

Consultation on A Draft Code of Practice for Stop and Search

March 2016

Foreword by Michael Matheson MSP, Cabinet Secretary for Justice



Stop and Search can be a valuable tool in combating crime and has led to the seizures of dangerous weapons, drugs and stolen goods. However, clearly it is important to get the balance right between protecting the public and the rights of the individual.

That is why, in March last year, I asked John Scott QC, Solicitor Advocate, to chair an independent Advisory Group on Stop and Search. I asked the group to develop a draft Code of Practice that would underpin how Stop and Search is used in Scotland.

The Advisory Group recommended that before the Code of Practice comes into force there should first be this consultation on a draft Code. The Group also recommended that non-statutory (or consensual) Stop and Search should end when the Code of Practice comes into force.

I would like to thank John Scott and the Advisory Group members for their considerable efforts and for their continued assistance with this consultation. The Scottish Government accepted the Group's recommendations in full and acted quickly to lodge amendments to the Criminal Justice Bill (now the Criminal Justice (Scotland) Act 2016) to make the necessary legislative changes.

I would also like to recognise the substantial progress and improvements that Police Scotland has made around Stop and Search over the last year. The proportion of statutory searches has continued to increase, rising from 72% in June to 89% for the period from September to December 2015. Police Scotland has also undertaken considerable work to improve the way Stop and Search information is recorded so the public can have much greater confidence in the data used to measure progress.

I have been keen to build consensus on this important issue and I welcome your views on the draft Code of Practice. I encourage you to respond to this consultation, particularly if you think that any changes should be made to the draft Code of Practice before it is implemented.

A handwritten signature in black ink, appearing to read 'Michael Matheson'. The signature is fluid and cursive, written on a light-colored background.

Michael Matheson

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1. Purpose of this consultation

This consultation asks for views on whether any changes should be made to a draft Code of Practice for Stop and Search before it comes into force. The draft Code of Practice is included as Part 5 of this paper.

2. Responding to this consultation paper

Responses should reach us by **15 July 2016**. Earlier responses would be welcome.

Please complete your response using the online system at <https://consult.scotland.gov.uk/organised-crime-and-police-powers-unit/stop-and-search> or send your response with the completed Respondent Information Form included at the end of this paper (see 'Handling your response' below) to:

Codeofpracticeconsultation@gov.scot

or:

Police Powers Team
Scottish Government
Area 1WR
Saint Andrew's House
Edinburgh
EH1 3DG

If you have any questions please phone Catherine Lobban on 0131 244 2160.

This consultation, and all other Scottish Government consultation exercises, can be viewed online on the consultation pages of the Scottish Government website at <https://consult.scotland.gov.uk/>

The Scottish Government has an email alert system for consultations <http://register.scotland.gov.uk/Subscribe/Step1> . This system allows stakeholders, individuals and organisations to register and receive a weekly email containing details of all new consultations.

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. Please complete the consultation online at <https://consult.scotland.gov.uk/organised-crime-and-police-powers-unit/stop-and-search> or complete and return the Respondent Information Form (included at the end of this paper) as this 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 we will treat it accordingly.

All respondents should be aware that the Scottish Government is 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.

The consultation process

In addition to publishing this consultation paper, the Scottish Government will continue to discuss the draft Code of Practice with the independent Stop and Search Advisory Group and key stakeholders. This may involve workshops and group discussions.

Next steps in the process

Where respondents have given permission for their response to be made public and after we have checked that they contain no potentially defamatory material, responses will be shared with the independent Advisory Group and made available to the public in the Scottish Government Library and on the Scottish Government consultation web pages by 15 September 2016.

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.

Following this consultation, we will analyse responses to the consultation and information gathered from any workshops, group discussions and meetings carried out during the consultation period. We will then work with the independent Advisory Group and other key stakeholders to review the draft Code of Practice.

A final version of the Code of Practice will be laid before the Scottish Parliament no later than 12 January 2017. The Code of Practice can come into effect only if approved by the Scottish Parliament. The Code of Practice will be reviewed and updated (if necessary) once it has been in force for 2 years. After that it will be reviewed again at least every 4 years.

Comments and complaints

If you have any comments about how this consultation exercise had been conducted, please send them to the contact details above.

3. Consultation Questions

We welcome any general comments on the draft Code of Practice. However, you may wish to consider the following specific questions.

1. Should the Code of Practice state what the primary purpose of Stop and Search is¹?

¹Police Scotland aims to ensure that Stop and Search is used in a proportionate and accountable way to prevent and detect crime, keep people safe and improve community wellbeing. The Code of Practice in England and Wales (PACE Code A) says that 'the primary purpose of Stop and Search

- 2. Should there be a separate section of the Code of Practice to deal specifically with searches of children and young people²?**
- 2A – If you answered YES to Q2 – do you have any suggestions as to what should be included in a section on children and young people? (if so, please specify below)**
- 3. Should there be a separate section of the Code of Practice to deal specifically with searches of adults at risk and vulnerable adults³?**
- 3A – If you answered YES to Q3 – do you have any suggestions as to what should be included in a section on adults at risk and vulnerable adults? (if so, please specify below)**
- 4. Should the Code of Practice include a section about local public scrutiny of how Stop and Search is used?**
- 4A – If you answered YES to Q4 - do you think the existing local scrutiny arrangements⁴ should be used, or do you have any other suggestions? (if so, please specify below)**
- 5. Do you think it is necessary to record any information about searches carried out under section 67 of the Criminal Justice (Scotland) Act 2016⁵? (if so, please specify below what information should be recorded)**
- 6. Is there anything else that should be included within the Code that would help further promote community wellbeing and provide confidence that Stop and Search is being used with due consideration**

powers is to enable officers to allay or confirm suspicions about individuals without exercising their power of arrest'

2 At the moment there is no separate section, but paragraph 5.1 says that when deciding whether to search a child or young person who is under 18 years old the constable must treat the need to safeguard and promote the wellbeing of the child as a primary consideration, as required by section 68 of the 2016 Act

3 An adult at risk is someone who is unable to safeguard their own well-being, property, rights or other interests, is at risk of harm and because they are affected by disability, mental disorder, illness or physical or mental infirmity, is more vulnerable to being harmed than adults who are not so affected. A vulnerable person is someone who may not have a medical diagnosis confirming a physical or mental condition, however, their behaviour or position at a particular time can place them in vulnerable situations. They may not fit the 3 point test that defines an adult at risk, however, if they were to receive additional support from the Council or third sector organisations, they would be able to safeguard themselves

4 Existing arrangements are already in place for local scrutiny of policing. All local Divisional Commanders report regularly through the local scrutiny arrangements of Scotland's 32 local authorities and work closely with local Community Planning Partnerships and other local partners. These include, Community Councils, local Licensing Boards, and multicultural and faith groups. This local scrutiny is the formal route for elected members to influence local police services and retain and develop the successful partnership work between councils and Police

5 These are searches on entry to relevant premises or events, where consent to being searched has been given as a condition of entry imposed by the organiser. Part 6 of the draft Code says that a record should be made of every search that does not result in an arrest, unless this would be impracticable. In most cases, due to the nature of such events and the volume of people seeking to gain entry at the same time, it would be impracticable to make a record of a search under s.67

to Fairness, Integrity, Respect and Human Rights? (if so, please specify below)

- 7. Is there anything missing from the draft Code of Practice that should be added? (if so, please specify below)**
- 8. Is there anything in the draft Code of Practice that should be deleted and/or changed? (if so, please specify below)**

Background to this consultation

The independent Advisory Group on Stop and Search

In March 2015 the Scottish Government's Justice Secretary, Michael Matheson asked John Scott QC, Solicitor Advocate, to chair an independent Advisory Group on Stop and Search. The group was made up of experts in policing, law enforcement, children's rights and academics.

