



OFFICIAL REPORT
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Justice Sub-Committee on Policing

Thursday 26 January 2017

Session 5



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JUSTICE SUB-COMMITTEE ON POLICING

2nd Meeting 2017, Session 5

CONVENER

*Mary Fee (West Scotland) (Lab)

DEPUTY CONVENER

Margaret Mitchell (Central Scotland) (Con)

COMMITTEE MEMBERS

John Finnie (Highlands and Islands) (Green)

*Rona Mackay (Strathkelvin and Bearsden) (SNP)

*Ben Macpherson (Edinburgh Northern and Leith) (SNP)

*Liam McArthur (Orkney Islands) (LD)

*Stewart Stevenson (Banffshire and Buchan Coast) (SNP)

*attended

THE FOLLOWING ALSO PARTICIPATED:

Pauline McIntyre (Children and Young People's Commissioner Scotland)

John Scott (Advisory Group on Stop and Search)

Calum Steele (Scottish Police Federation)

Assistant Chief Constable Mark Williams (Police Scotland)

CLERK TO THE COMMITTEE

Diane Barr

LOCATION

The David Livingstone Room (CR6)

Scottish Parliament

Justice Sub-Committee on Policing

Thursday 26 January 2017

[The Convener opened the meeting at 13:01]

Decisions on Taking Business in Private

The Convener (Mary Fee): Good afternoon and welcome to the second meeting in 2017 of the Justice Sub-Committee on Policing. Apologies have been received from John Finnie and Margaret Mitchell.

Our first agenda item is a decision on taking business in private. Do members agree to take item 3, consideration of the evidence that we will hear at today's meeting, in private?

Members indicated agreement.

The Convener: Does the committee agree that consideration of our letter to the Justice Committee and our forward work programme should also be taken in private at our meeting on 2 February 2017?

Members indicated agreement.

Subordinate Legislation

Draft Stop and Search Code of Practice (Appointed Day) (Scotland) Regulations 2017

13:01

The Convener: The purpose of this session is to increase our understanding of stop and search and to help inform a letter to the Justice Committee, which will consider next month whether to approve or disapprove the regulations. I know that the Justice Sub-Committee on Policing in session 4 took a keen interest in stop and search; that is one of the reasons why we are considering the draft regulations today.

I welcome John Scott QC, chair of the independent advisory group on stop and search; Assistant Chief Constable Mark Williams from Police Scotland; Pauline McIntyre, who is a member of the independent advisory group and parliamentary and policy officer for the Children and Young People's Commissioner Scotland; and Calum Steele from the Scottish Police Federation.

Given the time constraints today—we have about an hour—I am grateful to John Scott for not making an opening statement. I intend to move straight to questions. I refer members to the note from the clerk and the paper from the Scottish Parliament information centre.

I will put things into context with a general question. Are the witnesses satisfied that the code of practice will lead to a significant improvement in the way in which stop and search operates in Scotland, or are there particular elements of the code that give cause for concern?

John Scott (Advisory Group on Stop and Search): No particular part of the code gives cause for concern. The drafting process for this code has been different from that for many others; ordinarily, the legal directorate would be tasked with drafting the code but, in this case, although we had assistance from the legal directorate—and Craig French in particular—the whole of the advisory group was involved in redrafting the code, on the basis of the draft that was attached to our initial report. We also had great assistance from the national stop and search unit of Police Scotland, and input from academics such as Kath Murray and Genevieve Lennon and other groups with a particular interest in children and young people. Pauline McIntyre co-ordinated our new chapter on children and young people and David Harvie, the Crown Agent, drafted the section on vulnerable people.

The code, as it was laid before the Parliament, had changed quite a bit from the original draft,

which was based fairly heavily on code A of the Police and Criminal Evidence Act 1984, and it now better reflects the situation in Scotland. The code is intended for more than one audience—it is not simply a working document for police officers, but is intended as guidance for the public and for specific groups, such as children and young people.

In the last 18 months of doing my day job, I have seen that there is really poor awareness of rights and responsibilities among our citizens. Ideally, I would like to see the code become part of civic education in schools to address what was previously a power imbalance, which affected the question of consent. We are way beyond that stage; rather, we are at the final step of the first steps towards putting us in a much healthier position than we were in a few years ago.

I should record my gratitude for the great willing that Police Scotland has shown to get to the stage we are at, so that even ahead of the introduction of the code the position is significantly better than it was.

The Convener: That is very helpful. Thank you. Does Liam McArthur want to come in?

Liam McArthur (Orkney Islands) (LD): No, I am happy to follow on from the answers.

Assistant Chief Constable Mark Williams (Police Scotland): Police Scotland is satisfied that, when the regulations are passed by Parliament, the code will represent a significant improvement in the way in which we codify and apply stop and search. We are very grateful to John Scott and the IAG for consulting and working closely with us throughout the drafting of the code. We have been very involved in the detail of supporting that drafting process and that has been a key part of the work over the piece.

