Proceeds of Crime Act 2002: Code of Practice for Constables in Scotland

A Consultation Paper
July 2013
CODES OF PRACTICE FOR CONSTABLES
ISSUED UNDER THE PROCEEDS OF CRIME ACT 2002

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EXECUTIVE SUMMARY

The Proceeds of Crime Act 2002 ("the 2002 Act") is a powerful and comprehensive package of measures which allows the enforcement authorities to track down and recover the profits of crime and unlawfully gained assets more effectively.

The Policing and Crime Act 2009 amends and extends these measures.

Section 293 of the Proceeds of Crime Act 2002 requires Scottish Ministers to make and publish a Code of Practice for Constables, the purpose of which is to provide guidance for Police Constables in Scotland undertaking the exercise of Section 289 of the Act; that is, powers to search premises for cash which they have reasonable grounds to suspect has been obtained through unlawful conduct, or is indeed intended for use in unlawful conduct. The power to search premises is only exercisable when the officer has lawful authority to be present under other legislation, or is present with the occupiers’ or owners’ permission.

Officers will already be familiar with the procedures and safeguards in the current Code of Practice, approved and published by the Scottish Parliament in June 2009.

Section 63 of the Policing and Crime Act 2009 inserts a new provision into Section 289 of the 2002 Act so that an officer can now require the search of a vehicle if he or she has reasonable grounds for suspecting there is cash in the vehicle which is recoverable property or intended for use in unlawful conduct. Again, this is only exercisable when the officer has lawful authority to be present under other legislation, or is present with the occupiers’ or owners’ permission.

In light of the legislative changes made to Section 289 of the 2002 Act by the Policing and Crime Act 2009, Scottish Ministers are required to publish a draft revised Code and consult on the proposed amendments.

This consultation seeks to provide an opportunity for comments, observations and suggestions – drafting or otherwise – on the relevant amendments to the Code of Practice at Annex A, which have been developed in partnership with colleagues from both the Crown Office and Procurator Fiscal Service and the police service.

Before the revised Code can be brought into force, Scottish Ministers will consider any representations made to them about it during consultation, with modifications being made in light of any such representations and where appropriate.

The new Code will then be laid before the Scottish Parliament, and brought into force to coincide with the UK Government’s commencement of Section 63 of the Policing and Crime Act 2009.
WHO ARE WE CONSULTING?

This consultation is relevant to anyone who is either involved or interested in the operation of the powers contained within the Proceeds of Crime Act 2002; and is open to other Government Departments, interested organisations and members of the public who may wish to contribute.

The Code of Practice at Annex A is intended to be self-explanatory and so we would welcome views on any passages that are confusing, ambiguous or lack clarity. The Code is a consequential necessity due to new and amended powers in the primary legislation.

All responses to the Consultation are due by 30 August 2013.
RESPONDING TO THE CONSULTATION PAPER

We are inviting written responses to this consultation paper on the proposed amendments to the Code of Practice for Constables by 30 August 2013.

To respond, please complete the Response Form at Annex C. The completed form should then be sent with your responses to the Consultation Questions at Annex D to cashsearchescodeofpractice@scotland.gsi.gov.uk or to:

Lee-Anne Barclay
Organised Crime Unit
Scottish Government
Area 1WR,
St. Andrews House
Regent Road
Edinburgh, EH1 3DG

If you have any queries contact Lee-Anne Barclay on 0131 244 2151.

Handling your response

We need to know how you wish your response to be handled and, in particular, whether you are happy for your response to be made public.

Completing Section 3 of the Response Form at Annex C will ensure that we treat your response appropriately. If you ask for your response not to be published we will regard it as confidential and treat it accordingly. All respondents should be aware that the Scottish Government are subject to the provisions of the Freedom of Information (Scotland) Act 2002 and would therefore have to consider any request made to it under the Act for information relating to responses made to this consultation exercise.

