explanation of those provisions follows.

- **Transitional provisions – Section 79 (Pre-trial time limits)**

26. As noted above, article 3 provides that section 79 is to come into force on 29 May 2017, for indictments served on an accused on or after that day.
27. Subsection 79(3) amends section 66 of the 1995 Act, with the effect that the Crown, when serving an indictment on an accused, will indict the accused to a first diet only, as opposed to a first diet and a trial diet. (In terms of new section 71B of the 1995 Act, to be introduced by section 81, the duty to fix a trial diet will thereafter fall on the court when it is satisfied about the state of preparation of the case.)
28. However, paragraphs (3) and (4) of article 3 permit the Crown, between 29 May 2017 and 30 July 2017, to continue to indict cases under the existing procedure of citing an accused to appear at both a first diet and a trial diet.
29. On 31 July 2017 and thereafter, it will be only be competent for the Crown to indict an accused to a first diet alone. At that first diet the court will consider whether to appoint a trial diet.
30. This will ensure that, during the period when the present system is being phased out and the new system is being brought into force, the Crown can, where appropriate, continue to make best use of available court time by citing accused people to first diets and trial diets.

- **Saving provision – Section 81(3) and (4) (First diets)**

31. Article 4 provides that subsections 81(3) and (4) are to come into force on 31 July 2017. These subsections make significant amendment to the 1995 Act in respect of first diets, including the introduction of new section 71B, which requires the court to fix a trial diet when it is satisfied about matters set out in that section, particularly the likelihood of the case being ready to proceed to trial.
32. However, to complement the transitional provisions for section 79, which are set out above, paragraph (2)(a) of article 4 provides that this requirement will not apply until 27 August 2017 to cases which have already been indicted by the Crown to both a

first diet and a trial diet; and paragraph (2)(b) provides that the new first diet procedure does not apply to the adjournment, postponement, or any other alteration of a first diet where the accused was indicted to a first diet and trial diet. This is subject to detailed transitory provision in article 6 about the adjournment and alteration of diets.

33. Article 6 makes transitory provision about the adjournment and alteration of diets calling before 28 August 2017 in cases where the Crown has indicted the accused to a first diet and a trial diet. The policy intention is to provide a mechanism to bring such cases into the new system and article 6 deals with this in two ways. First, the court is enabled to bring cases back to a first diet in the new system – despite the fact that a trial diet has been set at the point of indictment – by discharging that trial diet and appointing a first diet in the new system calling between 31 July 2017 and 27 August 2017. Where it does so, paragraph (5) excludes the operation of article 4(2) with the effect that the new first diet procedure will apply to the newly fixed first diet.
34. Second, if the court adjourns or postpones a previously set first diet to a date on or after 28 August, the previously appointed trial diet is treated by article 6(6) as having been discharged. That, along with the time limited saving provision in article 4(2), ensures that the adjourned or postponed first diet is under the new system.
35. From 28 August 2017 all cases will be in the new system.

## **Consultation**

36. The Act further develops the majority of the recommendations of two independent reviews of key aspects of the criminal justice system. It includes provisions which have been developed from the recommendations of Lord Carloway’s Review of Scottish Criminal Law and Practice, and provisions which have been developed from the recommendations of Sheriff Principal Bowen’s Independent Review of Sheriff and Jury Procedure. Formal consultations were carried out by the Scottish Government with regard to the recommendations of Lord Carloway and Sheriff Principal Bowen’s reviews.
37. Extensive consultation with criminal justice partners and stakeholders was undertaken during the Bill process, and continues in relation to implementation of the 2016 Act. In particular, Scottish Courts and Tribunals Service and the Crown Office and Procurator Fiscal Service provided significant input in relation to the policy intention underpinning the transitional provisions in this Order.

## **Impact Assessment**

38. An Equality Impact Assessment (EQIA) was carried out for the purposes of the Criminal Justice (Scotland) Bill, which did not identify any areas in which there would be a negative impact on any of the protected categories as a result of the policies contained in the Bill.

Scottish Government  
Justice Directorate

28 March 2017