When the code is passed and we apply it operationally, we will monitor and evaluate its effectiveness closely and consider how front-line officers will use it in practice. It is very important that the code meets the needs that it is set out to deliver, and I am confident that that will happen. Reviews will be built into the code and we will regularly review how it is being applied, for example, after six months, 12 months and thereafter. If any areas give us cause for concern, we will gather that evidence and bring it back for appropriate scrutiny, review and consultation.

In short, we are satisfied that the code will lead to a significant improvement in how we apply stop and search in Scotland.

Pauline McIntyre (Children and Young People's Commissioner Scotland): We are particularly pleased to see the inclusion of the chapter on children and young people. As John

Scott suggested, there have been massive steps forward in Police Scotland's rights-based approach to a number of areas of work. Police Scotland should be commended for the significant progress that has been made in a short period.

The way in which the Scottish Government has approached consultation with children and young people has been particularly useful. It has engaged with groups such as the Children's Parliament and the Scottish Youth Parliament at an early stage in the process. That has been incredibly helpful, because usually children and young people are consulted when adults have created something on their behalf and then want to know their views. In this case, the process was about shaping the code with their views in mind. That was the starting point of the process.

Stephen Jones of the Scottish Government should be commended for the work that he has done, which has been groundbreaking and sets the tone for a range of work that can be taken forward.

Calum Steele (Scottish Police Federation): At the risk of breaking up the love in the room, the Scottish Police Federation has had a fairly strident position on stop and search for a long time. Before I address the specific question of whether the code will lead to an improvement, it is important that I lay out that position again, because it has significant nuances.

First, we believe that the practice that was heavily promoted by the Police Service of Scotland in effect poisoned the well of police tactics and the ability to engage with large elements of our society. We roundly dismissed the well-publicised figure of half a million stop and searches undertaken by Police Scotland. Others, including Her Majesty's inspectorate of constabulary in Scotland, have subsequently conceded that our position was correct. We were ardent critics of the target approach within the service, which was perverting behaviours. We have little doubt that, had it not been for that, we would probably not have found ourselves dealing with this particular issue.

The issue of consensual stop and search, which in large part was what the code was designed to overcome, given the provisions of section 65 of the Criminal Justice (Scotland) Act 2016, is something that we have great concerns about. It might be something of a moot point, given that Parliament has already legislated in that area, but it is certainly our belief and the belief of our members that it will have a very limiting effect on the police's ability not only to detect crime, but to prevent crime, which is something that is often overlooked in this regard.

Turning to the specifics of the code, as those who have gone before me have done, I would like to pay tremendous testimony to John Scott for the work that he has done on this. I know that it has not been easy and that he has come up against some fairly strident views, most notably our own. He approached the Scottish Police Federation with courtesy and a willingness to listen, certainly in all the dealings that I had with him.

At the risk of repeating our written submission, by and large there are lots of things in the code that are uncontroversial. There are bits that are unnecessary, and that might relate to the fact that it is aimed at more than one audience. That is a slight peculiarity, given the expectations of the code as laid out in section 73 of the 2016 act. We have concerns that some grey areas still remain, and the removal of the capability of people to co-operate with the police in a free and unfettered fashion is something that we believe will not ultimately lead to a safer Scotland.

Liam McArthur: In addition to paying tribute to my predecessor Alison McInnes regarding where we have got to now, I note that Dr Kath Murray has clearly played a pivotal role. She has described the code of conduct as a major milestone in the reform of stop and search. Interestingly, there appears to have already been quite a shift in practice. Recent figures suggest that there has been a 93 per cent reduction in stop and search and a 99.5 per cent reduction, and therefore almost eradication, of consensual stop and search.

I would be interested to know, particularly from Mark Williams and Calum Steele, whether we are now at your expected level of stop and search, or whether it is too early to tell.

Assistant Chief Constable Williams: When the code is passed by Parliament and introduced, there will be a new framework around which stop and search is applied. We have worked very hard over recent years to move in the direction that the code will take us, with a presumption for statutory rather than consensual stop and search, hence the significant reductions that Liam McArthur mentioned.

While that has undoubtedly moved us to a position in which only about 2 or 3 per cent of all of stop and searches are consensual and those will cease when the code comes into place, it is too early to say what that will mean in terms of overall volumes of stop and searches.

What is important is that the framework facilitates good engagement and communication by police officers across Scotland when they are dealing with members of the public. When it is appropriate, justified and reasonable, they should feel confident in using stop and search as a tactic

in the right circumstances and when dealing with the right incidents. That is what we are trying to achieve in applying the code.

As I speak, we are training every front-line officer in Scotland to engage better, to communicate better, to understand the powers that they have and to work within the code. That is so that, when the code comes into place, we are ready to apply it effectively, professionally and in a way that puts communication and engagement first but always remembers that, where it is justified and reasonable, officers have a power that they can use.

13:15

Liam McArthur: I do not want to steal Calum Steele's thunder, but in a sense the reduction that we have seen in overall levels of stop and search has happened and, to my knowledge, we have not seen a spike or a noticeable change in crime detection or, indeed, prevention. The assumption from that would have to be that there have not been significant issues arising from reduction in a tactic that, as you say, all of us accept is still a legitimate and very necessary one under certain circumstances.

