

**Supplementary report by the  
Advisory Group  
on Stop and Search**

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**To Michael Matheson, MSP,  
Cabinet Secretary for Justice**

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The Independent Advisory Group on Stop and Search reported to the Cabinet Secretary for Justice on 31 August 2015<sup>1</sup>. Our report contained ten recommendations, including the ending of non-statutory (“consensual”) stop and search, upon commencement of a Code of Practice (Recommendations 1 and 8) Following publication of our report in September 2015, all ten recommendations were accepted by the Government. This resulted in amendments to the Criminal Justice (Scotland) Bill (now the Criminal Justice (Scotland) Act 2016).

Two of our recommendations were for further consultation on specific issues – the terms of the Code of Practice (Recommendation 2), and the question of whether there should be a specific power to search children for alcohol (Recommendation 6).

Consultation on these recommendations commenced on 21 March 2016 and ran until 15 July 2016. Responses have been published (where consent was given), and analysis of the responses has also been published by the Government<sup>2</sup>.

The Cabinet Secretary asked the Advisory Group to meet again to consider the responses to, and analysis of, the two consultations. I am grateful to my colleagues on the Advisory Group who all agreed to continue with this important work. (Moi Ali of the Scottish Police Authority Board kindly agreed to join the group as Morag McLaughlin had been appointed as a Summary Sheriff at Aberdeen; Pauline McIntyre, Parliamentary and Policy Officer at the Children and Young People’s Commissioner Scotland, agreed to join in place of Nico Juetten who joined the Scottish Government Legal Directorate).

The search power for alcohol was obviously the more contentious of the two issues consulted on. The consultation on this subject elicited a large number of responses, far more than is commonly encountered in Government consultations. This was due, to a significant extent, to the efforts of the Scottish Government and its officials to reach out for the views of children and young people. Specific events for children and young people were organised by, and on behalf of, the Government. Many groups, organisations and networks assisted in this process. As a result, many children and young people have had their say on this topic, whether as individuals or through the various groups and networks. The Government is to be commended for their efforts. Many involved with children and young people have expressed the view that this consultation offers a new benchmark for any consultations where the views of these groups should be sought. I am particularly grateful to Stephen Jones (Head of Police Powers at the Scottish Government) for his work in this consultation.

## **ALCOHOL SEARCH POWER - CONSULTATION RESPONSES**

Respondents were split on whether a new power to stop and search children for alcohol should be introduced. National children’s and young people’s organisations were unanimously opposed. There were divergent views amongst other

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<sup>1</sup> <http://www.gov.scot/Resource/0048/00484527.pdf>

<sup>2</sup> <https://consult.scotland.gov.uk/organised-crime-and-police-powers-unit/stop-and-search/results/consultation-of-a-draft-code-of-practice-for-stop-and-search---analysis-of-responses.pdf>

organisations including policing bodies. Almost two-thirds of respondents thought a new power to stop and search young people would have negative effects<sup>3</sup>.

Despite the attention and scrutiny given to this area for almost two years, no evidence was produced to vouch the need for such a power.

Even if the necessary evidence in support of such a power had existed, the arguments against it are persuasive, especially the potentially adverse impact on relations with the community in general and children and young people in particular.

The consultation response of the Police Service of Scotland (“Police Scotland”) was a most helpful contribution to this previously contentious area. It acknowledged the need for evidence-based change. Police Scotland’s response said that a decision on whether a new search power is required should be deferred until at least six months after the Code of Practice has been in force, to allow evidence to be gathered on the impact of ending non-statutory search.

In view of expert advice on gathering data, the Advisory Group suggested that there should also be a review after 12 months. This would allow a slightly longer period to establish some of the baselines to be expected with the new data.

Following the consultation, and the Advisory Group’s recommendation, the Government announced on 4 November that it did not believe there is sufficient evidence to support creating such a power at this time. However, the situation will be re-assessed after the Code has been in force for 12 months (with an interim assessment after 6 months), during which time a range of further evidence will be gathered. The Advisory Group was unanimous in supporting this course of action.