The Advisory Group produced a draft Code of Practice as an Annex to their report, which was published on 3 September 2015⁶. This draft has been used as the basis for this consultation. The Advisory Group decided to use the Code of Practice on Stop and Search in England and Wales as a template for their draft Code. This was brought in by the Police and Criminal Evidence Act 1984 [PACE] and is known as PACE Code A. The Advisory Group used this because the law in England and Wales is similar to the law in Scotland and PACE Code A has been developed and refined over a considerable number of years. The Advisory Group's view was that if they had been starting with a blank sheet of paper they would have produced much of what is contained in PACE Code A.

The Criminal Justice (Scotland) Act 2016

Since the Advisory Group published its report, the Criminal Justice (Scotland) Act 2016 (the 2016 Act) has made several changes to the law about Stop and Search. Some minor amendments have therefore been made to the draft Code to reflect these changes. Some minor amendments have also been made to reflect the questions that we are asking as part of this consultation.

The 2016 Act requires Scottish Ministers to make a Code of Practice to underpin how Stop and Search is used. It also requires Ministers to consult on a draft Code of Practice before it is brought into force. This consultation, therefore, is the consultation on a draft Code of Practice that was recommended by the Advisory Group and is required by the 2016 Act.

⁶ <http://www.gov.scot/Resource/0048/00484527.pdf>

Police Scotland Stop and Search Improvement Plan

Since the end of 2013 the use of Stop and Search powers by the police in Scotland has been subject to significant public debate. This has led to subsequent inspections, reviews and evaluations by Police Scotland, the Scottish Police Authority (SPA), Her Majesty's Inspectorate of Constabulary in Scotland, the Scottish Institute for Policing Research and the Independent Stop and Search Advisory Group. The Police Scotland Stop and Search Improvement Plan⁷ captures the 82 recommendations emerging from all this work and the governance structure laid out in the plan, overseen by the SPA Audit and Risk Committee and Board, identifies and disseminates good practice across the country to continue the journey of improvement.

What is 'Stop and Search'?

Various laws give the police the power to detain and search a person who has not been arrested. This is usually where there is reasonable suspicion that the police might find evidence of an offence or something that could be used to commit a crime. The police also have the power in some limited circumstances to search a person to protect the health and wellbeing of that person or others, where there is no suspicion that any offence has been committed⁸. The term 'Stop and Search' is used to describe this process of detaining and searching a person who has not been arrested.

At the moment, there are two different types of Stop and Search in Scotland, Statutory and Non-Statutory (or consensual). Both are described below:

Statutory Stop and Search

This can happen where there is a specific law that gives police the power to search someone (for example, if an officer has reasonable grounds to suspect someone is in possession of controlled drugs, section 23 of the Misuse of Drugs Act 1971 gives the police the power to search that person).

Non-statutory (or consensual) Stop and Search

This can happen where there isn't any specific law that would give police the power to search a person. If, however, a person agrees to being searched, the person can be searched with their consent.

The 2016 Act provides that when the Code of Practice comes into force, the police will no longer be able to use non-statutory (or consensual) Stop and Search. From then on all Stops and Searches will be Statutory.

What is the Code of Practice?

⁷ <http://www.scotland.police.uk/about-us/police-scotland/stop-and-search/stop-and-search-improvement-plan>

⁸ For example, see section 66 of the Criminal Justice (Scotland) Act 2016

Codes of Practice are increasingly common in the work of public bodies. They can allow for greater certainty on the part of the public and the public servants involved.

The Code of Practice on Stop and Search will set out rules and guidance on when and how Stop and Search is used, how the search should be carried out and the type of information that should be recorded.

A Draft Code of Practice on Stop and Search is included as Part 5 of this consultation paper. We welcome your comments on whether any changes are required to this draft Code before it is implemented.

5. Draft Code of Practice

DRAFT Code of Practice on the Exercise by Constables of Powers of Stop and Search of the Person in Scotland

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Part 2

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Part 3

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- Annex B** Example of Information to be Given to Persons subject to Stop and Search
- Annex C** Establishing Gender of Persons for the Purpose of Searching
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Introduction

1.1 It is a fundamental value of our society that we respect the right of every person to go about their lawful business without unjustified interference from the State. Where the State does interact with any person, that interaction should be governed by a respect by the State for that person, and for that person's freedoms and rights. In all its interactions the State must act with fairness and integrity, and in compliance with the law. Police work is an example of the interaction between the State and the individual, sometimes when the individual is at their most vulnerable; this Code must therefore be read in light of that fundamental right.

1.2 Police work in Scotland is carried out in accordance with the policing principles agreed by the Scottish Parliament in the Police and Fire Reform (Scotland) Act 2012. These are:

- that the main purpose of policing is to improve the safety and well-being of persons, localities and communities; and
- that the police should achieve that purpose by policing in a way which is accessible to, and engaged with, communities, and promotes measures to prevent crime, harm and disorder.

These principles inform all police work and, by extension, this Code.

1.3 This Code of Practice must be available online and at all police stations for consultation by constables, police staff, detained persons and members of the public.

1.4 This Code governs all situations in which constables Stop and Search a person without first making an arrest. It applies to situations involving the exercise of particular statutory powers of Stop and Search, and covers all searches unless the search is expressly excluded, either under this Code or by statute, or by virtue of the search being subject to a separate statutory Code or guidance as to its exercise. The Code also sets out the requirements to be followed by the Police for recording information in relation to all Stop and Search activity covered by this Code.

1.5 The purpose of this Code is to:

- set out the principles under which Stop and Search is undertaken;
- ensure a consistency in the application of Stop and Search;
- set the standard to which constables can be scrutinised and evaluated;
- explain why, when and how Stop and Search is used.

1.6 Nothing in this Code alters or otherwise affects any provision in any statute which makes express provision as to the exercise of powers of stop or search, or which specifies any procedural requirements relating to stop or search.

1.7 Nothing in this Code alters or otherwise affects any existing rule of law or legal test, e.g. as to what amounts to reasonable grounds for suspicion or as regards admissibility of evidence.

2. Principles governing Stop and Search

2.1 Recognising that stopping and searching members of the public is a significant intrusion into their personal liberty and privacy, all Stop and Search activity must be appropriate, as defined by this Code. To be appropriate it must be:

- **Lawful** – in accordance with the law and in accordance with any legal duties which are imposed on constables, with particular regard to the Human Rights Act 1998 and the Equality Act 2010;
- **Proportionate** – both in the decision of the constable to carry out a Stop and Search and in the way in which a Stop and Search is conducted. It must balance the rights of the individual against the necessity of the search;
- **Justifiable** – not applied indiscriminately; backed by intelligence and/or reasonable suspicion; and
- **Accountable** – properly recorded, verifiable and justifiable.

