Scottish Police Federation

5 Woodside Place Glasgow G3 7QF

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3 September 2015

Dear Colleague

Report by the Advisory Group on Stop & Search - Information

As you are aware John Scott QC was commissioned by the Scottish Government to Chair an Advisory Group looking at the question of Stop & Search.

That group has now passed its report to Scottish Ministers and has been published today.

The recommendations can be found on pages 14 and 15.

Please find attached a copy for your information.

Whilst this circular is primarily for your information, please submit any comments you have on its content to me no later than ten days after the date of publication.

Yours sincerely

Calum Steele
General Secretary

Advisory Group on Stop and Search
Buidheann-comhairleachaidh an Stad agus Sgrùdach

The report of the

Advisory Group on Stop and Search

Chaired by John Scott, Q.C., Solicitor-Advocate, Convenor, Howard League Scotland

To Michael Matheson, MSP, Cabinet Secretary for Justice

Image: BBC

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Advisory Group on Stop and Search Secretariat
Area 1-WR, Saint Andrew's House,
Regent Road,
EDINBURGH. EH1 3DG
E-mail: AGSS@scotland.gsi.gov.uk

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www.gov.scot/About/Review/stopandsearch

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FOREWORD

This report is about consent – policing by consent and, specifically, stop and search with consent. The headlines may be about our key Recommendation on "consensual" stop and search, but there is much more to the report than that single Recommendation.

I have been keen to ensure that the report is about what can and should be done in a positive sense, as opposed to merely what should not be done. I hope that, when the headlines fade, the report will still be relevant and helpful in a renewed landscape of policing by consent in Scotland.

John Scott QC, Solicitor Advocate
30 August 2015

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INTRODUCTION

1. Talking and listening to people is an essential part of good policing, whether it is just passing pleasantries or with a specific purpose in mind. Good policing depends on effective relationships between police officers and the communities they serve. This has always been the case and should not change as a result of the work of this Advisory Group. No one wants to change it. Indeed, as a Group, we would wish to see it encouraged and developed.

2. The dynamic of everyday encounters between police and public is not what we have been looking at, other than as affected by the tactic of "consensual" stop and search. Not every encounter between the public and police involves the use of enforcement powers or requires an official record. We should be able to expect a smile and a "Good morning" from officers without any Code or bureaucracy. We have all encountered officers who do a difficult job with good judgement, good humour and compassion, defusing potentially tense situations with minimum fuss and without resort to the use of any powers. While we cannot expect a smile from every officer in all situations, respect from everyone in our police service for every member of the public is a basic expectation to which all members of the public are entitled. Indeed, fairness, integrity and respect are the core values of the Police Service of Scotland (hereafter "Police Scotland") and should be reflected in every aspect of its work. Conversely, respect for police officers from the public is the equally valid expectation of those officers.

3. Some are concerned that our review will have the necessary and unwelcome effect of increasing the formality and tension in all encounters between police and public, whether there is any criminal activity involved or not[1]. That is not our intention and is not a necessary consequence of any part of our work, thinking or Recommendations. The same officers will be involved in any new landscape and should prove just as capable of carrying out their duties with the skill and good humour that many of us have experienced and come to expect.

4. As with other police tactics, the use of stop and search, necessary though it may still be as part of policing in 2015, can have a very great impact on public attitudes and confidence in the police. I see our work as an opportunity to emphasise the positive aspects of policing by consent, by ensuring that police activity in the detection and prevention of crime does nothing to damage those attitudes unnecessarily, especially where a significant majority of non-statutory searches find nothing. It is an opportunity to re-focus police activity to those areas where intelligence and evidence suggests greater prospects of success by way of detection. It may also help to improve the success rate of statutory searches where, more often than not, nothing is found either (albeit the success rate of statutory stop and search is improving as the emphasis in day-to-day policing moves away from non-statutory stop and search).

5. In Scotland, it seems that the tactic of stop and search has been used to a significant extent with children and young people, albeit an undertaking has been given by Police Scotland to the Scottish Parliament that non-statutory stop and search will no longer be used with children under 12. The focus of the tactic on children and young people has helped to inform the composition of our Advisory Group.