Assistant Chief Constable Williams: It is too early to say. We also appreciate—Dr Kath Murray lays this out very clearly in her written submission—that it is very difficult to draw direct correlations, academically, between the volume of stop and searches and the levels of crime that prevail in society. It has been tried over many decades, but never have we actually been able to isolate out, say, violence and stop and search and link them in a way that justifies either an increase, a decrease or a link between the two.

We know that tackling crime in Scotland is a complex issue. Stop and search is a very narrow tactic that can be applied in some scenarios to certain incidents, but it certainly is not the only tactic that can be applied.

In truth, it is too early to answer that question. We will ensure that we have officers, across Scotland, who are trained to deal with the code and to apply it as best as possible. We will evaluate and review the code after six months or a year, and thereafter, to ensure that it is delivering what we expect it to deliver. If we identify any challenges, it will be for the service to collect credible evidence of them and bring them back to the IAG, to the Government and to others so that we can deal with them then.

Calum Steele: To some extent, Liam McArthur's question perhaps highlights the very real difficulty that we have—that of dining off the fruit from the poisoned tree. That 93 per cent reduction is based on numbers that were largely

made up, therefore we are claiming reductions from things that were not real in the first place. That is inherently problematic.

I am conscious that we are trying to make progress on the issues of today rather than constantly harking back to the problems of the past. However, when we were recording, for example, a seizure of alcohol from one young person, who might have been in a group of 10 or 20, as 20 positive searches when, in fact, nobody had been searched, that does not result in any reductions in the use of search now; we are just making sure that we are recording things in a different manner. Therefore, the 93 per cent reduction is a false flag. Those statistics are what might, topically, be termed alternative facts, in that they are not factual at all.

The issue of causation versus correlation is one that I do not think we will ever be able to answer. We could set academics on a course for probably 100 years and they would never be able to get to a position that would support that. However, anecdotally—I appreciate that that is about as much use as alternative facts—our members report to us just now that, in certain areas of the country, they are coming under pressure from their commanders because violence is on the increase in their areas. I suspect that it is too early to say that there is a causation or, indeed, a correlation, but there is undoubtedly the fact that that pressure is coming to bear at this point in time.

Even yesterday—John Scott will know what I am about to say, because I mentioned him in a tweet yesterday evening—the BBC carried a report that a knife crime is committed in the United Kingdom once every 15 minutes. It is difficult to see that we might improve that by getting to a situation in which there is a belief that the only time we will search those who might be suspected of having weapons, or have been in the habit of carrying them, is every single time we have a specific piece of intelligence or information to support that. That is why I am so concerned about losing that approach.

I acknowledge that it is a moot point, but losing the consensual approach to stop and search to some extent ties the hands of police officers in dealing with members of the public, not least because of some of the issues that are laid out in the draft code. The opportunity to discourage offending through the notion that there is a likelihood of search has gone, and I believe strongly that our communities are likely to suffer as a consequence.

The Convener: Okay. Thank you.

Stewart Stevenson (Banffshire and Buchan Coast) (SNP): My question is for Mark Williams. On searches that will now not be made, was there

a bureaucratic burden associated with recording and reporting them that will now be eliminated?

Assistant Chief Constable Williams: We record all recordable stop and searches, and the draft code defines them clearly. Every stop and search is audited, checked and accounted for by the national stop and search unit—we audit 100 per cent of them. It is very important to us to ensure that our data and information are credible, and we will continue to do what we do at present once the code is introduced.

When officers stop and search a member of the public, there is a requirement on them to record that activity on the stop and search database. If we carry out less stop and search activity, fewer stop and searches will be recorded and there will be less bureaucracy for the officers in terms of recording. However, it is very important that we are seen to be acting legitimately, and with the trust and confidence of the public, and that we ensure that the data that we have are credible and are properly recorded and analysed. That is at the heart of the draft code.

The journey that we have been on for a number of years now has brought us to a place where we can be confident that that is the case. Indeed, every three months we publish online all the national data on stop and search for the public and others to scrutinise. That will continue as we introduce the code and start to apply it. In addition, local area commanders across Scotland will be furnished with specific information for their own areas of responsibility, which will be shared with scrutiny committees and other accountable bodies to allow them to delve further into the detail of activity in those areas. That is appropriate, because how the code will be applied locally will differ across Scotland, given the different needs of communities.

To answer your question: yes, there is a correlation between the recording bureaucracy and officer time, but it is very important that the data that we have are accurate, audited, accountable, published, open and transparent. We have been very committed to ensuring that that is the case—it will continue when the code is introduced.

Stewart Stevenson: I am just testing the assertion by the Scottish Police Federation that the code will create “a heavy bureaucratic burden”. We have eliminated some of the burden, but we are increasing the recording that is associated with the searches that will remain. What is your sense of the balance of that in terms of bureaucracy and the amount of effort that will have to be devoted to it? Can you be fairly concise?

Assistant Chief Constable Williams: Recording is done electronically in a database. It

is computerised and is pretty short and sharp—it does not take a lot of time to carry it out. At the time of the stop and search, a receipt will also be issued to the member of the public who is searched so that a record is kept. I think that the benefits of that accountability and legitimacy outweigh any small amount of bureaucracy involved in recording the activity.

