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Justice Committee

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



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Justice Committee

Stop and Search Code of Practice (Appointed Day) (Scotland) Regulations 2017, 3rd Report, 2017
(Session 5)

Justice Committee

Remit: To consider and report on matters falling within the responsibility of the Cabinet Secretary for Justice.



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Scottish Conservative
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Stewart Stevenson
Scottish National Party

Introduction

1. At its meeting on 7 February 2017 the Committee considered the following instrument—

Stop and Search Code of Practice (Appointed Day) (Scotland) Regulations 2017 [draft].
2. The draft instrument was referred to the Justice Committee as lead committee and was subject to affirmative resolution. The Cabinet Secretary for Justice, Michael Matheson, attended the meeting to give evidence on the instrument and also to move the relevant motion recommending approval of the instrument.¹
3. The instrument is made under section 77(1) of the Criminal Justice (Scotland) Act 2016. The Regulations bring into effect a code of practice about the carrying out of a search of a person who is not in police custody. The code of practice applies to the functions exercisable by a constable. It sets out:
 - the circumstances in which a search of such a person may be carried out;
 - the procedure to be followed in carrying out such a search;
 - the record to be kept in relation to such a search;
 - the right of someone to receive a copy of that record.
4. The instrument specifies that the code will come into effect on Thursday 11 May 2017. This takes into account the logistical implications for Police Scotland in terms of training and ensuring that the necessary arrangements are in place. Non-statutory (often called ‘consensual’) stop and search will become unlawful on the date that the code comes into effect. It will be appreciated from the above that the Justice Committee’s scrutiny was focussed on the code of conduct, rather than on the instrument itself, the terms of which are straightforward: it simply brings the code into effect. (This also applies to the scrutiny carried out by the Justice Sub-Committee on Policing.)

Scrutiny by the Delegated Powers and Law Reform Committee

5. The Delegated Powers and Law Reform Committee considered the draft instrument at its meeting on 24 January 2017 and agreed that it did not need to draw it to the attention of the Parliament on any grounds within its remit.

Justice Sub-Committee on Policing consideration

6. At its meeting on 26 January 2017 the Justice Sub-Committee on Policing took evidence on the instrument from John Scott QC, Chair of the independent Advisory Group on Stop and Search, Pauline McIntyre, Parliamentary and Policy Officer at the Children and Young People's Commissioner Scotland, Assistant Chief Constable Mark Williams of Police Scotland, and Calum Steele, General Secretary of the Scottish Police Federation.² The Sub-Committee also received written evidence from the Advisory Group on Stop and Search, the Children and Young People's Commissioner Scotland, the Law Society of Scotland, Police Scotland, the Scottish Police Federation, and Dr Kath Murray, an independent policing and criminal justice researcher.³
7. The Sub-Committee wrote to the Justice Committee with its findings. The letter can be found at Annexe A.

Justice Committee consideration

8. The Justice Committee considered the draft instrument at its meeting on 7 February 2017, when Michael Matheson, Cabinet Secretary for Justice, attended to give evidence on the instrument.
9. The Cabinet Secretary told the Committee that there was consensus among the members of the independent Advisory Group on Stop and Search about the changes that were made to the draft code of practice as a result of the consultation responses. Mr Matheson indicated that the code of practice will be kept under regular review and that the advisory group will continue to play a role in helping the Scottish Government to assess evidence after the code has been in force for 12 months, with an interim assessment after six months.
10. In response to a request for more detail of the review process and what action might be taken at six months if there were issues with regards to how the code was being applied, for example to vulnerable individuals. Mr Matheson told the Committee that the interim report would provide an opportunity for the Scottish Government to consider whether it needed to do anything further to fully understand the extent and nature of the issue prior to the review at the end of the first year of the code being in place.
11. The Committee had received evidence that the baseline figures for the use of stop and search generally and for unregulated stop and search were not robust. The Cabinet Secretary agreed that due to the recording methods used the historical

figures were not robust. However, he confirmed that the figures for the last year were a more accurate reflection of the use of stop and search by Police Scotland.