In addition, any Stop and Search must be carried out in accordance with the Constable's declaration, and in particular, the following principles:

- **Fairness** – a Stop and Search must be carried out fairly and impartially, and without unlawful discrimination;
- **Integrity** – a Stop and Search will not be carried out in a manner which is abusive, discriminatory, or which amounts to harassment or intimidation, the purpose of the search must be genuinely to find a particular item in the person's possession; it will reflect the principles of good conduct and personal responsibility;
- **Respect** – the person being searched must understand why they are being stopped and searched, and the procedure will be carried out with respect for individual needs – including religious and cultural values and beliefs; and
- **Human rights** – Stop and Search powers must be used compatibly with an individual's human rights, with particular regard to whether a Stop and Search is necessary and is the least intrusive method a constable could use to identify and remove the item from the person's possession.

2.2 Evidence obtained from a search to which this Code applies may be open to challenge if the provisions of the Code are not observed.

3. Applicability of this Code

3.1 This Code applies to:

(a) all stops and searches of the person who is not in police custody carried out pursuant to a statutory power (see Annex A for a non-exhaustive list)

and

(b) Searches of the person carried out in accordance with a warrant issued by a court in Scotland

3.2 This Code does not apply to;

- Searches of persons in custody
- Searches of persons under arrest under section 1 of the Criminal Justice (Scotland) Act 2016
- Searches of vehicles that do not also involve a search of a person⁹
- Searches of premises

3.3 A court or tribunal in civil or criminal proceedings must take this Code of Practice into account when determining any question arising in the proceedings to which the Code is relevant¹⁰.

3.4 Terminology

A statutory Stop and Search is one conducted by a Constable in the course of their duties where the individual is searched using a specific statutory provision or search warrant.

3.6 Constables must not search a person, even if they are prepared to submit to a search voluntarily, where no statutory power to search is applicable, and they have no warrant to do so.

4. Basis for Carrying out Stop and Search

4.1 Reasonable grounds for suspicion is the legal test which a constable must satisfy before they can stop and detain a person to carry out a search under statutory provisions. The usual requirement is a suspicion that the person has committed, or is committing, or is about to commit, a crime. Constables must therefore be able to explain and justify the basis for their suspicion by reference to intelligence or information about, or some specific behaviour by, the person concerned.

4.2 Some search powers are exercised on the basis that a constable suspects a person of carrying certain items. Suspicion that the person has committed or is committing an offence is not always required (see for example, paragraph 4.3 below). The test must be applied to the particular circumstances in each case and is in two parts:

⁹ This Code does not apply to a search of a vehicle alone, but the Code does apply to the related search of any person within the vehicle.

¹⁰ See section 75 of the Criminal Justice (Scotland) Act 2016

(i) First, the constable must have formed a genuine suspicion in their own mind that they are likely to find the object for which the search power being exercised allows them to search; and

(ii) Second, the suspicion that the object will be found must be reasonable. This means that there must be an objective basis for that suspicion based on facts, information and/or intelligence which are relevant to the likelihood that the object in question will be found, so that a reasonable person would be entitled to reach the same conclusion based on the same facts and information and/or intelligence.

4.3 The exercise of these Stop and Search powers depends on the likelihood that the person searched is in possession of an item for which they may be searched; it does not always depend on the person concerned being suspected of committing an offence in relation to the object of the search. A constable who has reasonable grounds to suspect that a person is in innocent possession of a stolen or prohibited article, controlled drug or other item for which the constable is empowered to search, may Stop and Search the person even though there would be no power of arrest. This would also apply when a child under the age of criminal responsibility is suspected of carrying any such item (see Note 3A).

4.4 Some search powers are exercised to ensure the care and protection of the person being searched and/or to ensure the safety of others. The exercise of these powers does not depend on the person concerned being suspected of a crime. Under the powers in Section 66 of the Criminal Justice (Scotland) Act 2016 a constable may search a person who is being taken, or is to be taken, from one place to another. The purpose of a search under this section is to ensure that the person is not in possession of any item or substance that could cause harm to them or someone else.

4.5 Under the powers in Section 67 of the Criminal Justice (Scotland) Act 2016, a constable may search a person who is seeking to enter or attend, or who has entered or is attending a relevant premises or event, where the person has consented to the search as a condition of entry imposed by the occupier or organiser. The purpose of a search under this section is to ensure the health, safety or security of people on the premises or at the event.

Personal factors can never support reasonable grounds for suspicion

4.6 Reasonable suspicion can be supported by information or intelligence which provides a description of a person suspected of carrying an article for which there is a power to Stop and Search. The following cannot be used, alone or in combination with each other, or in combination with any other factor, as the reason for stopping and searching any individual:

(a) A person's physical appearance with regard, for example, to any of the 'relevant protected characteristics' set out in the Equality Act 2010, section 149, which are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation or the fact that the person is known to have a previous conviction; and

- (b) Generalisations or stereotypical images that certain groups or categories of people are more likely to be involved in criminal activity.

Reasonable grounds for suspicion based on information and/or intelligence

4.7 Reasonable grounds for suspicion should normally be linked to accurate and current intelligence or information, relating to articles for which there is a power to Stop and Search, being carried by individuals in any locality. This would include reports from members of the public or other constables describing:

- (a) a person who has been seen carrying such an article.
- (b) crimes committed in relation to which such an article would constitute relevant evidence, for example, property stolen in a theft (including by housebreaking) or an offensive weapon or bladed or sharply pointed article used to assault or threaten someone.

4.8 Searches based on accurate and current intelligence or information are more likely to be effective. Targeting searches in a particular area at specified crime problems not only increases their effectiveness but also minimises inconvenience to members of the public. It also helps in justifying the use of searches both to those who are searched and to other members of the public. This does not, however, prevent Stop and Search powers being exercised in other locations where such powers may be exercised and reasonable suspicion exists.

Reasonable grounds for suspicion and searching groups

4.9 Where there is reliable information or intelligence that members of a group or gang habitually carry knives unlawfully or other weapons or controlled drugs, and dress in a distinctive manner or use other means of identification in order to identify themselves as members of that group or gang, that distinctive style of dress or other means of identification may provide reasonable grounds to Stop and Search any person believed to be a member of that group or gang.

4.10 A similar approach would apply to particular organised protest groups where there is reliable information or intelligence:

- (a) that the group in question arranges meetings and marches to which one or more members bring articles intended to be used to cause damage and/or injury to others in support of the group's aims;
- (b) that at one or more previous meetings or marches arranged by that group, such articles have been used and resulted in damage and/or injury;

and

- (c) that on the subsequent occasion in question, one or more members of the group have brought with them such articles with similar intentions.

These circumstances may provide reasonable grounds to Stop and Search any members of the group to find such articles.

Reasonable grounds for suspicion based on behaviour, time and location

4.11 Reasonable suspicion may also exist without specific information or intelligence and on the basis of the behaviour of a person. For example, if a constable encounters someone on the street at night who is obviously trying to hide something, the constable may (depending on the other surrounding circumstances) base such suspicion on the fact that this kind of behaviour is often linked to stolen or prohibited articles being carried. A constable who forms the opinion that a person is acting suspiciously or that they appear to be nervous without good reason must be able to explain, with reference to specific aspects of the person's behaviour or conduct which they have observed, why they formed that opinion. A hunch or instinct which cannot be explained or justified to an objective observer can never amount to reasonable grounds.

Securing public confidence and promoting community relations

4.12 All police officers must recognise that searches are more likely to be effective, legitimate and secure public confidence when their reasonable grounds for suspicion are based on a range of objective factors. The overall use of these powers is more likely to be effective when up-to-date and accurate intelligence or information is communicated to constables and they are well-informed about local crime patterns. Local senior officers have a duty to ensure that those under their command who exercise Stop and Search powers have access to such information, and the constables exercising the powers have a duty to acquaint themselves with that information.