Stewart Stevenson: I am sure that we will return to the benefits.

Rona Mackay (Strathkelvin and Bearsden) (SNP): I would like to explore with you the principles of the code. A search has to be “in accordance with law”, “necessary” and “proportionate”. Are the principles sufficiently clear to enable officers to use their judgment in establishing whether the rights of an individual in a particular circumstance outweigh the perceived benefits of a search? Is there anything in the principles that you feel could be a bit ambiguous?

Assistant Chief Constable Williams: I do not believe that there is anything that is ambiguous, in that sense. The principles of necessity, proportionality and justification are very well known in the Police Service of Scotland: they feature in a great many of the judgments and decisions that police officers make every day. We entrust our front-line officers with a huge burden both of judgment and—which is important—discretion. We trust them to act fairly in a host of different situations and incidents. The principles of fairness, integrity and respect, as values of the force, underpin that behaviour.

I am comfortable that the principles that govern stop and search, as they are articulated in the draft code, are appropriate and necessary, and allow for justification and necessity to be evidenced in each and every incident that the police deal with.

John Scott: My impression is exactly the same. We also get those three factors—lawful, necessary and proportionate—from the European convention on human rights. There is considerable familiarity in Scotland with those principles in Parliament, the Government and Police Scotland. It ties in, as I understand it, with other aspects of the training of police officers and is one of the things that the national stop and search unit has assisted us with. Training on stop and search blends with other training—officers are not being presented with an entirely new way of approaching the question of a defensible decision.

Rona Mackay: Do you wish to come in on that point, Calum?

Calum Steele: I am happy to wait for the next question.

Rona Mackay: I want to pick up on one aspect, in relation to necessity. Could you explain the difference between “locate a harmful item” and “confirm ... possession of an illegal item”?

Are they one and the same thing, or are they different? Is it just that the terminology is a bit confusing?

John Scott: Which page or section of the code is that in? I have a lovely folder with all my paperwork in it, but not here, unfortunately.

The Convener: It is part of the necessary principles, if that is helpful.

John Scott: I have got it. Thank you.

They may be the same thing, but I suspect that situations will require be two separate approaches.

Rona Mackay: So, it is really just a question of the way in which it is worded, but they essentially mean the same thing.

Assistant Chief Constable Williams: Yes. I suggest that in a scenario in which the necessity in the search is to locate a harmful item, that may be based on intelligence or information that a police officer has: the officer might believe that a member of the public is in possession of something that is harmful or illegal, so will stop and search them to ascertain whether that is the case.

Rona Mackay: To “confirm” that. Yes.

Assistant Chief Constable Williams: That means that the item must be located. As for the alternative, to “confirm the possession of” something, officers might see the person put something in their pocket, for instance, or it might be intimated to them by a witness or a member of the public that the person is in possession of an illegal item. Then, the officer is confirming that that is the case. It is a subtle use of language, but I think that both are appropriate.

Stewart Stevenson: If you will excuse me, I wonder whether I might illustrate it thus. They are quite different things. An unloaded handgun would be “illegal” but not necessarily “harmful”, but a pen that is equipped to stab someone in the eye is not “illegal” but could be “harmful”. It strikes me, therefore, that they are different provisions, both of which are necessary. Is that a fair comment?

Assistant Chief Constable Williams: It is—but it is also how person uses an item that might generate its legality or otherwise.

Stewart Stevenson: Exactly.

Liam McArthur: I wish to pick up on John Scott’s point about familiarity with the code being picked up in training. Is it the expectation that additional training will be required for officers? If so, can that be quantified, and is Police Scotland

confident that familiarity and comfort with the new code will be brought in through standard initial and on-going training?

Assistant Chief Constable Williams: I am happy to quantify that for you. We are training all front-line police officers—constables, sergeants and inspectors. They undergo two forms of training. First, an online pre-hard-training day—done through a mechanism that we use called Moodle—is undertaken on the code and its application. Thereafter, there is a half day of face-to-face training about the code, its application and some of its key elements, which include engagement and communication, with a particular emphasis on children and young people. It covers issues including unconscious bias, and goes into detail about the lawfulness of officer activity, and statutes and how they might be applied.

13:30

We take training very seriously; more than 8000 officers have been trained; obviously, several thousand are still to be done and that will be finished prior to the code being introduced. The half day is face-to-face, and the precursor training is online.

The Convener: Is all the training mandatory?

Assistant Chief Constable Williams: Yes—the training is mandatory for front-line police officers. Every officer in Scotland will be trained in advance of the code being introduced.

The Convener: Calum—do you want to come in?

Calum Steele: Yes. Before we get too far away from the questions that Rona Mackay asked about the code and its relevance to “necessary” and “proportionate” views in terms of the law, I say that I think that in many cases it goes beyond what the law expects. If we look, for example, at the code of practice requirements in section 73 of the Criminal Justice (Scotland) Act 2016, we see that it does not talk about a requirement of the code to set the standard by which constables are to be scrutinised and evaluated. Those are matters that are properly determined by the chief constable and should not be determined in any code. It is right and proper, of course, that the chief constable sets those standards in accordance with the parameters and governance expectations that are laid upon him or her by the Scottish Police Authority. I think that in some respects the draft code goes beyond that and steps into an area that is not properly in its remit and, therefore, goes beyond the limit of the law.