12. Mr Matheson told the Committee that the practice of consensual stop and search had decreased significantly and that it would come to an end once the code of practice was introduced. In response to evidence that the Justice Sub-Committee on Policing had received that the loss of consensual stop and search could potentially lead to an increase in some types of crime, Mr Matheson said that there was no evidence to date to support that proposition.
13. In response to questions about whether the child protection provisions in the code of practice were robust, the Cabinet Secretary told the Committee that he was confident that they were, explaining that young people had been fully involved in the process of drafting them. Mr Matheson confirmed that the stop and search data on young people would also be monitored over the course of the first year to determine whether there was a legislative gap around the ability to search young people for alcohol. Mr Matheson also referred to the work that is being done to develop a children and young people's guide to stop and search.
14. The Committee asked for clarification of whether police constables would be able to override issues of safety and do whatever is necessary to preserve life. The Cabinet Secretary explained that Section 3.4 of the code of practice reminds officers of their duty to protect life and confirmed that officers would be able to search an individual for items that might cause them harm. The Cabinet Secretary added that, if further legislative changes were thought necessary by Police Scotland or the Advisory Group to address this issue, that could be done in due course.
15. Mr Matheson moved the motion in his name: S5M-03459—That the Justice Committee recommends that the Stop and Search Code of Practice (Appointed Day) (Scotland) Regulations 2017 [draft] be approved.
16. The motion was agreed to without debate or dissent.

Recommendation

17. The Justice Committee recommends to the Parliament that it approve the draft instrument.

Justice Committee

Stop and Search Code of Practice (Appointed Day) (Scotland) Regulations 2017, 3rd Report, 2017 (Session 5)

¹ Scottish Parliament Justice Committee. *Official Report 7 February 2017* Cols 2-16. Available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10785&mode=pdf>

² Scottish Parliament Justice Sub-Committee on Policing. *Official Report 26 January 2017* Cols 2-22. Available at: <http://www.parliament.scot/parliamentarybusiness/report.aspx?r=10756&mode=pdf>

³ Justice Sub-Committee on Policing. Written submissions received. Available at: <http://www.scottish.parliament.uk/parliamentarybusiness/CurrentCommittees/103176.aspx>

Annexe A

Letter from the Convener of the Justice Sub-Committee on Policing to the Convener of the Justice Committee

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

The Justice Sub-Committee on Policing agreed, at its meeting on 12 January 2017, to hold an evidence session on the [draft Stop and Search Code of Practice \(Appointed Day\) \(Scotland\) Regulations 2017](#), and to write to the Justice Committee setting out its views, in advance of the latter formally considering the Cabinet Secretary's motion to approve the regulations later this month, to help inform that scrutiny.

The Sub-Committee took oral evidence from John Scott QC, Chair of the Independent Advisory Group on Stop and Search; Assistant Chief Constable Mark Williams, Police Scotland; Calum Steele, Scottish Police Federation; and Pauline McIntyre, Parliamentary and Policy Officer, Children and Young People's Commissioner Scotland, on 26 January.

The Sub-Committee also considered [written evidence](#) provided by the witnesses and from Dr Kath Murray, independent policing and criminal justice researcher, and from the Law Society of Scotland. We are grateful to all those who provided evidence.

Introduction

Stop and search is used by the police to search individuals for weapons, drugs, unlawful alcohol or stolen goods, with the aim of helping to keep people safe. In response to concerns about the level and nature of the practice of stop and search in Scotland, both the Scottish Police Authority (SPA) and Her Majesty's Inspectorate of Constabulary in Scotland (HMICS) undertook separate reviews of the practice.

In May 2014, the SPA published a final report and recommendations following its [Scrutiny Review – Police Scotland's Stop and Search Policy and Practice](#) and in March 2015 HMICS published its [Audit and Assurance Review of Stop and Search: Phase 1](#).

The HMICS Review recommended that: "Police Scotland should consider a policy which raises a general presumption amongst officers that stop and search encounters should be legislative" (recommendation 15) and that "Police Scotland and Scottish Police Authority should consult with the Scottish Government on the potential development of a statutory Code of Practice for stop and search" (recommendation 19).

In March 2015, Police Scotland confirmed that there would be a presumption against consensual (non-statutory) stop and search for all age groups and that children under the age of 12 would no longer be subject to consensual stop and search.