[1] For example, Scottish Police Federation Parliamentary Briefing Note, The Police Use of Stop and Search, June 2015

6. Within our Group we had individuals with the very greatest experience and knowledge of policing, criminal justice and human rights, especially the rights of children and young people. Accordingly we have been able to explore our remit in considerable detail, having particular regard to the emphasis in practice on searching young people. We have debated the issues at length and reached substantial agreement, albeit there remain residual differences of opinion on the key Recommendation about whether use of the tactic of "consensual stop and search" by police officers should be allowed to continue.

7. It is worth pointing out, when discussing questions of agreement, and majorities and minorities within the Group, that the position of Police Scotland during this review was always, quite properly, that decisions on these matters were for others. Accordingly, although contributing fully to the debate and discussion, Deputy Chief Constable (DCC) Rose Fitzpatrick, as the Police Scotland representative, did not take a position on this key Recommendation.

8. Although some individuals on the Group came from organisations directly involved in policing or its supervision and scrutiny, I asked them to contribute primarily as individuals. While ensuring that the views and experience of their organisations were fully represented, each has assisted me with their own views as well, informed by many years of relevant experience.

9. We have had only five months to carry out this review. That was a necessary consequence of the timetabling of the Criminal Justice (Scotland) Bill which comes back before the Scottish Parliament in September 2015. Certain amendments were tabled to the Bill that referred to matters within our Terms of Reference. Following receipt of the reports[2] mentioned in our Terms of Reference, the Scottish Government decided to have stop and search reviewed by this independent Advisory Group. After discussion with my colleagues on the Advisory Group I was satisfied that we would be able to produce a report by the end of August that would address the Terms of Reference. Hopefully our work will also assist with the further progress of the relevant parts of the Bill.

10. The timescale has meant, however, that we were unable to have a full public consultation. Instead we issued a Call for Evidence, including an abbreviated and more accessible version of the Call, to encourage the widest participation and submissions. We also sought out contributions from specific groups and individuals, some of whom are listed at the end of the report. This includes a number of experts in the fields of law, policing and justice who provided written position papers on key aspects surrounding the legality and legitimacy of stop and search which provided valuable background information and points of clarification. I am grateful to those who submitted formal responses and papers, and to those individuals and groups who took the time to meet with me or the Group to ensure that we heard from as many people as possible with relevant evidence, experience and views. Those who contributed included serving and retired police officers of all ranks, academics, lawyers, victims of crime, young people, care leavers, local authorities, other statutory bodies and various voluntary organisations and charities. These, and other, contributions ensured that we had access to a great deal of evidence about policy, practice and culture, with opinions also offered by those who have direct experience of carrying out stop and searches, as well as those who have been searched.

[2] Scottish Police Authority's Scrutiny Review of Stop and Search, May 2014(omitted in error from the Terms of Reference but the third key report leading to this review); HMICS Audit and Assurance Review in relation to Stop and Search, 31 March 2015; Police Scotland review of Consensual Stop and Search, 31 March 2015

11. On the Recommendation regarding the future of non-statutory stop and search, the Advisory Group did not reach a unanimous position. To a significant extent our differences should be seen, however, as different ways of giving emphasis to a shared view – that non-statutory stop and search, as it has been operated, should end. The majority thinks it should end completely and without qualification. The minority thinks that, subject to a rigorous Code of Practice and there being a presumption against its use, non-statutory stop and search should remain available meantime, pending consideration of data on the overall practice of stop and search that were not previously available.

12. While it would have been possible simply to outline the different views on our Terms of Reference and express them as, in effect, multiple choice recommendations, it was my view, as Chair, that our remit required something more of us. Through the many discussions, debates, presentations, submissions, reports and other evidence, I considered that I could discern a clear Recommendation concerning non-statutory stop and search. A majority of colleagues on the Group agreed with me.

13. In light of the history of the tactic, issues over its legitimacy and emerging challenges to its lawfulness and compatibility with the European Convention on Human Rights (ECHR), I considered that, rather than it being a case of having a presumption in favour of retention, the case for retention would have to be made with the clearest of evidence. The tactic has been utilised for a sufficiently long period of time to allow us to have found the best arguments in its favour, even if the recording of data has been incomplete and inconsistent. I believe that we heard the strongest arguments in favour of retention, as well as some unpersuasive ones. We also heard the strongest arguments against retention, as well as some weaker ones. These arguments have all been explained, explored and debated in our many meetings.

14. In this report I have attempted to capture both points of view on the Recommendation regarding the future of non-statutory stop and search. I am grateful to all of my colleagues on the Advisory Group for assisting me in doing so.