There is one area that I know probably everyone around the table recognises. For understandable reasons, the code seems to suggest that to protect

life, one particular area of the provisions of the 2016 act—section 65—should be set aside. The 2016 act says that no search shall be carried out unless it is “in accordance with” the statutory provision, yet the code says, “Forget that. If we need to save a life, we can search, regardless.” I can understand why the code says that, and why police officers would want to do that; however, one definitely sits against the other. I suppose it would take us into a whole host of discussions about many of the unintended consequences of what would fall out from things that Parliament has legislated for.

I also want to touch on the question about bureaucracy that was asked by Stewart Stevenson. It is difficult to reconcile, on the one hand, the statement that there is complete trust in police officers and their ability to use their discretion, with the previous statement that we audit 100 per cent audit of activities in respect of stop and search. It seems to me that those two statements cannot sit side by side. The issue of bureaucracy is very relevant and hugely salient to the way in which police officers undertake their day-to-day activities. If we are faced with a process that is overly onerous in terms of the bureaucratic expectation, whether on the street, when the officer returns to the station, or when they respond to the stop and search unit—in effect, the compliance unit—that will, in its own right, dissuade officers from being involved in the activity in the first place. That cannot be overstated.

When the service was making a right royal Horlicks of the whole issue, the approach to the recording of stop and search was largely a box-ticking exercise; it was not onerous and not difficult. To some extent, that allowed numbers to be completely made up. The move from that to something that is so heavily specific in its expectations will create bureaucracy that will be offputting, that will discourage officers from using their powers to stop and search and that will sustain an industry—I dare say that journalists will feed off it forever, so it will be terrific from that perspective. Ultimately, if Parliament determines that those are the kinds of activities for which it wishes police resources to be utilised, the service will have to fall into line.

John Scott: We are in a position where there will be better use of police resources. What we saw previously in unrestrained use and even in targeted use of non-statutory stop and search was that the chances of finding something were far less than they are in the situation in which stop and search is properly intelligence-led and based on reasonable grounds to suspect. Previously, officers were engaged to a significant extent—albeit that, because of poor counting, the actual

figures are unknown—in searching for things that were not there. It is about striking a balance.

A level of bureaucracy is required in order to have proper accountability and scrutiny, and the Scottish Police Federation identified early the problem of the lack of proper accountability and scrutiny in respect of stop and search. It should be borne in mind that, although stop and search is an important police tactic for which there is still, and always will be, a place, as just one of a number of measures, the majority of searches will still find nothing. Therefore, the code must cater not only for those who are found to be in possession of illegal items after a proper search for which there were reasonable grounds. It must also cater for the huge number of people with whom officers engage on reasonable grounds, and about whom they do not need to be right, and whom they search without finding anything. Baselines have not yet been determined, so we do not know what the correct number of such people is. We will find that out over time, and it may change. Following the introduction of the code, I think that how those people are left at the end of the search will be far better than it was previously, when a lot of young people asked us why they had been searched but were not given an answer. As a result of the code, they should get an answer to that question.

I will deal briefly with Calum Steele's point about protection-of-life situations. He is right in what he says, and the matter is specifically flagged up on pages 8 and 9 of the supplementary report from the advisory group, where we identify that, ideally, those situations would be covered by the legislation. There was no legislative slot for them, but we felt a sense of responsibility to officers because of the changes that we were involved in. Therefore, there is comfort to be derived from the other pieces of legislation and article 2 of the ECHR all being read together. Although there is no specific power of search in those situations, it may be that, in the course of the review process, Parliament—perhaps the committee—will review that and allot a specific power to deal with those situations. In the meantime, what we have put in the supplementary report is intended as a comfort to officers who are asking the right questions in training and are asking, "What power do I have to do that?"

Stewart Stevenson: I would like to make a wee observation. There is precedent—in the Air Navigation Order 2016, which explicitly says that pilots may override any rule or regulation in the interests of safety.

The Convener: Thank you for that clarification, Stewart.

In paragraph 6.10, the code states that

"Constables must ensure, so far as is reasonably practicable, that the person understands why they are to be searched and what the search will involve."

Can you explain to me in layman's terms exactly what that means? It seems to me that we get into a grey area when a person has a mental health condition. Where is the line drawn when the police have done as much as they can and the person still does not understand? Where do you stop?

John Scott: The code is intended to leave a great deal of the assessment of the situation to the individual officer. It is a hugely complicated area, which has been touched on in some of the other work of the Justice Committee, and perhaps of this committee, in evidence that Calum Steele has given about front-line policing. Identification of different types of vulnerability is hugely complicated. It might be that a full assessment of an individual can be made only as a result of healthcare professionals working for several weeks or months, but officers are often called on to make very quick decisions and may not be able to identify fully particular communication issues, vulnerability issues or understanding issues.