We would be grateful if you could clearly indicate in your response which questions or parts of the consultation paper you are responding to as this will aid our analysis of the responses received.

Viewing SG Consultations

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the web pages of the Scottish Government website at http://www.scotland.gov.uk/consultations

The Scottish Government has an e-mail alert system for consultations, http://register.scotland.gov.uk. This system allows stakeholder individuals and organisations to register and receive a weekly e-mail containing details of all new consultations (including web links). It complements, but in no way replaces SG distribution lists, and is designed to allow stakeholders to keep up to date with all SG consultation activity, and therefore be alerted at the earliest opportunity to those of most interest. We would encourage you to register.
NEXT STEPS IN THE PROCESS

After the consultation closing date

The consultation will close on **30 August 2013**. All responses will be analysed and considered along with any other available evidence to help us reach a decision on the Code of Practice for Police Constables undertaking cash searches. The Code will then be laid in the Scottish Parliament and will be commenced shortly thereafter.

Subject to comments from consultees, the Scottish Government anticipates working towards a commencement date of the new provisions within the Policing and Crime Act 2009 on 1 October 2013.

Individual Responses

Where you have given permission for your response to be made public, we will check that it does not contain any potentially defamatory material. Responses will then be made available to the public in the Scottish Government Library by **30 September 2013**. We will also post them on the Scottish Government consultation web pages.

You can make arrangements to view responses by contacting the SG Library on 0131-244-4552. Responses can be copied and sent to you, but a charge may be made for this service.

Comments and complaints

If you have any comments about how this consultation exercise has been conducted, please send them to Ian.Kernohan@scotland.gsi.gov.uk or to:

Organised Crime Unit  
Scottish Government  
Area 1WR  
St. Andrews House  
Regent Road  
Edinburgh  
EH1 3DG
CASH SEARCHES

UNDER SECTION 289 OF THE PROCEEDS OF CRIME ACT

CODE OF PRACTICE FOR CONSTABLES IN SCOTLAND ISSUED UNDER
SECTION 293 OF THE PROCEEDS OF CRIME ACT 2002

Introduction

1. Section 294 of the Proceeds of Crime Act 2002 ("the Act") makes provision for the seizure of cash by police constables who have reasonable grounds for suspecting that it has been obtained through unlawful conduct or is intended for use in unlawful conduct. The constable can detain the cash initially for a period of 48 hours. The constable can detain the cash for longer, but only after receiving the authority of a sheriff.

2. This code of practice is made in connection with the exercise by constables in Scotland of the search powers conferred by section 289 of the Act. The code is made by Scottish Ministers under section 293 of the Act. The code is not a statement of the law. It replaces the code issued in December 2002.

3. The code applies exclusively to searches conducted under section 289 of the Proceeds of Crime Act 2002. If searches conducted under Part 8 of the Act, under other legislation or under common law result in cash being seized under section 294, the provisions of this code do not apply.

4. The code should be available at all police stations for consultation by the police and members of the public. It should also be available at police offices at ports where the powers are, or are likely, to be used. The Scottish Ministers will also make arrangements for the code to be publicly available on the Scottish Government website.

General

5. The right to respect for private and family life, home and correspondence and the right to peaceful enjoyment of possessions are both safeguarded by the Human Rights Act 1998 and so far as acts of the Scottish Ministers are concerned, the Scotland Act 1998. Powers of search may
involve significant interference with the privacy of those whose premises and persons are searched and therefore need to be fully and clearly justified before they are used. In particular, constables should consider at every stage whether the necessary objectives can be achieved by less intrusive means. In all cases constables should exercise their powers courteously and with respect for the persons and property of those concerned. The possibility of using reasonable force to give effect to the power of detention of a person and search of a person or premises should only be considered where this is necessary and proportionate in all the circumstances.

6. Powers to detain and search a person must be used fairly, responsibly, with respect for people being searched and without unlawful discrimination. The Race Relations Act 1976 as amended makes it unlawful for police officers to discriminate on the grounds of race, colour, or ethnic origin when using their powers.