15. It was no part of our task to review statutory stop and search, other than in the context of considering whether, and to what extent, a Code of Practice should be introduced to provide safeguards around the conduct of these searches, as well as strengthening police accountability. Statutory stop and search operates mostly on the basis of a requirement for a police officer to have reasonable grounds to suspect that an individual is in possession of a specific item, the possession of which is prohibited. Some of the recent evidence suggests that officers have used non-statutory stop and search in the last few years when they could have used statutory powers of search which are governed by a requirement for reasonable grounds of suspicion. We consider that the burden of demonstrating “reasonable grounds to suspect” is not unduly onerous. “Reasonable grounds” can exist and yet the individual may have nothing prohibited in their possession. The test does not require belief or certainty regarding possession of a prohibited item, merely suspicion based on reasonable grounds. It does not mean that the officer has to be right. Whenever an officer has specific reasons for wishing to search an individual in a particular situation they should normally be able to articulate these in a manner that would satisfy this burden. The freedom to use non-statutory stop and search may have encouraged some officers to approach such situations without any thought of having to justify their actions, even where they would have been able to do so in the context of having “reasonable grounds”. There is concern, however, about the arbitrary use of police authority to

target individuals for no good reason other than a general suspicion, hunch or whim, which is not permitted in other parts of the UK. With the presumption in favour of statutory stop and search now in place within Police Scotland, that should already be changing.

16. Whilst media attention on the tactic of non-statutory stop and search has generated a certain momentum towards ending it, we have been careful to try to examine the evidence and make recommendations based solely on what can be gleaned from that considerable evidence and expert opinion which is available on the subject.

17. We make our recommendations, not because of the media publicity, but because we consider them appropriate having had the opportunity to consider not only the detailed reports which have specifically addressed the subject but also the evidence we received in response to the Call for Evidence, and the other evidence and submissions we have seen and heard.

18. Although responsibility for drafting this report is mine, it is the product of substantial contributions from a number of individuals and organisations, together with the informed assistance of others, as well as consideration of relevant evidence. Some of this evidence was already available and some has been produced specifically for the assistance of our review. Considering the evidence in its many forms has been key to our work and this report.

19. Police Scotland has been a crucial contributor, assisting us greatly in our work. Indeed we could not have completed the Report in such a short timescale without its obvious commitment to achieving a good outcome for the public and police. There has been no question of us having to impose ourselves on Police Scotland. It has been our willing partner throughout.

20. DCC Rose Fitzpatrick has been a key member of the Advisory Group. She has assisted us with guidance and suggestions which have been very helpful. Her experience of policing under a Code of Practice in England has allowed her to offer reassurance about the advantages of this method of proceeding, as well as highlighting possible limitations. She has arranged meetings for us with officers who have been able to offer evidence and impressions from their own experience, although I also arranged separate contact with other officers as well, both formally and informally. The recently established Police Scotland National Stop and Search Improvement Delivery Team has also provided invaluable support for the group through the provision of up to date statistics and information on the practice of stop and search following changes in the use of the tactic.

21. The Chief Constable of Police Scotland, Sir Stephen House, personally, and Police Scotland as an organisation, have made it clear, rightly, that they will welcome whatever decisions are made about non-statutory stop and search and a Code of Practice, and will implement all Recommendations accepted by the Scottish Government. They recognise that these decisions are not for them to make. The Scottish Parliament will decide, and Police Scotland will respond by ensuring that policing in Scotland continues to be effective, with or without non-statutory stop and search.

22. Acknowledgement of that dynamic is important. Operational matters must be for the police to decide, but defining the limits of police powers is not an operational matter. It is a matter of public policy for our Parliament, or for the United Kingdom Parliament as far as reserved matters are concerned. If additional police powers are thought necessary, the case for

them should be made to Government and should be supported by evidence. Thereafter Parliament can decide whether such powers should be provided and, importantly, whether any additional safeguards are needed to ensure proper scrutiny and accountability in respect of any such new powers.

23. In terms of scrutiny and accountability, in addition to statutory accountability through the Scottish Police Authority (SPA) and inquiries and reports by Her Majesty's Inspectorate of Constabulary in Scotland (HMICS), Police Scotland has signed up to the Scottish Human Rights Commission's Scottish National Action Plan[3] (SNAP). This involves additional aspiration and scrutiny for Police Scotland that has been willingly accepted. I am a member of the SNAP Human Rights Action Group on Justice and Safety which has considered subjects of relevance to this review: improving the protection of human rights within the criminal justice system, particularly for children and when investigating and prosecuting sexual offences; and, embedding human rights in policing including through training and accountability - for example, ensuring legality and proportionality of stop and search.