The phrase "reasonably practicable" is there because the code is intended to ensure that efforts are made. However, officers cannot guarantee that a person will understand, because there may be hidden or unobvious reasons for their not understanding. The code goes as far as we can, while recognising that it would be impossible to guarantee that the person would understand. Ideally, everyone would fully understand; that not being the case, we have gone as far as we can while recognising the very difficult job that is involved.

Calum Steele: That is an interesting issue; the question of vulnerability is worth further exploration. The question is predicated on the notion that a search is to be undertaken and on the capacity to understand of the individual with whom we are dealing.

Daily, police officers come across people whose ability to communicate and understand is limited. There may be concerns about the individual's safety and wellbeing because of the general nature of the environment in which they find themselves or in which police officers are dealing with them. There may be nothing criminal involved or nothing to suggest that they are of harm to themselves, but there may be something that would leave police officers uneasy about leaving them behind if they were not able to establish the individual's identity.

Even the fact that we are now not able to say, "Look, do you mind if I have a look in your pockets to see if I can find a driving licence, a bank card or something to help me find out who you are and where you might belong, so that we can find

someone to come to help you, if necessary?" is going to be problematic. There are also the questions about what happens if the police officer finds something illegal while undertaking that activity to try to support the individual, and about how that sits with the overall provisions of the code about not undertaking a search unless it is "in accordance with" statutory provision.

The Convener: What impact does Pauline McIntyre think the situation may have specifically in relation to children?

Pauline McIntyre: There is provision within the section on children and young people, which makes it clear that it is important that other options be considered to safeguard the child or young person. It should not automatically be assumed that a search is the best way of safeguarding that child. It might be that the child should be taken home to his or her parents, or someone else could be found who can support the child, and the case taken forward in that way.

John Scott alluded to the fact that, when the group considered the matter, we were careful to consider where there could be flexibility. We had to balance the rights of the people whom the code would affect against the operational side and how the police work day to day. There was a careful balancing act. I hope that the draft code as it is now captures that and allows enough flexibility for such individual approaches to be taken.

Ben Macpherson (Edinburgh Northern and Leith) (SNP): We have gone through the principles; I will touch on the concept of suspicion, which Calum Steele raised. I am curious about what steps officers will be expected to take in forming a genuine suspicion that they are likely to find an object during a search. Will you also elaborate on the SPF's concerns about suspicion generally? Are there any circumstances in which the code will restrict officers' capability and capacity to deal effectively with individuals who might be acting suspiciously?

Calum Steele: That is a very clever question. Acting suspiciously and having suspicion for a search are two entirely different things.

On your question about how the code will affect situations in which suspicion exists for a search, the short answer is that it will not make a jot of difference, because the suspicion will be the providing principle. People acting suspiciously is something inherently different.

I know that the example that was provided in the SPF's submission is at the more extreme end of emotions, but it was provided for the specific reason that sometimes people are acting suspiciously because they are up to no good. They might not have committed any criminal offence; they might not have any article on them;

or they might be carrying £10,000 as a consequence of organised crime.

Unless someone has a nose like a cash dog, they will not smell the money on that person—a person's pupils do not dilate as a consequence of carrying that kind of money. An officer's ability to deal in a non-confrontational way with people who are acting suspiciously—to use their awareness and that person's ignorance, which is often an advantage and is undoubtedly one that the code seeks to address at some point—is going to be lost. The ability to use that skill is to be taken away from the officer. The code probably goes beyond what the law expects on that.

The code is clear that nothing that is written in it is intended to prevent police officers from engaging with any member of the public on any issue. I can approach someone on the street and say, "All right—what's going on? What's your name?" and engage in that kind of idle chitchat. However, the second that I come to any notion that I am going to search them, I have to say, "What's your name? By the way, you don't have to tell me." It seems somewhat odd to introduce something that is akin to a second-tier police caution when we are dealing with individuals.

13:45

The issue of suspicion is one side, but the area that causes the greatest concern for us is vulnerability. To an extent, the issue has strong relevance to the discussion at the main Justice Committee on Tuesday this week about the dangers of exploitation of some of our young people. When, for instance, children and young people go missing from a care establishment, regardless of the provider, there is a danger that they will be exposed to sexual exploitation. Inquiries into such issues are being undertaken in the service at this moment.

Those victims of crime do not realise that they are victims, and they are being exploited and being paid, if you like, with money—on rare occasions—or with drugs, electronics and phone top-up cards. Although none of those things—save drugs—is illegal in its own right, we have lost the ability to gather intelligence through what was a non-invasive activity. I use the term "non-invasive" in the roundest possible sense, because of course searching is by its nature invasive, although it is certainly largely non-confrontational. We have lost the ability to gather intelligence that supports the getting it right for every child agenda in order to look after vulnerable individuals. That is a difficult circle to square when it comes to the activities that we expect police officers to be involved in.

Pauline McIntyre: I am not sure that I entirely agree with Calum Steele's assessment. From our

perspective, as we have mentioned, the use of stop and search has been fairly ineffective in many ways. Consensual stop and search of children and young people often did not find items, so it was clearly not a useful tactic. The idea of policing on the basis that somebody is up to no good moves quite far away from the process that we have gone through with the code of practice and the progress that Police Scotland has made on accountability and taking a rights-based approach. The code tries hard to build in flexibility and to allow police officers to use their instincts, although they also have to justify those instincts and give a clear reason for why they are taking things forward.