Questioning to decide whether to carry out a search

4.13 A constable who has reasonable grounds for suspicion may detain the person concerned in order to carry out a search. Before carrying out the search the constable should, as a matter of good practice, ask questions about the person's behaviour or presence in circumstances which gave rise to the suspicion. As a result of questioning the detained person, the reasonable grounds for suspicion necessary to detain that person may be confirmed or, because of a satisfactory explanation, be dispelled. (See Notes 4 and 5). Questioning may also reveal reasonable grounds to suspect the possession of a different kind of unlawful article from that originally suspected.

4.14 If, as a result of questioning before a search, or other circumstances which come to the attention of the constable, there cease to be reasonable grounds for suspecting that an article of a kind for which there is a power to Stop and Search is being carried, no search may take place. In the absence of any other lawful power to detain, the person is free to leave at will and must be so informed.

4.15 There is no power to stop or detain a person in order to find grounds for a search. Constables have many encounters with members of the public which do not involve detaining people against their will and do not require any statutory power for

a constable to speak to a person. However, if reasonable grounds for suspicion emerge during such an encounter, the constable may detain the person to search them, even though no grounds existed when the encounter began. Reasonable grounds for suspicion however cannot be provided retrospectively by such questioning during a person's detention or by refusal to answer any questions asked. As soon as detention begins, and before searching, the constable must inform the person that they are being detained for the purpose of a search and take action in accordance with paragraphs 5.9 to 5.11 under "Steps to be taken prior to a search".

Searches authorised under section 60 of the Criminal Justice and Public Order Act 1994

4.16 Authority for a constable in uniform to Stop and Search under section 60 of the Criminal Justice and Public Order Act 1994 may be given if the authorising constable reasonably believes:

- (a) that incidents involving serious violence may take place in any locality, and it is expedient to use these powers to prevent their occurrence; or
- (b) that persons are carrying dangerous instruments or offensive weapons without good reason in any locality.

4.17 An authorisation under section 60 may only be given by a constable of the rank of inspector or above and in writing (although the requirement for the order to be in writing need not be met immediately and can be satisfied when it is practicable to do so). The authorisation must specify the grounds on which it was given, the locality in which the powers may be exercised and the period of time for which they are in force. The period authorised may not exceed 24 hours.

4.18 Where an officer below the rank of assistant chief constable authorises Section 60 powers, this should be reviewed as soon as is practicable by an officer of at least the rank of assistant chief constable.

4.19 A constable of the rank of superintendent or above may direct that the authorisation shall be extended for a further 24 hours if it is necessary to do so, having regard to the offences which have been (or are suspected of having been) committed, or the on-going activity in the area. That direction must be given in writing unless it is not practicable to do so, in which case it must be recorded in writing as soon as practicable afterwards.

4.20 Although the powers in section 60 provide that a constable may stop any person or vehicle and make any search they see fit whether or not they have grounds for suspecting that the person or vehicle is carrying weapons or articles of the relevant kind, the selection of persons and vehicles under section 60 to be stopped and, if appropriate, searched should reflect an objective assessment of the nature of the incident or weapon in question and the individuals and vehicles thought likely to be associated with that incident or those weapons. When selecting persons and vehicles to be stopped in response to a specific threat or incident, constables must take care not to discriminate unlawfully against anyone on the grounds of any of the protected characteristics set out in the Equality Act 2010.

4.21 The driver of a vehicle which is stopped under section 60 and any person who is searched under section 60 are entitled to a written statement if they apply within twelve months from the day the vehicle was stopped or the person was searched. This statement is a record which states that the vehicle was stopped or (as the case may be) that the person was searched under section 60 and it may form part of the search record or be supplied as a separate record.

4.22 Section 60(4A) of the Criminal Justice and Public Order Act 1994 also provides a power to constables to demand the removal of disguises. The constable exercising the power must reasonably believe that someone is wearing an item wholly or mainly for the purpose of concealing identity. There is also a power to seize such items where the constable believes that a person intends to wear them for this purpose. There is no power to Stop and Search for disguises. A constable may seize any such item which is discovered when exercising a power of search for something else, or which is being carried, and which the constable reasonably believes is intended to be used for concealing anyone's identity. This power can only be used if an authorisation given under section 60 is in force.

4.23 Authority under section 60(4A) for a constable in uniform to require the removal of disguises and to seize them may be given on the same grounds as specified in paragraph 4.16.

4.24 An authorisation under section 60(4A) may only be given by a constable of the rank of inspector or above, in writing, specifying the grounds on which it was given, the locality in which the powers may be exercised and the period of time for which they are in force. The period authorised may not exceed 24 hours.

4.25 The following powers to search premises also authorise the search of a person, not under arrest, who is found on the premises during the course of the search:

(a) section 49B of the Criminal Law (Consolidation) (Scotland) Act 1995 under which a constable may enter school premises and search the premises and any person on those premises for any bladed or pointed article or offensive weapon;

(b) under a warrant issued under section 23(3) of the Misuse of Drugs Act 1971 to search premises for drugs or documents but only if the warrant specifically authorises the search of persons found on the premises;

(c) under a search warrant or order issued under paragraph 1, 3 or 11 of Schedule 5 to the Terrorism Act 2000 to search premises and any person found there for material likely to be of substantial value to a terrorist investigation; and

(d) under a warrant issued under section 11 or section 52 of the Salmon and Freshwater Fisheries (Consolidation) (Scotland) Act 2003 to search any premises and any person found there for: evidence of an offence under that Act; illegally taken salmon or trout; or illegal fishing equipment.

4.26 Before the power under section 49B of the Criminal Law (Consolidation) (Scotland) Act 1995 may be exercised, the constable must have reasonable grounds to suspect that an offence under section 49A of that Act (having a bladed or pointed article or offensive weapon on school premises) has been or is being committed.

4.27 A warrant to search premises and persons found therein may be issued under section 23(3) of the Misuse of Drugs Act 1971 if there are reasonable grounds to suspect that controlled drugs or certain documents are in the possession of a person on the premises.

4.28 Searches authorised under a warrant do not require prior specific grounds to suspect that the person to be searched is in possession of an item for which there is an existing power to search. However, it is still necessary to ensure that the selection and treatment of those searched under these powers is based upon objective factors connected with the search of the premises, and not upon personal prejudice.

5 Conduct of Searches - General

5.1 All Stop and Search activity must be carried out with courtesy, without prohibited discrimination, and with respect for the human rights of the person concerned. When deciding whether to search a child or young person who is under 18 years old the constable must treat the need to safeguard and promote the wellbeing of the child as a primary consideration.¹¹

5.2 The use (and misuse) of Stop and Search powers has a significant impact on public confidence in the police. Every reasonable effort should be made to minimise the disruption and embarrassment that a person being searched may experience.

5.3 The co-operation 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 only be made if it has been established that the person is unwilling to co-operate or resists. Reasonable force may be used as a last resort if necessary to conduct a search or to detain a person for the purposes of a search.

5.4 The length of time for which a person may be detained must be reasonable and kept to a minimum. The thoroughness and extent of a search must depend on the circumstances of the search, including what is suspected of being carried, and by whom. If the suspicion relates to a particular article which is seen to be slipped into a person's pocket or bag, then subject to a reasonable consideration of the safety of the searching constable, and in the absence of other grounds for suspicion or an opportunity for the article to be moved elsewhere, the search must be confined to that pocket or bag. In the case of a small article which can readily be concealed, such as a drug, and which might be concealed anywhere on the person, a more extensive search may be necessary.