24. Police Scotland is a new public body that has been subject to intense scrutiny, and rightly so. Many police officers have told me that they welcome such scrutiny. They are aware of the extensive powers they have and wish to be challenged and held to account for them. They recognize that improvements are needed but also want people to see the good faith in their intentions, with officers often left to deal with difficult situations that others cannot, or will not, deal with. I want to acknowledge the obvious integrity and dedication of the officers I have met in carrying out this review. While there are criticisms in this report of police policy, practice and culture, positive changes are already happening. I hope that our work encourages those involved in policing in Scotland to do even more to get through this challenging transitional period by renewing genuine policing by consent.

25. I am grateful to my colleagues on the Advisory Group for their invaluable contribution to the review. Thanks to their knowledge, experience and other skills we have been able to produce this report within our extremely challenging timescale

26. In this Report, for the sake of consistency, and in recognition of some of the issues around "consent", we will refer to the tactic of "consensual" stop and search as "non-statutory stop and search."

[3] http://www.scottishhumanrights.com/ourwork/actionplan

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EXECUTIVE SUMMARY & RECOMMENDATIONS

27. Stop and search is an area of policing that requires constant scrutiny and oversight. It involves the use of police enforcement powers or practices that can affect general public attitudes to policing. If used proportionately and in a targeted manner, with positive outcomes by way of prohibited items being found, it can assist with public confidence. If not, it can undermine attitudes to the police, especially in deprived areas where the tactic has been used a great deal on children and young men. "Policing by consent" relies on the support and confidence of the public throughout the country, and is no less important in such areas where so much crime happens.

28. Stop and search is important but represents only a small part of policing. It has received considerable attention, in particular because of the excessive use of non-statutory stop and search. Non-statutory stop and search lacks any legal framework and is of questionable lawfulness and legitimacy, with poor accountability.

29. There are a number of complicated issues regarding consent in the context of policing, and specifically in the context of police search. In non-statutory stop and search, concerns have been expressed about how genuine and informed any "consent" has been, in view of the age and vulnerabilities of some of the individuals being asked to consent, especially given the perceived imbalance in power between the police and public.

30. Our key recommendations are that there should be a statutory Code of Practice, that the Code should be consulted on before implementation, that there should be early consultation on whether the police should have a power to search children under 18 for alcohol, that there should be a detailed implementation and training plan and that stop and search should end at the point that the Code of Practice comes into effect. We also make recommendations about data gathering, a legislative change to ensure the rights of the child are fully considered and we recommend that discussions take place between the relevant organisations on the most appropriate ways to deal with vulnerable children and adults.

31. We recommend that a statutory Code of Practice should be issued dealing with all aspects of stop and search by Police Scotland. The Code should be issued by the Scottish Ministers, subject to Parliamentary oversight prior to commencement. Thereafter the Code should be kept under review at regular intervals, again subject to Parliamentary oversight on revision.

32. We recommend that use of non-statutory stop and search should end when the Code of Practice is introduced. The group are not unanimous on this point. A minority of members preferred a precautionary approach that would wait, allow recent changes by Police Scotland to bed in, gather more evidence and ensure that there would be no unintended consequences to ending consensual search. I have attempted to in part address these concerns by recommending a period of transition and consultation.

33. A substantial focus of our work was on trying to identify any gaps in police powers, should consensual stop and search end. The majority in the group are satisfied that no significant gaps would exist. We found that officers have often relied on consensual search where other statutory and more appropriate ways to intervene existed. We recommend that before

consensual stop and search ends there should be a detailed implementation plan that includes training for officers to make them better aware of the statutory powers that they have.

34. The main gap highlighted to us by the Police was the ability to search children under 18 for alcohol. We have not been able to form a concluded view on whether a gap in powers exists that could not be dealt with by existing powers, and also on whether a power to search children for alcohol would be desirable. We therefore recommend that there should be a public consultation that involves children and young people. The sheer scale of the activity around alcohol underlines Police Scotland's view that this continues to be an area of concern and the inability to use search powers to remove alcohol from young people is a potential problem. We therefore recommend that this should be considered separately, subject to wider consultation, specifically involving children and young people.