When the use of stop and search and a potential new power to stop and search young people for alcohol was discussed, the argument was quite often used that that would prevent crime and terrible things from happening to children and young people. It was difficult to evidence that—the evidence for that was not there.

There is a danger in using the worst examples of things that happen to children and young people to justify a move away from something that is helpful for them. The code of practice is moving us in the right direction and is doing what the United Nations Committee on the Rights of the Child says that we should do by looking at the way in which stop and search is happening and ensuring that it is targeted in the right way and that officers are held accountable for their actions.

Assistant Chief Constable Williams: I have one point, which I think that everyone has reflected in their responses. At the heart of the code, one of the key principles is that communication and engagement are the first and most important part of any interaction with a member of the public. If that is done well, openly, transparently and routinely, it alone has enormous benefits.

The code definitely advances that agenda, as does the training that we are undertaking. Officers are excellent communicators and excellent judges of situations and incidents. That usually comes through years of experience of dealing with members of the public in the various scenarios that officers have to deal with.

Officers' ability to gather intelligence, for example, comes from a host of different approaches. The matter is complicated, but engaging and communicating in the first place potentially generate some incredible intelligence and really useful information. The code allows us to focus on that and train officers on it, to the benefit of the wider policing purpose that we pursue.

Although we acknowledge the challenges, the code has sufficient flexibility. The communication

and engagement element is important and welcome. The investment that we are putting into that through training will reap genuine benefits not only in legitimacy, accountability and the trust and confidence that the public have in us but in more technical issues, such as the gathering of intelligence. Having that element in the code is a great benefit.

The Convener: I make a plea to members to keep their questions as brief as possible and to witnesses to make their answers as brief as possible, because we still have areas that we need to cover.

Liam McArthur: I will do my best, convener. The Law Society of Scotland has raised another concern about suspicion and people acting suspiciously, which is that the fact that

"generalisations or stereotypical images that certain categories of people are more likely to be involved in criminal activity"

can be used to underpin reasonable grounds for suspicion seems to be at odds with the approach that is taken south of the border. Is that a divergence that we should be concerned about or is it in accordance with the principles of the code and therefore entirely reasonable?

The Convener: A specific concern of the Law Society is about the use of the word "alone". When the witnesses answer, could they address that point as well?

John Scott: I saw the Law Society's submission and discussed it yesterday with the Law Society's head of policy so that I could better understand it. I do not think that, in practice, the approach north of the border will differ from that south of the border, and that is not the intention. If anything, the wording in England is slightly misleading. To say that the protected characteristics can never be a basis for a search but then to say "unless", as the code in England does, is really another—but less straightforward—way of saying what we say, which is that none of those characteristics can be used alone.

Calum Steele previously gave me an example that related to a Scottish island with a limited population, where a witness gave a description of someone that included reference to something that would be categorised as a protected characteristic. In that case, it would be possible under the code for an officer to proceed to search, because the ground for suspicion would be not the protected characteristic on its own but the addition of a description of the witness. That is the same as the position in England.

The intention north and south of the border is the same, but we are a bit more straightforward about it. Perhaps the wording in England was

chosen to address the special issues that England has had in relation to race.

Liam McArthur: That is helpful.

The Convener: Ms McIntyre, do you feel that the application of the code will safeguard children's rights effectively? Is there anything else that should be included in the code or any monitoring that should be done to ensure that children's rights are protected?

Pauline McIntyre: The monitoring that the code suggests is sufficient. We had input into that process, so we are happy with that.

Children and young people were clear about what they wanted to be in the code. They wanted a clear explanation of the process of stop and search. They felt that, when it happened, they did not understand what was going on or what their rights were, and the code works hard to set out those rights. They also wanted a clear complaints route to be available to them.

On children's rights, the code considers the need for officers to use age-appropriate language, to think about the level of understanding that children of different ages might have and to be conscious that that might not always be the same. For example, eight-year-olds might have different understandings, depending on their background and upbringing. The code recognises a child's life experiences. It moves away from the assumption that a child has the same life experience as an adult, and it makes an officer think about whether a child will be familiar with that experience.

The code also considers other factors that would influence a child's behaviour. It is explicit in stating the power imbalance that we alluded to that exists between a police officer and a child or young person. That is incredibly helpful, because it allows police officers to think about what an experience is like for a child or young person. It also means that officers will look at whether a child has a disability—particularly a hidden disability—that might affect the way in which they are behaving, or whether the child might have experienced trauma and how that might impact on their behaviour.

The code looks at the wide range of children and young people that police officers might come into contact with and equips officers with the necessary tools. It allows them to think, "Actually, there's something here that I need to think about, so I might approach this differently." From that perspective, we are happy with how the code approaches the issue of children's rights.

The Convener: How will the information about the code be made known to the organisations that support children and work with young people?