**Overall, the responses to the consultation made clear that no such power should be created at this stage. Review of this area, once evidence is available, should take particular account of these responses and the clear statement of the relevant advantages and disadvantages.**

## CODE OF PRACTICE

Given the responses to the above consultation, we were able to spend most of our time in several meetings exploring the detail of the new Code of Practice.

As acknowledged in our original report, we used PACE (Police and Criminal Evidence Act) Code A<sup>4</sup> as a starting point for the draft Code of Practice we produced for the purposes of consultation. Using PACE Code A had a number of advantages – it is a working code which has been in force for many years in England and Wales; it covers many of the areas we would wish to see in a code for Scotland; it has been subject to regular revision due to experience and consultation.

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<sup>3</sup> <https://consult.scotland.gov.uk/organised-crime-and-police-powers-unit/under18search/results/consultation-on-police-powers-to-search-children-and-young-people-for-alcohol---analysis-of-responses.pdf>

<sup>4</sup> Code of practice for statutory powers of stop and search and requirements to record public encounters by police officers and staff

Nonetheless, PACE Code A could not be adopted in Scotland without appropriate adaptation. The law is not the same in Scotland. Police practice is also different in many respects. The revised Code of Practice that the Government will lay before Parliament omits aspects of Code A which were unnecessary or irrelevant, and includes areas which we felt necessary but which do not appear in Code A, or at least do not appear in precisely the same terms.

Revising the draft Code involved considerable work, with significant input from all Group members and many others. I am particularly grateful to Craig French of the Scottish Government Legal Directorate for the patient and astute application of his many years of drafting experience.

## **CODE OF PRACTICE - CONSULTATION RESPONSES**

Respondents to the consultation expressed a clear view that the Code should contain a statement setting out the purpose of stop and search. There was significant support for the Code to contain separate sections on children and young people, adults at risk and vulnerable adults. Respondents offered a wide range of very individual and specific points about different aspects of the Code. A small number of respondents (including those representing Police Scotland and the Scottish Police Federation) made detailed comments about the practical use of the Code in specific situations. All responses have been considered and discussed in detail. Many are reflected in the final version of the Code. We are grateful to all respondents for their comments and suggestions. We have tried to retain focus on relevant principles, particularly respect for human rights, equalities and transparency, while acknowledging the practicalities as far as possible.

## **NEW SECTIONS**

- A new section has been added (paragraph 1.3) that states the primary purpose of stop and search (to promote public safety and help prevent and detect crime).
- A new chapter (chapter 7) has been added on searches where a child is involved
- A new chapter (chapter 8) has been added on searches where a vulnerable person is involved
- Significant revisions have been made to chapter 4 (legal basis for carrying out a search) and chapter 10 (monitoring and supervising stop and search). These sections have been restructured in a more logical order, and have been amended to make them clearer.
- Chapter 9 (recording requirements) has been amended to ensure that information about strip searches (including strip searches of children) will be recorded.
- A new section has been added (paragraph 3.4) to make it clear that, notwithstanding the ending of non-statutory search, a constable must take all necessary steps to protect life (this addresses concerns raised that constables may feel unable to intervene in certain threat to life situations – for example to look for and remove a harmful item from a suicidal person).

In the draft Code attached to our report, there were no sections specifically dealing with children and vulnerable individuals. We recognised that both areas merited

special attention and produced the two new sections to address them. I am most grateful to my colleagues, Pauline McIntyre and David Harvie, who led our work in drafting these sections. We did not have the time to issue these new sections for public consultation but they have been subject to considerable discussion within the Advisory Group and consultation outwith our membership, including relevant groups and organisations, as well as officers at Police Scotland's National Stop and Search Unit (NSSU) and leading academics with a particular interest in this area. I am grateful to all of those who helped us to produce a working Code which we hope will be of benefit to public and police officers alike. The addition of the new sections has been warmly welcomed by everyone that the group has engaged with and we are confident that the new sections of the Code address the issues raised in consultation responses.

### **STRIP AND INTIMATE SEARCHES**

Some consultation responses suggested that it should be recorded if a strip search is carried out. The group agreed with this. The Code now includes a requirement to record whether a strip search or intimate search was carried out and the National Stop and Search database had been updated to enable this.