35. If non-statutory stop and search is ended, officers of Police Scotland will still be able to carry out their duties effectively. Abolition will not result in any significant gaps. Specifically, officers will still be able to respond to any welfare or protection issues they encounter. Action will still be possible even when required on an emergency basis, whether carried out by police officers, social workers, medical staff or others.

RECOMMENDATIONS

1. **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.**

2. **That, ahead of implementation of the Code of Practice, further public consultation should take place on the terms of the Code. To assist in this consultation, a draft Code of Practice is included with this Report.**

3. **That the Code of Practice should be reviewed at regular intervals of not less than every four years, with provision for earlier review being triggered at the request of the Chief Constable of Police Scotland, the Scottish Police Authority or Her Majesty's Inspector of Constabulary in Scotland. There should be specific provision for post-implementation review to take place two years after the initial Code comes into effect.**

4. **That the Code of Practice should be issued by the Scottish Ministers, subject to Parliamentary approval as to commencement and, thereafter, on the coming into force of any proposed revision.**

5. **That Police Scotland should provide regular reports to the Scottish Police Authority about the use of stop and search, including all relevant data on all recorded stops and searches, for the purposes of evaluating and monitoring use of the practice through public scrutiny. These data should also be released publicly on a regular basis by the SPA and by Police Scotland so as to ensure openness and transparency and allow for wider research and monitoring purposes.**

6. **That the Scottish Government should hold an early consultation on whether to legislate to create a specific power for police officers to search children under 18 for alcohol in circumstances where they have reasonable grounds to suspect that they have alcohol in their possession. Such a power might also extend to searching those suspected of supplying alcohol to those under 18. The Government should ensure that the consultation process engages effectively with children and young people. In introducing any such power care should be taken to ensure that there is no consequent increase in criminalisation of children and young people.**

7. **That the duty on constables to consider the child's best interests in s. 42 of the Criminal Justice (Scotland) Bill be amended so as to apply to a constable's decision to search a child (there defined as a person under 18) who is not in custody. (*Those in custody are outwith our Terms of Reference*).**

8. **That the policing tactic known as "consensual" or non-statutory stop and search of the person in Scotland should end when the Code of Practice comes into effect. All searches by police officers in Scotland of persons not in custody should be thereafter be undertaken on the basis of statutory powers exercised in accordance with the Code of Practice referred to in Recommendation 1.**

9. **That careful consideration should be given to the implications of implementation of these Recommendations for Police Scotland, the Scottish Police Authority and for other stakeholders. The policy, practice and cultural changes required are extensive and should be the subject of a formal implementation programme, subject to effective governance and scrutiny arrangements, training and post-implementation review.**

10. **That discussion should take place between Police Scotland and other partners and stakeholders, including the Scottish Government, regarding the most appropriate methods of dealing with children and vulnerable adults who come to notice for protection and welfare reasons during stop and search situations.**

CONTEXT

36. Any encounter with the police may have several possible reasons, or none. Community policing, an example often given of policing by consent, routinely involves speaking with the public as an accepted aspect of daily activity. Another reason, of course, is that the officer may have evidence to suspect, or may come to suspect, the commission of an offence and may decide to exercise one of his or her many statutory powers. Another may be an officer picking up intelligence on crimes committed or planned in the local area. Several other possibilities come to mind.

37. Any such encounter may have several possible outcomes, ranging from the briefest of discussion to arrest. Our Terms of Reference focus on encounters in between those two extremes, usually involving more than just conversation but less than detention or arrest. These encounters do not have to progress to a search although we are concerned with those which do. Searching of an individual by the police inevitably moves to a more intrusive form of police-public interaction that deserves careful attention and is usually best defined and justified by statutory powers.

38. What we have been looking at in this review are some of those situations where an intrusion is made into the right of the public to go freely about their lawful business in a public place without a basis of reasonable suspicion or evidence of wrongdoing. In particular, it will be seen from our Terms of Reference that what we have been tasked to examine is the police tactic or practice known as "consensual stop and search", in other words where statutory powers do not exist, or are considered inappropriate, and non-statutory arrangements or practices have been used instead. The concept of "consent", by which is meant "informed consent", is at the heart of the tactic. Given its importance, we will deal with consent separately at the start of the main body of the report. It is not always a straightforward matter.