The Independent Advisory Group on Stop and Search

Scottish Ministers [announced](#) on 31 March 2015 that an Independent Advisory Group on Stop and Search policy in Scotland would be established, and that it would be chaired by John Scott QC.

Remit and timescales

The remit of the Advisory Group is to advise Ministers on the long-term policy which should be in place for stop and search, in particular to:

- “consider and report to Scottish Ministers on whether a presumption against consensual stop and search goes far enough or, alternatively, if there should be an absolute cessation of the practice. The group should advise on the steps that require to be taken in the light of the conclusion it reaches, including any consequent legislation or change in practice that might be necessary.
- develop a draft Code of Practice that will underpin the use of stop and search in Scotland”.

“The Advisory Group may also provide advice and recommendations to Scottish Ministers on:

- legislative options in relation to stop and search, including ways in which the Code of Practice can have a legislative basis; and
- the use of statutory stop and search in relation to children and young people for more general safeguarding and well-being.”

The Advisory Group was asked to report back to the Cabinet Secretary for Justice by the end of August 2015 and the Cabinet Secretary for Justice published [the Advisory Group's report](#) on 3 September 2015. The Advisory Group recommended: “That there should be a Code of Practice covering Stop and Search of the person in Scotland. The Code should be given effect by statute” (recommendation 1)

Supplementary Report by the Advisory Group on Stop and Search

Between 21 March and 15 July 2016, the Scottish Government undertook two public consultations; one on a draft Code of Practice to underpin the use of police powers to stop and search in Scotland, and one on Police Powers to Search Children and Young People for Alcohol. Once these consultations were concluded an analysis of the responses to the [Code of Practice](#) and the [Power to Search for Alcohol](#) were published.

The Cabinet Secretary asked the Advisory Group to meet again to consider the responses to, and analysis of, the two consultations. The Advisory Group published a [Supplementary Report on Stop and Search](#) in January 2017. The draft Code of Practice was amended to address some of the issues raised in response to the consultations.

The draft Code of Practice

The [draft Stop and Search Code of Practice \(Appointed Day\) \(Scotland\) Regulations 2017](#) was laid in the Scottish Parliament on 11 January 2017.

The purpose of the Sub-Committee's scrutiny was to investigate whether the draft Code of Practice provides a workable, consistent and transparent approach to the practice of stop and search.

The majority of the written and oral evidence received indicates that the code of practice is a welcome tool which will assist police constables in the use of stop and search, as well as providing assurance to the public that it will be a lawful and transparent practice in future, which will be monitored and reviewed.

A number of issues were raised by the Scottish Police Federation and the Law Society of Scotland in their written evidence, which the Sub-Committee explored in more detail during the oral evidence session.

The Purpose of the draft Code of Practice

John Scott QC, Chair of the Independent Advisory Group on Stop and Search, told the Sub-Committee that a collaborative approach had been taken to drafting the code of practice, and that it had two purposes and two audiences. He explained that: "... 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".¹ He hoped that this would help to educate people about stop and search and redress the power imbalance that many feel when being searched.

Calum Steele told the Sub-Committee that the Scottish Police Federation considered that: "There are bits [of the draft code] that are unnecessary", adding: "that might relate to the fact that it is aimed at more than one audience".² An example given in the Scottish Police Federation's written submission is the reference to: "existing legislative provisions throughout",³ which police officers would already be familiar with. However, this view did not appear to be shared by Police Scotland.

In response to a question on whether the code of practice will lead to significant improvements in the practice of stop and search, Assistant Chief Constable Mark Williams confirmed that Police Scotland: "are satisfied that the code will lead to a significant improvement in how we apply stop and search in Scotland".⁴

Pauline McIntyre from the office of the Children and Young People's Commissioner Scotland told the Sub-Committee the approach to consulting children and young people prior to the inclusion of a chapter on children and young people in the code of practice had been inclusive and innovative, describing the process as: "about shaping the code with their views in mind".⁵

Conclusion: Stop and search has the potential to have a significant impact on preventing and detecting crime. The Sub-Committee is content that the draft Code of Practice on Stop and Search appears to provide police officers with practical and flexible guidance, whilst providing the public with confidence that any stop and search process will be lawful.