7. Where the power to search a person is exercised, the Act provides that the constable may require the person - so far as the constable thinks necessary or expedient - to permit:

   (a) a search of any article the person has with them; or

   (b) a search of their person.

8. A constable may detain the person for so long as is necessary to carry out the search, including ascertaining whether the cash is not less than the minimum amount (set at £1000: The Proceeds of Crime Act 2002 (Recovery of Cash in Summary Proceedings: Minimum Amount) Order 2006-SI No 1699.)

9. The powers are exercisable only so far as reasonably required for the purposes of finding cash. The power to search can only be exercised by constables lawfully in the place where the search is carried out.

**Reasonable grounds for suspicion**

10. In order to exercise the search power a constable must have reasonable grounds for suspecting that the cash has been obtained through unlawful conduct or is intended for use in such conduct.
11. Whether there are reasonable grounds for suspicion will depend on the circumstances in each case. There must be some objective basis for that suspicion based on facts, information and/or intelligence. The constable should take into account such factors as how the individual or premises were identified, previous intelligence on persons or premises, previous involvement with the persons or premises, and suspected links with criminal activities.

12. Reasonable suspicion can never be supported on the basis of personal factors alone without reliable supporting intelligence or information or some specific behaviour by the person concerned. For example, a person’s race, religion, age, appearance, or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other as the reason for searching that person. Reasonable suspicion cannot solely be based on generalisations or stereotypical images of certain groups or categories of people being more likely to be involved in criminal activity.

**Authority to search for cash**

13. Any decision to search for cash under the Act must, if practicable, be approved by a sheriff. Judicial approval is only likely to be impracticable because of the immediacy of the circumstances of the case. This is more likely to be the case in relation to the search of a person than the search of premises. But constables must assess each case on its merits. There can be no assumption that judicial approval is impracticable for all searches of a person – constables **must** carefully consider any decision not to obtain such approval.

14. If judicial approval for a search is impracticable, a police officer of the rank of Inspector or above (a “senior officer”) should provide approval for the said search.

15. Authorisation to search should be obtained prior to the actual search itself where practicable. The constable should explain to the senior officer the reasonable grounds he or she has for undertaking the search. The authority should only be given where the senior officer is satisfied that the necessary grounds exist. The senior officer should make a written record of such reasons. Oral authorisation should be supported by written authorisation as soon as that is reasonably practicable.
16. If approval by a senior officer for a search is impracticable, a search may proceed, but the constable must give an explanation of the reasons for the search to a senior officer as soon as reasonably practicable. The senior officer should make a written record of the reason.

**Reports to the “appointed person”**

17. If a search is conducted without prior judicial approval - whether with or without senior officer approval the constable is required under section 290 of the Act to prepare a report in the following circumstances:

- if the search does not result in the seizure of cash, or
- if cash is released before the matter proceeds to a detention hearing, or
- if the court at a detention hearing does not authorise the detention of the seized cash for more than 48 hours after it was initially seized.

18. Cash may not be detained for more than 48 hours except by order of a sheriff.

19. The report must set out why it was not practicable to obtain prior judicial approval and why circumstances led the constable to believe that the search powers were exercisable. These factors could include why the constable was on the premises where the search took place, what aroused his/her suspicion and why there was a need for an immediate search. If the prior approval of a senior officer was obtained, the report should state this, with the senior officer’s reasons for approval, if practicable. If the prior approval of a senior officer was not obtained, the report should state the reasons why.

20. The report must be submitted to the independent person appointed under section 290 of the Act by the Scottish Ministers. Reports should be sent to:
   The Appointed Person for Scotland
   c/o Police Division
   1WR
   St Andrews House
   Regent Road
   Edinburgh
   EH1 3DG
21. The report should normally be submitted as soon as practicable and in any event no later than 14 days from the exercise of the search powers. Following the submission of the report, the constable must also submit to the appointed person referred to in paragraph 19 any supplementary information which the appointed person reasonably requires the constable to submit.