5.5 The search must be carried out at or near the place where the person was first detained. (See Note 8).

¹¹ See Section 68 of the Criminal Justice (Scotland) Act 2016

5.6 There is no power to require a person to remove any clothing in public other than an outer coat, jacket, gloves, headgear or footwear except under section 60(4A) of the Criminal Justice and Public Order Act 1994 (which empowers a constable to require a person to remove any item worn to conceal identity). (See Notes 6 and 8). A search in public of a person's clothing which has not been removed must be restricted to superficial examination of outer garments. This does not, however, prevent a constable from placing his or her hand inside the pockets of the outer clothing, or feeling round the inside of collars, socks and shoes if this is reasonably necessary in the circumstances to look for the object of the search or to remove and examine any item reasonably suspected to be the object of the search. For the same reasons, subject to the restrictions on the removal of headgear, a person's hair may also be searched in public.

5.7 Where on reasonable grounds it is considered necessary to conduct a more thorough search (e.g. by requiring a person to take off a T-shirt), this must be done out of public view, for example, in a police van unless paragraph 5.8 applies, or police station if there is one nearby (see Note 8). Any search involving the removal of more than an outer coat, jacket, gloves, headgear or footwear, or any other item concealing identity, may only be made by a constable of the same sex as the person searched and may not be made in the presence of anyone of the opposite sex unless the person being searched specifically requests it. (See Annex C).

5.8 Searches involving exposure of intimate parts of the body must not be conducted as a routine extension of a less thorough search, simply because nothing is found in the course of the initial search. Searches involving exposure of intimate parts of the body may be carried out only at a nearby police station or other nearby location which is out of public view (but not a police vehicle). These searches must be conducted in accordance with Annex D.

Steps to be taken prior to a search

5.9 Before any search of a detained person takes place the constable must take reasonable steps, if not in uniform (see paragraph 5.10), to show their warrant card to the person to be searched and whether or not in uniform, to give that person the following information:

- (a) that they are being detained for the purposes of a search;
- (b) the constable's name and number (except where the constable reasonably believes that giving their name might put them in danger, in which case a warrant or other identification number shall be given) and the name of the police station to which the constable is attached;
- (c) the legal search power which is being exercised;
- (d) a clear explanation of:

(i) the object of the search in terms of the article or articles for which there is a power to search; and

(ii) in the case of:

- the power under section 60 of the Criminal Justice and Public Order Act 1994 (see paragraphs 4.14 to 4.21), the nature of the power, the authorisation and the fact that it has been given;
- all other powers requiring reasonable suspicion;
- the grounds for that suspicion. This means explaining the basis for the suspicion by reference to information and/or intelligence about, or some specific behaviour by, the person concerned;

and

(e) that they are entitled to a copy of the record of the search in accordance with the requirements set out in Chapter 6 of this Code. The constable must explain to the person to be searched what those requirements are.

5.10 The person should also be given information about police powers to Stop and Search and the individual's rights in these circumstances. The information should reflect the same information included in the example at Annex B.

5.11 Constables must make every effort to satisfy themselves that the person understands why they are to be searched and what the search will involve. If the person to be searched does not appear to understand what is being said, or there is any doubt about the person's ability to understand English, the constable must take reasonable steps to bring information regarding the person's rights and any relevant provisions of this Code to his or her attention. If the person is deaf or cannot understand English and is accompanied by someone, then the constable must try to establish whether that person can interpret or otherwise help the constable to give the required information.

6. Recording requirements

Searches which do not result in an arrest

6.1 When a constable carries out a search in the exercise of any power to which this Code applies and the search does not result in the person searched being arrested, a record must be made of it, electronically or on paper, unless there are exceptional circumstances which make this wholly impracticable (e.g. in situations involving public disorder or when the constable's presence is urgently required elsewhere). It is unlikely to be practicable in most cases to make a record of a search under section 67 of the Criminal Justice (Scotland) Act 2016 (searches on entry to relevant premises and events, where consent has been given as a condition of entry imposed by the organiser).

6.2 The constable carrying out the search must make the record on the spot unless this is not practicable, in which case, they must make the record as soon as practicable after the search is completed (see Note 11).

6.3 If the record is made at the time, the person who has been searched must be asked if they want a copy and if they do, they must be given immediately, either:

- a copy of the record; or
- a receipt which explains how they can obtain a copy of the full record or access to an electronic copy of the record.

6.4 A constable is not required to provide a copy of the full record or a receipt at the time if they are called to an incident of higher priority (see Note 15).

Searches which result in an arrest

6.5 If a search in the exercise of any power to which this Code applies results in a person being arrested, the constable carrying out the search is responsible for ensuring that a record of the search is made as part of their custody record. The custody officer must then ensure that the person is asked if they want a copy of the record and, if they do, that they are given a copy as soon as practicable (see Note 11).

Record of search

6.6 The record of a search must always include the following information:

- Details of the constable conducting the search
- Details of the corroborating constable
- Time
- Date
- Locus (nearest address, private place or street)
- Name (if provided. There is no requirement for a person to provide their name if nothing is found, but it should be recorded if given)
- Age (if provided)
- Gender (if provided)
- Date of Birth (if provided)
- Address (if provided)
- Self - defined ethnicity and national origin (if provided)
- Type of search
- The legislation used
- The grounds on which the search is based, including the grounds for reasonable suspicion
- The outcome of the Stop and Search
- Details of any item(s) recovered
- In the case of a search conducted pursuant to the power under section 60 of the Criminal Justice and Public Order Act 1994, the nature of the power, the authorisation and the fact that it has been given.

- In the case of a search of a person pursuant to a warrant the date the search warrant was issued and the fact that the warrant was produced.

6.7 For the purposes of completing the search record, there is no requirement to record the name, address and date of birth of the person searched where this is not provided by the person being searched. The person is under no obligation to provide this information and they should not be asked to provide it for the purpose of completing the record.

6.8 Nothing in this Code requires the names of constables to be shown on the search record or any other record required to be made under this Code where a constable reasonably believes that recording names might endanger themselves or other constables. In such cases the record must show the constables' warrant or other identification number and duty station.

6.9 A separate record is required for each person searched.

6.10 The record of the grounds for making a search must, briefly but informatively, explain the reason for suspecting the person concerned, by reference to information and/or intelligence about, or some specific behaviour by, the person concerned.

6.11 Where officers detain an individual with a view to performing a search, but the need to search is eliminated as a result of questioning the person detained, a search should not be carried out and a record is not required.

6.12 Nothing in this Code requires a constable who requests a person in a public place to account for themselves, i.e. their actions, behaviour, presence in an area or possession of anything, to make any record of the encounter or to give the person a receipt.

7 Monitoring and Supervising Stop and Search

7.1 Any misuse of Stop and Search powers is likely to be harmful to policing and lead to mistrust of the police by the local community and by the public in general. Supervising officers must monitor the use of Stop and Search powers and should consider in particular whether there is any evidence that they are being exercised on the basis of stereotyped images or inappropriate generalisations. Supervising officers must satisfy themselves that the practice of constables under their supervision in stopping, searching and recording is fully in accordance with this Code. Supervisors must also examine whether the records reveal any trends or patterns which give cause for concern and, if so, take appropriate action to address this.

