I refer to the above and to your correspondence dated 12th January and thank you for inviting the Scottish Police Federation (SPF) to comment on the Code of Practice on stop and search (the code).

The SPF wishes to place on record our gratitude to John Scott QC for giving so generously of his time in engaging directly with us whilst working on this document. We appreciate this was not an easy task to undertake given the controversy of the subject.

As the sub-committee will be aware the SPF commented at length on the provisions of the draft code and many of our comments and observations at that time remain relevant to the final document. These are not repeated here and instead we largely provide general comment on the totality and “tone” of the code.

It is perhaps inevitable that the SPF will not agree with certain elements of the code and we see little benefit in much of its content. That being said Parliament has legislated for a code and we offer our comments for the consideration of the sub-committee.

In summary we would describe the code as containing much that is uncontroversial; much that is unnecessary; elements that are unclear; and provisions which directly undermine the operational independence of the office of Chief Constable.

Sect 73 of the Criminal Justice (Scotland) Act 2016 provides;

(2) A code of practice must set out (in particular)—

(a) the circumstances in which a search of such a person may be carried out,
(b) the procedure to be followed in carrying out such a search,
(c) in relation to such a search—
   (i) the record to be kept,
   (ii) the right of someone to receive a copy of the record.

(3) A code of practice is to apply to the functions exercisable by a constable

The SPF finds it unusual that the code which is essentially designed to govern the police use of search contains a great deal of narrative that is irrelevant to that purpose.

It has been suggested the code has been drafted for more than police consumption and whilst this may explain its “weight,” it does not in itself provide a compelling reason for much of its content.
For example the code repeats existing legislative provisions throughout. Police officers are already familiar with such provisions and repetition adds nothing other than distraction to the substantive intended meaningful direction and guidance otherwise provided.

Our use of the word intended is deliberate here. If we look for example at paragraphs 7.4 and 7.19 the code is very woolly and unclear. Given the code was to a large extent intended to establish absolute clarity, the inclusion of ambiguous provisions do little to advance that principle.

In addition the code provides at para 1.4 that its purpose includes to set the standard to which constables can be scrutinised and evaluated. It is our submission that this is not for the code to make such determinations. This goes beyond the provisions of section 73.

The correct application of the law is a matter for the courts and the courts alone. The code appears to suggest, for example at para 10.2 that lawfulness is determined by supervising officers. We consider that whilst supervisors may form opinions on the use of search and compliance with the code, that cannot extend to determinations on lawfulness.

Further, the internal standards a chief constable may wish to apply to evaluate the work of a constable are not matters that properly fall within the parameters of the code. Such matters are entirely for the Chief Constable to determine in accordance with the governance expectations placed upon him by the Scottish Police Authority.

In this vein the code creates a heavy bureaucratic burden on the police service that will do little to support the prevention and detection of crime but will in its stead divert time and resource from an already stretched and under resourced police service. We consider the recording expectations are overly onerous and do nothing other than create fodder for a new industry.

Section 56 of the Criminal Justice (Scotland) Act 2016 provides;

(2) It is unlawful for a constable to search the person otherwise than—

(a) in accordance with a power of search conferred in express terms by an enactment, or

(b) under the authority of a warrant expressly conferring a power of search

The SPF warned this provision would lead to gaps (beyond those relating to children and alcohol) and it appears the code agrees with this.

Paragraph 3.4 is at direct variance with the provisions of section 56 of the 2016 Act and whilst we are sympathetic to what is written, we ask how it is possible to reconcile this with the earlier decision of Parliament.

The code is inherently confusing on the issue of suspicion. Paragraph 4.7 seems to suggest that reasonable suspicion may exist (depending on other circumstances)
where a person is “obviously trying to hide something” yet goes on to state that there may be innocent explanations for apparently suspicious behaviour.

It is incredible that there is no concession for the reality that suspicious behaviour is often a product of a guilty mind that may not be allied to the carrying of a prohibited item.

Whilst this may be a moot point given the unambiguous provision of section 56 of the 2016 act, we ask the sub-committee to consider the realities of what it has supported. We have highlighted time and again that we do not operate in a perfect world and will not apologise for repeating this point here.

If we look for example at the recent spate of “stranger rapes” in Glasgow city centre. It would not be unreasonable to expect police officers to provide additional patrols to the risky areas. It is not difficult to imagine a situation where a police officer encounters a male who may be acting suspiciously (albeit has committed no crime at the time) and as a consequence of the provisions of this code, are effectively neutered from dealing effectively with them.

On one hand the code implies that if police officers engage with the individual for long enough they will find reasons to search them, whilst making the point that suspicious behaviour can in itself be innocent. The code makes clear officers have to tell individuals they are not obliged to provide any personal details when engaging with them. We are strongly of the view this obligation goes beyond the expectations laid out in section 73 of the 2016 act.

In our response to the draft code we provided a specific example of where a police hunch led to the arrest and conviction of paedophile Alan Hopkins. This code and the provisions of section 56 of the 2016 act effectively render one of the most invaluable skills a police officer has at their disposal as moribund.

In effect the code is implying that either the police concoct a reason to search the individual or allow a potential suspect to leave without having established either their identity or whether they might have been in possession of something that could prove to be of evidential value. We consider the public might find this impossible to accept.

Calum Steele
General Secretary
19 January 2017