**Steps prior to search**

22. If the constable suspects that there is cash concealed upon a person or on premises, the constable must take the following steps:

- inform such person or any responsible person on the premises that the constable has reasonable grounds for suspecting that he or she has cash on their person or, as the case may be, that there is cash on the premises which is not less than the minimum amount and is recoverable property or is intended by any person to be used in unlawful conduct
- inform the person that the constable has the power to search them or the premises under section 289 of the Act for the purposes of finding such cash
- produce any document authorising the search (if applicable)
- ask the person to confirm or deny whether they have cash on their person or whether there is cash on the premises
- allow the person the opportunity to produce and hand over the cash.

23. These steps do not necessarily have to be followed in the order presented. The constable will have flexibility depending on the circumstances of an individual case, but all the steps must be undertaken.

24. Constables not in uniform should show their warrant cards or give another suitable form of identification.

25. If the person to be searched does not appear to understand what is being said or the constable has doubts as to the person's ability to speak and/or understand English or that person is deaf or has difficulty with hearing or speaking, the constable should take reasonable steps to ensure that the person understands. Where desirable and practicable someone who can interpret or act as a communicator should be identified, but if no such person can be identified, the search should still be allowed to proceed.
**Search of a person**

26. All searches should be carried out with courtesy, consideration and respect for the person concerned. Wherever practicable, a constable of the same sex as the person being searched should carry out the search. The cooperation of the person to be searched must be sought in every case, even if the person initially objects to the search. A forcible search may be made only if it has been established that the person is unwilling to co-operate. Constables might want to consider the possibility of using reasonable force as a last resort if this appears to be the only way in which to give effect to their power of detention and search.

27. The length of time for which a person may be detained will be kept to the minimum necessary to carry out the search and to ascertain whether any cash found is not less than the minimum amount.

28. By virtue of section 289(3)(b) the search powers include the power to search a person. However this power does not extend to requiring a person to undergo an intimate or strip search. An intimate search is one involving a physical - and not just visual – examination of a person’s body orifices. A strip search is any search that involves the removal of an article of clothing that:

- is being worn (wholly or partly) on the trunk and
- is being so worn either next to the skin or next to an article of underwear.

29. If on reasonable grounds it is considered necessary to conduct a more thorough search this should be conducted with dignity and respect and should be done out of public view. Any search involving the removal of more than an outer coat, jacket, gloves, headgear or footwear, may only be made by a constable of the same sex as the person searched. It may not be made in the presence of anyone of the opposite sex unless the person being searched specifically requests it.

30. If the constable discovers cash during a search he or she should give the person who has possession of it an opportunity to provide an explanation of its ownership, origins, purpose and destination.
Search of premises

General

31. No right of entry is conferred by section 289 of the Proceeds of Crime Act 2002. In order to search for cash on premises a constable must be lawfully on the premises. This would include a search of premises undertaken with the consent of a person entitled to grant entry to the premises. It would also include a search carried out when a constable has exercised a power of entry conferred by common law or by a search warrant granted in some other connection or power of entry conferred under some other legislation and circumstances subsequently lead the constable to believe that there is cash on the premises. „Premises’ includes any place and, in particular, includes any vehicle. A search must be made at a reasonable hour - i.e. in the case of domestic premises outside normal sleeping hours and in the case of business premises during its normal business hours unless this might frustrate the purpose of the search.

32. If it is proposed to enter premises consent must be given by the person entitled to do so before any search can take place. The constable must make any necessary enquiries in order to be satisfied that the person has the authority to give such consent.

33. A constable cannot enter and search premises if the consent has been given under duress, nor continue to search premises if the consent is withdrawn before the search is completed.