7.2 Senior officers with area or force-wide responsibilities must also monitor the broader use of Stop and Search powers and, where necessary, take action at the relevant level.

7.3 Supervision and monitoring must be supported by the compilation of comprehensive statistical records of stops and searches at force and local authority level. Any apparently disproportionate use of the powers by particular constables or groups of constables or in relation to specific sections of the community should be identified and appropriate action taken.

7.4 In accordance with section 69 of the 2016 Act, as soon as practicable after the end of each reporting year (ending 31 March), Police Scotland must publish information on how many times during the reporting year a Stop and Search was carried out by a constable. So far as practicable, the information is to disclose (in addition)

- (a) how many persons were searched on two or more occasions,
- (b) the age and gender, and the ethnic and national origin, of the persons searched,
- (c) the proportion of searches that resulted in
 - (i) something being seized by a constable,
 - (ii) a case being reported to the procurator fiscal,
- (d) the number of complaints made to the Police Service of Scotland about the carrying out of searches (or the manner in which they were carried out)¹².

Suspected misuse of powers by individual constables

7.5 Police supervisors must monitor the use of Stop and Search powers by individual constables to ensure that they are being applied appropriately and lawfully. Monitoring takes many forms, such as direct supervision of the exercise of the powers, examining Stop and Search records (particularly examining the constable's documented reasonable grounds for suspicion) and asking the constable to account for the way in which they conducted and recorded particular searches or through complaints about a Stop and Search that a constable has carried out. Training opportunities for individual constables and for the wider force should be identified as a result of such monitoring, with best practice identified and communicated proactively throughout Police Scotland.

7.6 Where a supervisor identifies issues with the way that a constable has used a Stop and Search power, the facts of the case will determine whether the standards of professional behaviour as set out in the Code of Ethics for Policing in Scotland (<http://www.scotland.police.uk/about-us/Code-of-ethics-for-policing-in-scotland/>) have been breached and which formal action is pursued. Improper use might be a result of poor performance or a conduct matter, which will require the supervisor to take appropriate action such as performance or misconduct procedures. It is imperative that supervisors take both timely and appropriate action to deal with all such cases that come to their notice.

¹² See Section 69 of the Criminal Justice (Scotland) Act 2016

Notes for guidance

1 Nothing in this Code affects the ability of a constable to speak to or question a person in the ordinary course of the constable's duties without detaining the person or exercising any element of compulsion. This Code does not seek to prohibit or restrict everyday interaction between the police and the community.

2 The "relevant protected characteristics" referred to in paragraph 4.6 are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

3 Innocent possession means that the person does not have the knowledge that they are carrying an unlawful item which is required before an arrest on suspicion that the person has committed an offence in respect of the item sought and/or a criminal prosecution) can be considered. It is not uncommon for children under the age of criminal responsibility to be used by older children and adults to carry stolen property, drugs and weapons and, in some cases, firearms, for the criminal benefit of others, either:

- in the hope that police may not suspect they are being used for carrying the items;

or

- knowing that if they are suspected of being couriers and are stopped and searched, they cannot be prosecuted for any criminal offence.

Stop and Search powers therefore allow the police to intervene effectively to break up criminal gangs and groups that use young children to further their criminal activities.

3A Whenever a child or young person under the age of 18 is suspected of carrying unlawful items for someone else, or is otherwise found in circumstances which suggest that their welfare and safety may be at risk, the facts should be reported and actioned in accordance with Police Scotland's Child Protection Policy. This will be in addition to treating them as a potentially vulnerable or intimidated witness in respect of their status as a witness to the serious criminal offence(s) committed by those using them as couriers. Safeguarding considerations will also apply to other persons aged under 16 who are stopped and searched under any of the powers to which this Code applies and constables should, where appropriate, report any such interaction to the relevant authorities. Similarly, any contact with children aged between 16 and 18 who are subject to compulsory supervision under the terms of the Children's Hearings (Scotland) Act 2011 should be reported to the appropriate authorities.

4 In some circumstances preparatory questioning may be unnecessary, but in general a brief conversation or exchange will be desirable not only as a means of avoiding unsuccessful searches, but to explain the grounds for the stop/search, to gain cooperation and reduce any tension there might be surrounding the stop/search.

5 Where a person is lawfully detained for the purpose of a search, but no search in the event takes place, the detention will not thereby have been rendered unlawful.

6 Many people customarily cover their heads or faces for religious reasons - for example, Muslim women, Sikh men, Sikh or Hindu women, or Rastafarian men or women. A constable cannot order the removal of a head or face covering except where there is reason to believe that the item is being worn by the individual wholly or mainly for the purpose of disguising identity, not simply because it disguises identity. Where there may be religious sensitivities about ordering the removal of such an item, the constable should permit the item to be removed out of public view. Where practicable, the item should be removed in the presence of a constable of the same sex as the person and out of sight of anyone of the opposite sex.

7 A search of a person in public should be completed as soon as possible.

8 A person may be detained under a Stop and Search power at a place other than where the person was first detained, only if that place, be it a police station or elsewhere, is nearby. Such a place should be located within a reasonable travelling distance using whatever mode of travel (on foot or by car) is appropriate. This applies to all searches under Stop and Search powers, whether or not they involve the removal of clothing or exposure of intimate parts of the body (see paragraphs 5.7 and 5.8) or take place in or out of public view. It means, for example, that a search under the Stop and Search power in section 23 of the Misuse of Drugs Act 1971 which involves the compulsory removal of more than a person's outer coat, jacket or gloves cannot be carried out unless a place which is both nearby the place they were first detained and out of public view, is available. If a search involves exposure of intimate parts of the body and a police station is not nearby, particular care must be taken to ensure that the location is suitable.

9 A search in the street itself should be regarded as being in public for the purposes of paragraphs 5.7 and 5.8, even though it may be empty at the time a search begins. Although there is no power to require a person to do so, there is nothing to prevent a constable from asking a person voluntarily to remove more than an outer coat, jacket or gloves in public.

Recording

10. Where a Stop and Search is conducted by more than one constable the identity of all the constables engaged in the search must be recorded on the record. Nothing prevents a constable who is present but not directly involved in searching from completing the record during the course of the encounter.

11 When the search results in the person searched being arrested, the requirement to make the record of the search as part of the person's custody record does not apply if the person is liberated before being taken in custody to the police station

12 It is important for monitoring purposes to specify the time at which authority is given for exercising the Stop and Search power under section 60 of the Criminal Justice and Public Order Act 1994.

13 Constables should record the self-defined ethnicity and national origin of every person stopped. The person should be asked to select one of the five main categories representing broad ethnic groups and then a more specific cultural background from within this group, using the groups listed in the census questionnaire. An additional "Not stated" box is available but should not be offered to respondents explicitly. Constables should be aware and explain to members of the public, especially where concerns are raised, that this information is required to obtain a true picture of Stop and Search activity and to help improve ethnic monitoring, tackle discriminatory practice, and promote effective use of the powers. If the person gives what appears to the constable to be an "incorrect" answer (e.g. a person who appears to be white states that they are black), the constable should record the response that has been given and then record their own perception of the person's ethnic background. If the "Not stated" category is used the reason for this must be recorded on the form.

14 In situations where it is not practicable to provide a written copy of the record or immediate access to an electronic copy of the record or a receipt of the search at the time, the constable should consider giving the person details of the station which they may attend for a copy of the record. A receipt may take the form of a simple business card which includes sufficient information to locate the record should the person ask for copy, for example, the date and place of the search, and a reference number or the name of the constable who carried out the search (unless paragraph 5.9 applies).