Pauline McIntyre: At the moment, we are committed to doing two things in that regard. First, we are looking to provide to children and young people a guide on the code of practice, which will be written in accessible language so that they will be able to read about the code and know about their rights. Secondly—this is still in development—we are looking at whether to create a resource that might talk about 10 key things that children and young people need to know about stop and search. Again, that would be in an easily accessible format, such as an infographic.

The other thing that we are looking at—I will mention it briefly, because I am aware that we are short of time—is providing feedback to the groups of children and young people who inputted into the consultation on the draft code of practice. Today, we have talked about some of the nuances in the code. The feedback would be to make it clear to children and young people where their views have been taken on board and where, sometimes, we have had to take a slightly different approach to allow operational flexibility.

The Convener: I have a question for Mark Williams about the training for officers who deal with adults and young people with multiple disabilities or communication impairments. Mark, you said that the training is mandatory and will be refreshed, but are you working with outside organisations to develop and improve the training on an on-going basis?

Assistant Chief Constable Williams: The simple answer to that is yes. On the issue of children and young people, we have worked with a host of organisations. Indeed, one of the many groups that we have for the governance of stop and search relates to young people, and a wide variety of organisations that represent children and young people are represented on it. We also carried out workshops with young people as we were addressing our changing policies on stop and search. The feedback from children has influenced the syllabus of training that we undertake.

I perhaps should have said earlier that the training that we undertake is for a full day. In the morning, there is a half day on stop and search and, in the afternoon, a half day on mental health awareness and vulnerability. That second element is not specifically on stop and search; it deals more widely with how we better communicate and engage with people who are vulnerable, have mental health issues or have other disabilities or language challenges. That has been influenced through consultation with a number of organisations. We are evaluating the training as we go, and we will evaluate it formally after it is undertaken. We will amend and build on it as

appropriate as we move forward and learn from experience.

At this stage, I am confident that our training is appropriate, as it covers a host of scenarios and equips officers as best we can with the skills that are needed to communicate in challenging circumstances. The training will continue and will be evaluated.

14:00

The Convener: Will officers also have the ability to give feedback on stop and search? Will they be able to say what happened, how they dealt with it and what it would be beneficial to do in the future?

Assistant Chief Constable Williams: Yes. We do that. As I described, we have an online database, which includes a feedback function to enable officers to contact the national stop and search unit directly and make any suggestion that they might have. When the code of practice comes in, a key element of its application will be getting feedback from officers on whether it is working in practice and whether they come across any issues that they feel they cannot deal with because the code does not cover them. That will be an important aspect of the evaluation of the code.

Rona Mackay: The code does not say that a search must be stopped when a child becomes distressed. Would you not have preferred it to include a directive that said that, in such circumstances, the search should be stopped until an adult is present?

Pauline McIntyre: We considered that very carefully when we were drafting the code. We considered whether it might be appropriate to stop a search in those circumstances, but we wanted to allow some flexibility. We imagine that, in the majority of cases, the search would stop and someone else would be found to support the child or young person.

Rona Mackay: So it would be left to the officer to judge at what point—

Pauline McIntyre: It would be left to the officer. To go back to what Mark Williams said, we were clear that that should form part of the training. If a child is becoming particularly distressed, common sense would dictate that officers would stop the search.

John Scott: In the Scottish Police Federation's submission, Calum Steele made the point that, in a situation in which the search was going to have to happen anyway, and where delaying the process to enable a responsible adult to be located would increase the young person's distress, the consideration would be towards continuing and completing the search quickly.

When it comes to children, as far as I am concerned, the key thing in the code—and in the legislation—is having the best interests of the child recognised front and centre.

Rona Mackay: Thank you for clarifying that.

Liam McArthur: One area in which there was concern about the move away from unregulated stop and search was instances in which those under the age of 18 could be searched for alcohol. We have had the consultation and all the rest of it, and it appears that there is still a question there, albeit that the advisory group took the view that a new power is not required. Is that because there is a belief that the statutory provision for stop and search is adequate for covering that area, along with the other methods that Mark Williams identified as being part of the initial engagement, or will we have to come back to the issue in due course?

John Scott: It will depend on the data. Police Scotland said in its response to the consultation that the issue should be revisited once we had six months' worth of data. After some discussion on the advisory group about that and guidance on new baselines, we thought that a period of 12 months would be sensible, because after six months we might not know terribly much more. The issue can be kept under review.

In the supplementary report, we commented on the persuasive arguments against such a power, even if the evidence for it exists, so it is not a debate that has gone away entirely. The approach that is taken will be driven by data, feedback from officers and the views of children and young people.

Stewart Stevenson: I have a question for Mark Williams. Given that the code touches on operations, are the chief constable and the command corridor generally comfortable that it strikes the right balance when it comes to politicians keeping their noses well out of police operational matters and the discretion that should properly lie in the command corridor?

Assistant Chief Constable Williams: Yes is the simple answer to that. We believe that the benefits that will come in terms of trust, confidence, legitimacy and accountability outweigh any negatives.

The Convener: As members have no further questions, all that it remains for me to do is to thank all our panel members for coming along for what has been an extremely useful evidence session for us. We look forward to working with you in the future.

14:04

Meeting continued in private until 14:15.

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