### **INTIMATION TO PARENTS OF SEARCHES**

This is another area where there has been considerable discussion among the Group, mirroring issues highlighted in the evaluation report on the Fife Pilot on Stop and Search (during which intimation to parents was a routine part of the process):

*The letter to parents [of children aged 15 and under] is a difficult area. There are good suggestions which would make them more useful for parents. These include more detail on the circumstances of the stop and search, details of what brought the police officer to conduct a search, what possible outcomes or repercussions there might be for the child from the search and the use of less formal language. However, there is also a concern that the letters could have negative consequences for children in some households where contact with the police is seen as problematic. Careful consideration should be given to this and whether the letters in some cases might do more harm than good.<sup>5</sup>*

It is difficult, we think, to be prescriptive as to a single course of action which would be appropriate in every situation. There should be appropriate training on intimation to parents, addressing factors in favour of, and against, with the best interests of the child as the overriding factor (consistent with section 68 of the 2016 Act and Recommendation 7 of our Report). Thereafter, the decision in each case should be left to the individual officer who is best placed to make an assessment in each individual case. Decisions on intimation should be collated by Police Scotland in order to inform training and practice on intimation, as well as allowing proper scrutiny.

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<sup>5</sup> The Fife Division (Police Scotland) Stop and Search Pilot Evaluation; O'Neil, Aston and Krause; June 2015; Recommendation 18

## **DEVELOPMENTS**

Body-worn cameras have been piloted and are in use in the Aberdeen area. Use of these cameras carries implications beyond our remit. Any expansion of their use will no doubt be accompanied by appropriate consultation. We simply note that they may have a part to play in various aspects of stop and search.

## **ISSUES RAISED IN THE CONSULTATION AND NOT INCLUDED IN THE CODE OF PRACTICE**

### **Search on entry to concerts, sports events, etc**

Such searches had not been the subject of anything like the same level of concern as stop and search on the street. It seemed to us that submitting to search as a condition of entry was sufficiently common and well understood to the public as to avoid many of the contentious issues around stop and search.

There was consensus amongst the Advisory Group members that it would be impractical to record information about searches at entry to sports and other events. Notwithstanding that two thirds of consultation respondents said this was necessary, we unanimously considered that there would be significant practical and operational difficulties in recording searches on entry to large scale events.

## **TRAINING**

An important factor in our work this year, and that of the NSSU, has been the continuing decline in use of non-statutory stop and search. Police Scotland has come a very long way from the stage where the practice was routine. The overall number of searches has fallen significantly. In addition, there was a near-total reversal from a point where non-statutory stop and search made up approximately 70% of all searches, to the point when we reported that the relevant percentage had fallen to approximately 30%, to a point now when only approximately 3% of searches are conducted on this basis.

Advisory Group members have had the benefit of attending a full briefing at the Police College from officers of the NSSU. We attended there on 10 October 2016 and had the chance to explore many questions with those responsible for preparing and implementing the stop and search training of all officers of Police Scotland. This was a valuable session which helped to emphasise appropriate recognition of the necessary shift in policy, practice and cultural changes which we identified in our Report (Recommendation 9).

It was apparent from this session that there is renewed emphasis on what has been termed “engagement”. This is to allow the space for officers to speak to individuals without immediate escalation to search. Engagement represents exactly the sort of police activity which can reassure communities without alienating individuals. Each contact or “engagement” between police officers and the public, even if only confined to a single individual, is an opportunity to affect public opinion, for better or worse.

After engagement, the focus for officers is on the extensive range of existing statutory powers available to all constables. Training will encourage proper regard to

“reasonable grounds” justifying a search, as well as addressing issues such as unconscious bias.

## **FURTHER REVIEW**

As indicated above, there will be early reviews of stop and search practice at 6 and 12 months following commencement of the Code of Practice. The specific purpose of these early reviews will be to determine whether there are any gaps in legislative provision or practical or operational problems for Police Scotland in implementing the Code following the ending of non-statutory search. A draft review protocol has been developed and will be finalised by the Advisory Group shortly.

In addition, there will be a formal process of review as mentioned in Recommendation 3 of our Report (first review after 2 years; thereafter review every 4 years; earlier review can be triggered). While the reality is that non-statutory stop and search should end before the Code of Practice comes into force, the starting-point for some of the data will be the date of commencement of the Code. Time will be needed to establish baselines and ascertain what the data means.