¹ Justice Sub-Committee on Policing, Official Report, 26 January 2016, Col 3.

² Justice Sub-Committee on Policing, Official Report, 26 January 2016, Col 5.

³ Scottish Police Federation, written submission, page 2.

⁴ Justice Sub-Committee on Policing, Official Report, 26 January 2016, Col 3.

⁵ Justice Sub-Committee on Policing, Official Report, 26 January 2016, Col 4.

When powers of Stop and Search may be used

Paragraph 3.4 of the code of practice states that:

Notwithstanding paragraph 3.3, a constable must take all steps necessary to protect life.⁶

In its [Supplementary Report on Stop and Search](#), the Advisory Group highlight the lack of a power within current legislation to search a person to preserve their life:

“Some police officers expressed uncertainty to us about police powers to intervene to preserve life. Despite legislative provision giving powers and duties to the police and others to protect vulnerable people, there seems to be no explicit power of search to preserve life. This area should be monitored during the early stages of evidence-gathering. In situations involving risk to life, we do not want constables to hesitate to search an individual”.⁷

In his oral evidence to the Sub-Committee John Scott QC suggested that the Parliament may wish to review the lack of an explicit power to search a person to preserve their life and legislate accordingly, saying that: “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”.⁸

Recommendation: The Sub-Committee recommends that the Justice Committee raise any possible legislative gap with the Cabinet Secretary for Justice whilst taking evidence on the draft Stop and Search Code of Practice (Appointed Day) (Scotland) Regulations 2017, to ascertain the Scottish Government’s approach to addressing this concern.

Legal basis for carrying out a search

Paragraph 4.3 of the Code of Practice states that the following cannot be used *alone* as the reason for searching an individual:

- (a) a person’s physical appearance with regard to the relevant protected characteristics set out in the Equality Act 2010, section 149, i.e. age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation;
- (b) a person’s clothing or general appearance;
- (c) generalisations or stereotypical images that certain categories of people are more likely to be involved in criminal activity;
- (d) the fact that a person has any previous convictions

⁶ See section 75 of the Criminal Justice (Scotland) Act 2016.

⁷ Supplementary Report by the Advisory Group on Stop and Search, page 8.

⁸ Justice Sub-Committee on Policing, Official Report, 26 January 2016, Col 13.

In its written evidence the Law Society of Scotland raised a concern that this wording: “suggests that factors such as generalisations or stereotypical images could be considered reasonable grounds in conjunction with other information or intelligence”.⁹ Its view is that this is a markedly different practice from England and Wales where, because of a slight difference in the wording of the comparable provision, a person’s physical appearance, any relevant protected characteristics, generalisations or stereotypical images cannot be used alone or in combination with each other to stop and search a person.

John Scott QC clarified that the intention was that in practice the approach in Scotland would be the same as that in England and Wales. He explained that the provisions in England and Wales state that protected characteristics can never be a basis for a search, “unless”, which, in his view, was another way of saying: “that none of those characteristics can be used alone”.¹⁰

Conclusion: The Sub-Committee was reassured by the explanation provided by John Scott QC that the legal basis for carrying out a search of an individual in Scotland would be similar to that of a search carried out in England and Wales. This is an issue which the Justice Committee may wish to clarify further with the Cabinet Secretary for Justice.

Recording requirements

Chapter 9 of the Code of Practice introduces a requirement for police officers to record all searches and outlines the data that should be recorded.

Calum Steele told the Sub-Committee that the Scottish Police Federation’s members were concerned about the increase in the recording requirements when stopping and searching people, compared to the previous practice, saying that: “The move from that to something that is so heavily specific in its expectations will create bureaucracy that will be off-putting, that it will discourage officers from using their powers to stop and search”.¹¹

The Sub-Committee heard that the number of searches had been decreasing due to a move to a presumption for statutory rather than consensual stop and search, ahead of the code of practice being introduced. In response to a question on whether Police Scotland is now at its expected level of stop and search, or whether it is too early to tell, Assistant Chief Constable Mark Williams stated that: “it is too early to say what that will mean in terms of overall volumes of stop and searches”.¹²

ACC Williams went on to explain that data is recorded in an electronic database and is therefore not a time-consuming process. He stressed the importance of the data on searches being: “... accurate, audited, accountable, published, open and transparent”, adding that: “I think that the benefits of that accountability and legitimacy outweigh any small amount of bureaucracy involved in recording the activity”.¹³

⁹ Law Society of Scotland, written submission, page 2.