Although the power to search premises does include the ability to search vehicles an officer has no power to force entry into a vehicle, but where there is an identifiable person in control of the vehicle and that person is in or in the vicinity of the vehicle the officer can require that person to permit entry to and a search of the vehicle.

This power can only be exercised where the vehicle is in a public place or within the environs of a dwelling and the officer has reasonable grounds for believing that the identifiable person does not reside in the dwelling and the vehicle is there without the permission of a person who resides there.
Conduct of searches

34. Premises may be searched only to the extent necessary to achieve the objective of the search. A search may not continue once the objective of the search has been fulfilled - and no search may continue once the constable in charge of the search is satisfied that whatever is sought is not on the premises. (This does not prevent a further search if new information comes to light justifying such a search.)

35. Searches must be conducted with due consideration for the respect of the property and privacy of the occupier of the premises searched, executed courteously and with no more disturbance than necessary. Searches should be made within three calendar months of the date of the prior approval for that search.

Recording requirements – searches of a person

36. A constable who has carried out a search in the exercise of any power to which the Code applies will make a written record of it unless it is wholly impracticable to do so. If a record is not made at the time the constable must do so as soon as practicable afterwards. There may be situations in which it is not practicable to obtain the information necessary to complete a record, but the constable must make every reasonable effort to do so.

37. The constable will seek the name, address and date of birth of the person searched, but there is no obligation on a person to provide these details, and no power of detention for the purpose of obtaining them if the person is unwilling to provide them.

38. The following information should always be included in the record of a search even if the person does not wish to provide any personal details:

- the name of the person searched, or (if it is not given) a description
- their address and date of birth, if provided
- the date, time and place that the person was first detained
- the date, time and place the person was searched (if different)
- the grounds for making the search (and of any necessary authorisation if given)
- if a search is conducted without prior judicial approval, the reason for not obtaining such
• the outcome of the search (e.g. seizure of cash, no further action)
• a note of any injury or damage to property resulting from the search
• the identity of the officer making the search
• the date, time and place that the search was concluded.

**Recording requirements – search of premises**

39. Where premises have been searched in circumstances to which this Code applies the constable in charge of the search shall make or have made a record of the search and make such a record available if requested to do so unless the circumstances make it impracticable to do so. The following information should always be included in the record of a search:

• the address of the premises searched (and if relevant and possible the part of those premises searched) **or, where the premises are a vehicle, the registration mark and description of vehicle and its location**
• the grounds for making the search
• the date, time and duration of the search
• the authority under which the search was made, including whether prior judicial or senior officer approval was obtained
• the name of the officer in charge of the search and the names of all other constables who conducted the search
• the names of any people on the premises if they are known
• **the name and address of any suspect who has been required to permit entry to or a search of a vehicle**
• details of any damage caused during the search and the circumstances in which it was caused
• the outcome of the search (e.g. seizure of cash, no further action).
THE SCOTTISH GOVERNMENT CONSULTATION PROCESS

Consultation is an essential and important aspect of Scottish Government working methods. Given the wide-ranging areas of work of the Scottish Government, there are many varied types of consultation. However, in general, Scottish Government consultation exercises aim to provide opportunities for all those who wish to express their opinions on a proposed area of work to do so in ways which will inform and enhance that work.

The Scottish Government encourages consultation that is thorough, effective and appropriate to the issue under consideration and the nature of the target audience. Consultation exercises take account of a wide range of factors, and no two exercises are likely to be the same.

Typically Scottish Government consultations involve a written paper inviting answers to specific questions or more general views about the material presented. Written papers are distributed to organisations and individuals with an interest in the issue, and they are also placed on the Scottish Government web site enabling a wider audience to access the paper and submit their responses*. Consultation exercises may also involve seeking views in a number of different ways, such as through public meetings, focus groups or questionnaire exercises. Copies of all the written responses received to a consultation exercise (except those where the individual or organisation requested confidentiality) are placed in the Scottish Government library at Saughton House, Edinburgh (K Spur, Saughton House, Broomhouse Drive, Edinburgh, EH11 3XD, telephone 0131 244 4565).

