

POLICY NOTE

THE STOP AND SEARCH CODE OF PRACTICE (APPOINTED DAY) (SCOTLAND) REGULATIONS 2017

SSI 2017/72

The above instrument was made in exercise of the powers conferred by section 77(1) of the Criminal Justice (Scotland) Act 2016 ('the 2016 Act'). The instrument is subject to affirmative procedure.

Policy Objectives

This instrument brings into effect a code of practice about the carrying out of a search of a person who is not in police custody (commonly referred to as 'stop and search'). The code of practice ('the Code') 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.

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. A midweek date has been chosen as Police Scotland advises that there is typically a lower number of stops and searches carried out at this time.

Non-statutory (often called 'consensual') stop and search will become unlawful on the date that the Code comes into effect (in terms of sections 65 and 71 of the 2016 Act).

Consultation

Provisions to enable a Code of Practice were added to the 2016 Act following recommendations made by an independent advisory group on stop and search, chaired by John Scott QC¹. The group published its report on 3 September 2015². The Justice Secretary lodged amendments to the Criminal Justice Bill at Stage 2 to give effect to the group's recommendations.

To comply with the requirements of section 76 of the 2016 Act, Scottish Ministers consulted publicly on a draft of the Code from 21 March 2016 until 15 July 2016. An analysis of the consultation responses was published on 4 November 2016³. When preparing a draft code for public consultation, Scottish Government officials wrote to the persons listed in section 76(2) of the 2016 Act.

¹ The group had a broad membership that included Police Scotland, the Scottish Police Authority, the Crown Office and Procurator Fiscal Service, academics, representatives from Scotland's Commissioner for Children and Young People, and Anne Houston, Chair, Child Protection Committees Scotland and former Chief Executive of Children 1st.

² <http://www.gov.scot/Resource/0048/00484527.pdf>

³ <http://www.gov.scot/Resource/0050/00509193.pdf>

The Scottish Government also undertook a concurrent public consultation on whether the police should have legal powers to stop and search children and young people for alcohol. Many responses to this consultation raised wider issues about stop and search that have informed the development of the Code. A list of the organisations that Scottish Government officials met during the course of this consultation is included at Annex 1 of the analysis of consultation responses, available on the Scottish Government website⁴

Revisions to the Code to address issues raised in the consultation

At the request of the Cabinet Secretary for Justice, the Advisory Group met on 11 October 2016, 14 October, 1 December and 9 December to help the Government revise the Code to address issues raised in the consultation. There is consensus among advisory group members about all of the changes that have been made to the draft Code. Of most significance:

- A new section has been added (paragraph 1.3) that states the primary purpose of stop and search (to promote public safety and help prevent and detect crime).
- A new chapter (chapter 7) has been added on searches where a child is involved
- A new chapter (chapter 8) has been added on searches where a vulnerable person is involved
- Significant revisions have been made to chapter 4 (legal basis for carrying out a search) and chapter 10 (monitoring and supervising stop and search). These sections have been restructured to make them flow in a more logical order, and have been amended to make them clearer.
- Chapter 9 (recording requirements) has been amended to ensure that information about strip searches (including strip searches of children) will be recorded.

Issues raised in the consultation not included in the draft Code of Practice

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

Impact Assessments

An Equality Impact Assessment and a Children's Rights and Wellbeing Impact Assessment have been completed on the draft instrument and are attached. The assessments identified positive impacts against the protected characteristics. They did not identify any negative impacts. The results of the assessments were used to inform the public consultation and the work to revise the Code.

Of most significance, as a result of the assessments and consultations, new chapters have been added to the Code on searches involving children (chapter 7) and vulnerable adults (chapter 8). Chapter 4 (legal basis for carrying out a search) has been revised to make it clearer that personal factors alone (including a person's appearance with regard to the protected characteristics) cannot be used as a reason to stop and search a person. Chapter 6 (how stop and search is to be used) has been revised to make it clearer that a constable must pay due regard to gender, identity or other relevant religious and cultural differences. Chapter 6 also provides that if there is doubt about a person's ability to understand English, a constable must take reasonable steps to bring information regarding the person's rights and

⁴ <http://www.gov.scot/Resource/0050/00509077.pdf>

any relevant provisions of the Code to the person's attention. Chapter 9 (recording requirements) includes the person's age, gender and ethnicity in the list of information that must be recorded and published. Chapter 10 (monitoring and supervising) provides that supervising officers must ensure that constables are using stop and search powers fully in accordance with the Code, and that any apparently disproportionate use of the powers in relation to specific sections of the community should be identified and reviewed to determine the reasons and, if appropriate, action should be taken.

The impact assessments and consultation also highlighted the need for an easy to understand guide to the Code, aimed at members of the public. Scottish Government officials are working with the Advisory Group to prepare a plain English guide to the Code of Practice, A version of this guide aimed specifically at children will also be prepared. These guides will be made available on the Scottish Government website in advance of the Code coming into effect.

Privacy

It was not considered necessary for the Scottish Government to complete a Privacy Impact Assessment for this instrument as it does not introduce any significant changes to existing practice for Police Scotland in terms of the information that Police Scotland collects and how it is used. Police Scotland already records information about stop and search and has detailed Standard Operating Procedures in place on how this information is retained and used. These procedures have been subjected to Police Scotland's own Privacy Impact Assessment.

It was not considered necessary to complete a Strategic Environmental Impact Assessment as these regulations do not have any environmental impact.

Financial Effects

A Business and Regulatory Impact Assessment (BRIA) has been completed and is attached. The instrument has no financial impact on business. However, preparation for the introduction of the Code has resulted in costs for the Scottish Police Authority related to the training of police constables, amendments to business processes and database enhancements. Police Scotland has advised that the total costs associated with the introduction of the Code is £2,802,483. This is a one off cost.

Scottish Government
Safer Communities Directorate

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