The implications of all data will be considered as part of any reviews. Apart from on-going scrutiny by Her Majesty’s Inspectorate of Constabulary Scotland, the Scottish Police Authority and local monitoring arrangements, the Cabinet Secretary has asked the Advisory Group to consider emerging evidence at the 6 and 12 month stages.

Importantly, we wish to monitor any unintended changes in police practice.

To date, despite the existence of a power under Section 61 of Crime and Punishment (Scotland) Act 1997, there have been no arrests of any child for refusing to hand over alcohol. Officers of Police Scotland have repeatedly stated that they do not wish to see that change. It is important, therefore, to monitor the situation closely.

Also, in Scotland, with the exception, possibly, of major events like the G8 summit at Gleneagles in 2005, Police Scotland and legacy forces have made little or no use of their very wide power under section 60 of the Criminal Justice and Public Order Act 1994 to designate a particular area for a specified period not exceeding 24 hours, and during that time search individuals without suspicion.

Despite its limited use to date and the absence of any specific plans to use it, the legislation could be used in Scotland if there is an operational requirement and is another area which requires monitoring. If the power were to be used here, consideration would have to be given to the voluntary restrictions on its operation which apply through the Home Office’s Best Use of Stop and Search Scheme. Aspects of the legislation have been subject to criticism, and this Home Office Scheme meets some of that criticism. From discussion, it seems likely that Police Scotland would consider adopting these voluntary restrictions on its operation if the power was used. This is another area that requires careful monitoring.

One suggestion we received was that a record should be kept of all seizures of alcohol, an admittedly important part of the debate to date in relation to alcohol and children. Strictly speaking, seizures are a separate matter and outwith our terms of

reference. Nonetheless, we recognise that it may well be useful to keep in mind the information about seizures which is already published by Police Scotland when looking at some of the new data.

## **GAPS**

In our report, we stated that a majority in the Advisory Group were satisfied that abolition of non-statutory stop and search would result in no significant gaps in police powers. Despite a lengthier period in gathering evidence since our report, we have not been advised of any significant gaps or practical limitations on effective policing practice.

Nonetheless, we recognise that our work was done in a very short period of time and it is hard to be absolutely certain on this question, especially where non-statutory stop and search was being used in many situations, including those where specific statutory powers were available.

One area where we recommended further discussion between relevant bodies, including Police Scotland, was children and vulnerable adults who came to police attention on protection and welfare grounds during stop and search situations (Recommendation 10).

**Some police officers expressed uncertainty to us about police powers to intervene to preserve life. Despite legislative provision giving powers and duties to the police and others to protect vulnerable people, there seems to be no explicit power of search to preserve life. This area should be monitored during the early stages of evidence-gathering. In situations involving risk to life, we do not want constables to hesitate to search an individual. While non-statutory stop and search may have been inappropriate in such situations, especially where there were concerns about capacity, there is no doubt that there are times when it may be appropriate to search someone as one of the urgent steps taken to try to avoid any threat to life.** This is specifically recognised at paragraph 3.4 of the Code. This makes it clear that, notwithstanding the ending of non-statutory search, a constable must take all steps necessary to protect life.

Training will direct constables to statutes which prescribe relevant powers and duties (Adults with Incapacity (Scotland) Act 2000; Mental Health (Care and Treatment) (Scotland) Act 2003; Adult Support and Protection (Scotland) Act 2007), and the overriding duty to protect life (section 20(1)(c) of the Police and Fire Reform (Scotland) Act 2012; and Article 2(1), ECHR - "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law").



## LEGISLATION

The consultation process has highlighted one area of infelicitous drafting in the 2016 Act.

Section 69 deals with publication of information by Police Scotland – a key aspect of accountability and scrutiny.

Subsection 2 lists information to be published, so far as practicable. The list includes a reference to the “national origin” of persons searched. Consultation responses highlighted problems with questions about “national origin”. We recognise the force in these observations but the legislation already includes the phrase. **We suggest that it should be reviewed an early opportunity and, meantime, it may be that it is an area where relevant sensitivities should be addressed in training.**

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