All Scottish Government consultation papers and related publications (e.g. analysis of response reports) can be accessed at: Scottish Government consultations (http://www.scotland.gov.uk/consultations)

The views and suggestions detailed in consultation responses are analysed and used as part of the decision making process, along with a range of other available information and evidence. Depending on the nature of the consultation exercise the responses received may:

- indicate the need for policy development or review
- inform the development of a particular policy
- help decisions to be made between alternative policy proposals
- be used to finalise legislation before it is implemented

Final decisions on the issues under consideration will also take account of a range of other factors, including other available information and research evidence.

While details of particular circumstances described in a response to a consultation exercise may usefully inform the policy process, consultation exercises cannot address individual concerns and comments, which should be directed to the relevant public body.

* http://www.scotland.gov.uk/consultations
ANNEX C

Proceeds of Crime Act 2002
Revising the Code of Practice for Constables – A Consultation Paper

RESPONDENT INFORMATION FORM
Please Note this form must be returned with your response to ensure that we handle your response appropriately

1. Name/Organisation

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<thead>
<tr>
<th>Title</th>
<th>Mr</th>
<th>Ms</th>
<th>Mrs</th>
<th>Miss</th>
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Surname

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2. Postal Address

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3. Permissions - I am responding as…

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(a) Do you agree to your response being made available to the public (in Scottish Government library and/or on the Scottish Government web site)?

Please tick as appropriate

Yes [ ] No [ ]

(b) Where confidentiality is not requested, we will make your responses available to the public on the following basis

Please tick ONE of the following boxes

- Yes, make my response, name and address all available
- Yes, make my response available, but not my name and address
- Yes, make my response and name available, but not my address

(c) The name and address of your organisation will be made available to the public (in the Scottish Government library and/or on the Scottish Government web site).

Are you content for your response to be made available?

Please tick as appropriate

Yes [ ] No [ ]

(d) We will share your response internally with other Scottish Government policy teams who may be addressing the issues you discuss. They may wish to contact you again in the future, but we require your permission to do so. Are you content for Scottish Government to contact you again in relation to this consultation exercise?

Please tick as appropriate

Yes [ ] No [ ]
Please return the completed respondent information form (Annex C) and questionnaire (Annex D) by **30 August 2013** to: cashsearchescodeofpractice@scotland.gsi.gov.uk or

Lee-Anne Barclay  
Organised Crime Unit  
Scottish Government  
Area 1WR,  
St. Andrews House  
Regent Road  
Edinburgh, EH1 3DG

You can access the consultation online at http://www.scotland.gov.uk/consultations
CONSULTATION QUESTIONS

Please remember to include your Respondent Information Form (Annex C) with this response to ensure that your return is handled appropriately

Q1. Does the revised Code provide helpful practical guidance on the steps that constables should follow when undertaking cash searches of vehicles? (Search of Premises, paragraph 33)

Yes ☐ No ☐

Please use this space for comments

Q2. Does the revised Code provide clear guidance on what needs to be recorded by constables undertaking a search of premises where the premises are a vehicle? (Recording requirements – search of a premises, paragraph 39)

Yes ☐ No ☐

Please use this space for comments

Q3. Do you agree with the proposed amendments to the Code of Practice for Police Constables carrying out searches for cash? Do you have any other comments on the proposed amendments?

Yes ☐ No ☐

Please use this space for comments
Q4. The Code of Practice is intended to be self-explanatory. Do you find any of the passages confusing, ambiguous or lacking in clarity?

Yes □ No □

Please use this space for comments

Q5. Will the Code of Practice have an adverse impact on your organisation?

Yes □ No □

Please use this space for comments

Q6. Do you have any other comments on the proposals outlined in this paper?

Yes □ No □

Please use this space for comments