ANNEX A

List of main statutory powers of Stop and Search of the person (note: other statutory powers of search may also exist)

Section 47 Firearms Act 1968 (firearms)

Section 23 Misuse of Drugs Act 1971 (drugs)

Section 60 Civic Government (Scotland) Act 1982 (stolen property)

Section 4 Crossbows Act 1987 (crossbows)

Section 11 Protection of Badgers Act 1992 (evidence of commission of an offence under that Act)

Section 60 Criminal Justice & Public Order Act 1994 (power to Stop and Search in anticipation of violence)

Section 101 Conservation (Natural Habitat etc) Regulations 1994 (evidence of commission of an offence under that Act)

Section 4 Wild Mammals Protection Act 1996 (evidence of commission of an offence under that Act)

Section 21 Criminal Law (Consolidation) (Scotland) Act 1995 (control of alcohol at sporting events)

Section 48 Criminal Law (Consolidation) (Scotland) Act 1995 (offensive weapons)

Section 50 Criminal Law (Consolidation) (Scotland) Act 1995 (knives)

Section 7 Protection of Wild Mammals (Scotland) Act 2002 (evidence of commission of an offence under that Act)

Section 11A Fireworks Act 2003 (possession of a firework in contravention of a prohibition imposed by fireworks regulations)

Section 66 Criminal Justice (Scotland) Act 2016 (power to search a person who is to be, or is being taken from one place to another, to ensure not in possession of an item that could cause harm to self or others)

Section 67 Criminal Justice (Scotland) Act 2016 (power to search on entry to relevant premises or events, where consent to the search has been consented to as a condition of entry imposed by the organiser)

ANNEX B

Example of Information to be Given to Persons subject to Stop and Search

Know Your Rights

Why do the police use Stop and Search?

Stop and Search normally takes place in public places, particularly in areas experiencing problems with crime, but it can happen anywhere. The police have a right and a duty to stop and talk to people and in certain circumstances to search them. Constables do this to tackle crime and keep people safe. Constables may stop and speak to you for a variety of reasons; this will not always be to search you. Police may simply want to speak to you as a member of the local community or to establish your wellbeing or the wellbeing of another.

When can police Stop and Search you?

- If they suspect that you are carrying items illegally, for example: weapons, fireworks, drugs or stolen property.
- If they are looking for a suspect that matches your description.
- In certain occasions where there has been serious violence or disorder in the area.
- As part of anti-terrorism.
- If a court has issued a warrant that authorises the search.

Things you should know about Stop and Search

- Being stopped by the police does not mean that you are under arrest or that you have done something wrong.
- Police must use Stop and Search fairly, responsibly and with respect for people.
- You will not be stopped in any way by the police just because of your age, race, ethnic background, nationality, religion or because you have committed a crime in the past.

There are three different types of stop that police use:

1. Statutory search

This is when a police officer believes that you are committing a crime by carrying items illegally and uses their policing powers to stop you and then searches:

- you and your clothes;
- anything that you are carrying, such as a bag or wallet; and
- possibly the vehicle you are travelling in.
- For a list of statutory powers of search, associated legislation and Statutory Powers to require the surrender of items [click here](#).

2. Seizure

This is when a constable removes items from a person for their health and wellbeing. This does not involve the search of a person.

3. Vehicle Stop

A constable in uniform can stop any vehicle on a road and ask the driver for their driving documents. This is not the purpose of Stop and Search however, it may become a Stop and Search if a search is carried out on yourself or any passengers within the vehicle.

Your right to complain

Stop and Search must be carried out according to strict rules – the police have responsibility to ensure that people's rights are protected and that everyone is treated with fairness, integrity and respect.

If you are unhappy about the way you were treated by police, you can make a complaint at your local police office or by contacting the Police Non-Emergency Number of 101.

ESTABLISHING GENDER OF PERSONS FOR THE PURPOSE OF SEARCHING

1. Certain provisions of this Code explicitly state that searches and other procedures may only be carried out by, or in the presence of, persons of the same sex as the person subject to the search or other procedure.
2. All searches and procedures must be carried out with courtesy, consideration and respect for the person concerned. Constables should show particular sensitivity when dealing with transgender individuals (including transsexual persons) and transvestite persons (see Notes A2, A3 and A4).

Consideration

3. In law, the gender (and accordingly the sex) of an individual is their gender as registered at birth unless they have been issued with a Gender Recognition Certificate (GRC) under the Gender Recognition Act 2004 (GRA), in which case the person's gender is their acquired gender. This means that if the acquired gender is the male gender, the person's sex becomes that of a man and, if it is the female gender, the person's sex becomes that of a woman and they must be treated as their acquired gender.

Searching of Transgender Persons

4. As transgender people may have biological sex characteristics which differ from the gender that they live in, there is potential for distress and embarrassment during searching. Application of the following guidance should minimise the potential impact when searching a transgender person.
5. If a search is begun without any knowledge that the person being searched is transgender and it only comes to light during the search then, unless the transgender person requests a different gender of searching officer to take over the search, the search should simply be completed as usual by the original searching officer.
6. If a person is thought or known to be transgender prior to a search being carried out, then the officers should ask that person

'Is there anything I need to know before I search you?'

7. A female - male trans man who still has female physical characteristics may identify strongly as a man but may request to be searched by a female officer. In such a case, the trans man should still be referred to using male pronouns and treated as a man in all other ways except in terms of the gender of the officer who searches him.
8. A male - female trans woman who still has the male physical characteristics may identify strongly as a woman but may request to be searched by a male officer.

In such a case the trans woman should still be referred to using female pronouns and treated as a woman in all other ways except in terms of the gender of the officer who searches her.

9. If a person is unwilling to make such an election, the officer should try and determine the gender in which the person lives their life. This is likely to be indicated by the name, title or gender on their main identity document e.g. drivers licence, bank card etc. If the person appears for example to live as a woman, they should be treated as such.

10. Once the gender of the officer conducting the search has been established, the search should commence. The transgender status and appearance of the person being searched should not be commented upon. If any physical variation is encountered due to gender reassignment during searching, the officer should maintain a professional and respectful manner as per any physical variation encountered due to disability during searching.

Note: It may be necessary to share information about the persons gender identity with other custody related organisations and other police staff. Such disclosure should only be made for the purposes of the prevention of crime in relation to the transgender person which is relevant, legal, proportionate and fair.

Documentation

11. The person's gender as established above must be recorded in the person's custody record or, if a custody record has not been opened, on the search record or in the constable's notebook.

12. Where the person elects which gender they consider themselves to be but is not treated in accordance with their preference, the reason must be recorded in the search record, in the constable's notebook or, if applicable, in the person's custody record.

Disclosure of information

13. Section 22 of the GRA defines any information relating to a person's application for a GRC or to a successful applicant's gender before it became their acquired gender as 'protected information'. Nothing in this Annex is to be read as authorising or permitting any constable or any police staff who has acquired such information when acting in their official capacity to disclose that information to any other person in contravention of the GRA. Disclosure includes making a record of 'protected information' which is read by others.

Notes for Guidance

A1 While there is no agreed definition of transgender (or trans), it is generally used as an umbrella term to describe people whose gender identity (self-

identification as being a woman, man, neither or both) differs from the sex they were registered as at birth. The term includes, but is not limited to, transsexual people.