¹⁰ Justice Sub-Committee on Policing, Official Report, 26 January 2016, Col 18.

¹¹ Justice Sub-Committee on Policing, Official Report, 26 January 2016, Col 12.

¹² Justice Sub-Committee on Policing, Official Report, 26 January 2016, Col 5.

¹³ Justice Sub-Committee on Policing, Official Report, 26 January 2016, Col 9.

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John Scott QC added that only recording searches which are properly intelligence-led and based on reasonable grounds to suspect, would mean that: “We are in a position where there will be better use of police resources”.¹⁴

Recommendation: The Sub-Committee agrees that the potential benefits for the police and the public should outweigh the bureaucratic requirements of recording searches. The Sub-Committee recommends that the time taken by police officers to record searches be included in the monitoring and review process.

Review process

The Sub-Committee heard from ACC Mark Williams that the implementation of the code of practice will be reviewed by Police Scotland: “after six months, 12 months and thereafter”,¹⁵ to monitor and evaluate its effectiveness and to consider how front-line officers are using it in practice.

Conclusion: The Sub-Committee intends to keep a watching brief on the implementation of the code of practice to see how it is working and evolving, and to return to this issue after the publication of the first set of data.

I hope the Justice Committee finds these comments helpful.

Mary Fee
Convener, Justice Sub-Committee on Policing
2 February 2017

¹⁴ Justice Sub-Committee on Policing, Official Report, 26 January 2016, Col 12.

¹⁵ Justice Sub-Committee on Policing, Official Report, 26 January 2016, Col 3.

Annexe B

Extracts from the Minutes of the Justice Committee and the Justice Sub-Committee on Policing and associated written evidence

Justice Sub-Committee on Policing 2nd Meeting, 2017 (Session 5) Thursday 26 January 2017

Stop and Search Code of Practice (Appointed Day) (Scotland) Regulations 2017 [draft]: The Sub-Committee took evidence on the Stop and Search Code of Practice (Appointed Day) (Scotland) Regulations 2017 [draft] from—
John Scott QC, Chair of the independent Advisory Group on Stop and Search;
Pauline McIntyre, Parliamentary and Policy Officer, Children and Young People's Commissioner Scotland;
Assistant Chief Constable Mark Williams, Police Scotland;
Calum Steele, General Secretary, Scottish Police Federation.

Stop and Search Code of Practice (Appointed Day) (Scotland) Regulations 2017 [draft] (in private): The Sub-Committee reviewed the evidence heard earlier in the meeting.

Written evidence

-  [Advisory Group on Stop and Search](#)
-  [Children and Young People's Commissioner Scotland](#)
-  [Police Scotland](#)
-  [Scottish Police Federation](#)

Justice Sub-Committee on Policing 3rd Meeting, 2017 (Session 5) **Thursday 2 February 2017**

Stop and Search Code of Practice (Appointed Day) (Scotland) Regulations 2017 [draft] (in private): The Sub-Committee agreed a report back to the Justice Committee from its meeting on 26 January 2017.

Justice Committee 5th Meeting, 2017 (Session 5) Tuesday 7 February 2017

Subordinate legislation: The Committee took evidence on the Stop and Search Code of Practice (Appointed Day) (Scotland) Regulations 2017 [draft] from—
Michael Matheson, Cabinet Secretary for Justice, Scottish Government.

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Subordinate legislation: Michael Matheson (Cabinet Secretary for Justice) moved—

S4M-03459—That the Justice Committee recommends that the Stop and Search Code of Practice (Appointed Day) (Scotland) Regulations 2017 [draft] be approved.

The motion was agreed to without debate or dissent.

Annexe C

List of other written evidence

-  [Law Society of Scotland](#)
-  [Murray, Dr Kath](#)