A2 Transsexual means a person who is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of gender reassignment, which is a protected characteristic under the Equality Act 2010, by changing physiological or other attributes of their sex. This includes aspects of gender such as dress and title. It would apply to a woman making the transition to being a man and a man making the transition to being a woman, as well as to a person who has only just started out on the process of gender reassignment and to a person who has completed the process. Both would share the characteristic of gender reassignment with each having the characteristics of one sex, but with certain characteristics of the other sex.

A3 Transvestite means a person of one gender who dresses in the clothes of a person of the opposite gender. However, a transvestite does not live permanently in the gender opposite to their birth sex.

A4 The Chief Constable is responsible for providing corresponding operational guidance and instructions for the deployment of transgender constables and staff under their direction and control to duties which involve carrying out, or being present at, any of the searches and procedures described in paragraph 1. The guidance and instructions must comply with the Equality Act 2010 and should therefore complement the approach in this Annex.

CONDUCT OF INTIMATE AND STRIP SEARCHES

In this Annex, the word 'detainee' is used to describe the person who has been detained for the purposes of the search.

A: Strip search

1. A strip search is a search involving the removal of more than outer coat, jacket, gloves, headgear or footwear.

Action

2. A strip search may take place only if it is considered necessary to remove an article which the detainee would not be allowed to keep and the constable reasonably considers the detainee might have concealed such an article. Strip searches shall not be routinely carried out if there is no reason to consider that articles are concealed.

The conduct of strip searches

3. (a) The strip search must be authorised by a constable of the rank of Inspector or above.
- (b) The reason for the search must be fully explained to the detainee
- (c) A constable carrying out a strip search must be the same sex as the detainee (see Annex C);
- (d) the search shall take place in an area where the detainee cannot be seen by anyone who does not need to be present, nor by a member of the opposite sex (see Annex C) except an appropriate adult who has been specifically requested by the detainee;
- (e) Except in cases of urgency, where there is risk of serious harm to the detainee or to others, whenever a strip search involves exposure of intimate body parts, there must be at least two people present other than the detainee, and if the search is of a child or mentally disordered or otherwise mentally vulnerable person, one of the people must be the appropriate adult. Except in urgent cases as above, a search of a child may take place in the absence of the appropriate adult only if the child signifies in the presence of the appropriate adult that they do not want the adult to be present during the search and the adult agrees. A record shall be made of the child's decision and signed by the appropriate adult. The presence of more than two people, other than an appropriate adult, shall be permitted only in the most exceptional circumstances;
- (f) The search shall be conducted with proper regard to the sensitivity and vulnerability of the detainee in these circumstances and every reasonable

effort shall be made to secure the detainee's co-operation and minimise embarrassment. Detainees shall not normally be required to remove all their clothes at the same time, e.g. a person should be allowed to remove clothing above the waist and redress before removing further clothing;

(g) If necessary to assist the search, the detainee may be required to hold their arms in the air or to stand with their legs apart and bend forward so a visual examination may be made of the genital and anal areas provided no physical contact is made with a body orifice;

(h) If articles are found, the detainee shall be asked to hand them over. If articles are found within any body orifice other than the mouth, and the detainee refuses to hand them over, their removal would constitute an intimate search, which must be carried out as in Part B;

(i) A strip search shall be conducted as quickly as possible, and the detainee allowed to dress as soon as the procedure is complete.

(j) Where it is decided that the detainee should be subject to a strip search, the reason for this should be recorded and the name of the authorising officer should also be included.

B: Intimate search

4. An intimate search consists of the physical examination of a detainee's body orifices other than the mouth. The intrusive nature of such searches means the actual and potential risks associated with intimate searches must never be underestimated.

Action

5. Body orifices other than the mouth may be searched only under the authority of a warrant issued by a Sheriff.

6. The search is to be carried out by an Authorised Health Care Professional (HCP) in hospital premises within an Accident and Emergency Department, for which local arrangements should be in place. Examination by a HCP can take place only with the consent of the detainee.

7. In the case of children, mentally vulnerable or mentally disordered suspects, the seeking and giving of consent must take place in the presence of the appropriate adult.

8. A Police Officer of the same gender as the person to be searched is to be present to corroborate the search.

9. Before the search begins, a constable or designated detention constable, must tell the detainee that a warrant to carry out the search has been issued;

10. An intimate search at a police station of a child or mentally disordered or otherwise mentally vulnerable person may take place only in the presence of an appropriate adult of the same sex (see Annex C), unless the detainee specifically requests a particular adult of the opposite sex who is readily available. In the case of a child, the search may take place in the absence of the appropriate adult only if the child signifies in the presence of the appropriate adult they do not want the adult present during the search and the adult agrees. A record shall be made of the child's decision and signed by the appropriate adult.

11. A minimum of two people, other than the detainee, must be present during the search. No person of the opposite sex who is not a medical practitioner or nurse shall be present, nor shall anyone whose presence is unnecessary. The search shall be conducted with proper regard to the sensitivity and vulnerability of the detainee.

Documentation

12. In the case of an intimate search, the following shall be recorded as soon as practicable:

- the date the warrant was issued and the fact that the warrant was produced.
- the fact that the appropriate consent was given by the detainee to the CHP or (as the case may be) refused, and if refused, the reason given for the refusal (if any).
- which parts of the person's body were searched;
- who carried out the search;
- who was present;
- the result.

Consultation on a draft Code of Practice for Stop and Search



RESPONDENT INFORMATION FORM

Please Note this form **must** be returned with your response.

Are you responding as an individual or an organisation?

- Individual
- Organisation

Full name or organisation's name

Phone number

Address

Postcode

Email

The Scottish Government would like your permission to publish your consultation response. Please indicate your publishing preference:

- Publish response with name
- Publish response only (anonymous)
- Do not publish response

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?

- Yes
- No

Consultation on a draft Code of Practice for Stop and Search Consultation Questions



1. Should the Code of Practice state what the primary purpose of Stop and Search is?

YES

(if YES, please specify what the primary purpose should be)

NO

DON'T KNOW

2. Should there be a separate section of the Code of Practice to deal specifically with searches of children and young people?

YES

NO

DON'T KNOW

- 2A – if you answered YES to Q2 – do you have any suggestions as to what should be included in a section on children and young people? (if so, please specify below)

3. Should there be a separate section of the Code of Practice to deal specifically with searches of adults at risk and vulnerable adults?

YES

NO

DON'T KNOW

- 3A – if you answered YES to Q3 – do you have any suggestions as to what should be included in a section on adults at risk and vulnerable adults? (if so, please specify below)

4. Should the Code of Practice include a section about local public scrutiny of how Stop and Search is used?

YES

NO

DON'T KNOW

4A – If you answered YES to Q4, do you think the existing local scrutiny arrangements should be used, or do you have any other suggestions? (if so, please specify below)

5. Do you think it is necessary to record any information about searches carried out under section 67 of the Criminal Justice (Scotland) Act 2016?

YES

(if YES, please specify what information should be recorded)

NO

DON'T KNOW

6. Is there anything else that should be included within the Code that would help further promote community wellbeing and provide confidence that *Stop and Search is being used with due consideration to Fairness, Integrity, Respect and Human Rights?* (if so, please specify below)

7. Is there anything missing from the draft Code of Practice that should be added? (if so, please specify below)

8. Is there anything in the draft Code of Practice that should be deleted and/or changed? (if so, please specify below)





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Edinburgh
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