39. Stop and search, both statutory and non-statutory, is a tactic that came under the spotlight prior to the establishment of Police Scotland and, since the single force's inception, has been subject to continued scrutiny, in particular by the SPA and HMICS[4]. It has received significant publicity in the light of on-going concerns following their reviews, particularly during the last year, and even during the short lifespan of this review. A detailed evaluation of the Fife Division (Police Scotland) Stop and Search Pilot, commissioned by Police Scotland, was published in June 2015[5]. Undoubtedly most of the publicity and comment has been negative, raising questions of lawfulness, legitimacy and accountability, and featuring demands for an end to "consensual stop and search" from various quarters, notably the Scottish Human Rights Commission (SHRC)[6]. Even the Fife Pilot recommendations suggested that "Police Scotland move to a position of using legislative searches only"[7].

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[4] see Report section REPORTS – SPA, HMICS, POLICE SCOTLAND

[5] See separate section below

[6] SHRC Submission - UK report on International Covenant on Civil and Political Rights (ICCPR), 1 July 2015

[7] Recommendation 9: Some members of the public who had been stopped and searched during the live phase of the pilot complained about 'random' searches, in that there was no stated reason for the search. This suggests that even with the pilot's methods of making the option to refuse a consensual search explicit and the advice slips, a misunderstanding remains about the purpose of consensual searches. In light of this, we would suggest Police Scotland move to a position of using legislative searches only. Only these can truly be 'targeted' at 'the right people, right place and right time' thereby enhancing accountability and public confidence, two key aims of the pilot.

40. The tactic has been called into question particularly because of the large number of searches involved, of which the majority (around 70%) were non-statutory searches prior to the recent decision by Police Scotland to move to a presumption in favour of using statutory searches. That emphasis on non-statutory stop and search goes back at least to 2005, which marked the start of relevant data being recorded by some forces.[8]

STATISTICS

41. We appreciate that there are concerns over the accuracy of the published statistics. The SPA raised this as an area for further investigation and HMICS reported in March 2015 that they did not have confidence in the stop and search data held by Police Scotland[9]. Indeed Police Scotland has acknowledged the inaccuracy and unreliability of the data due to poor or inconsistent recording practices. We have even heard from some police sources that, prior to the requirement to record personal identifying details of individuals stopped and searched, some of the "stop and search" featuring in the statistics did not, in fact, take place. Consequently, some of the comparisons which have been made with other major cities outwith Scotland are problematic and do not provide a completely accurate contrast.

42. It is most unfortunate that there is such a major health warning regarding the figures on the use of stop and search. It is an area where accurate recording should have been an integral part of the tactic[10], to ensure accountability as well as the best use of the intelligence it offered.

43. Recognizing the possible inaccuracies in the statistics, it is nonetheless necessary to consider them to some extent as part of the context of our review. Police Scotland data[11] shows that there were 449,095 non-statutory stop and searches recorded in 2013/2014[12]. This represents about 70 per cent of all searches conducted in Scotland. It will be appreciated that the figures show a large number of statutory stop and searches too (191,604). Of the non-statutory stop and searches about 15.6 per cent were positive (i.e. an item was found), of which a large proportion involved alcohol seizures which were not recorded separately. This compares with 28 per cent of statutory stop and searches which were positive. Whatever the precise figures, it is clear that a percentage of those stopped and searched have been in possession of a prohibited item, or perhaps guilty of some other crime, but the majority have been in possession of no prohibited item and have been guilty of nothing. Public confidence in the fairness and appropriateness of the tactic can be affected by factors like the percentage of positive searches. That has necessarily informed the work and Recommendations of this Group.

POSSIBLE COMPARISONS

44. The number of non-statutory stop and searches has been compared by some to the equivalent search rate per head of population in other major cities which have had serious

[8] Murray, K. (2015) The Proactive Turn: Stop and Search in Scotland, PhD Thesis, University of Edinburgh
[9] HMICS Audit and Assurance Review in relation to Stop and Search, 31 March 2015
[10] SPA Scrutiny Review Report page 20 and Recommendation 9
[11] HMICS report p.13 and p.40
[12] For context, the estimated population of Scotland on 30 June 2014 was 5,347,600 – National Records of Scotland - http://nationalrecordsofscotland.gov.uk/news/2015/scotlands-changing-population

problems with crime, especially violent crime. Different reports suggest that the rate in Scotland represents between two to four times the rate in London and nine times the rate in New York.

45. Care is required with any detailed comparisons. Leaving aside concerns about the accuracy of some of the Scottish figures (noted above), there are issues of differing definitions of stop and search in different places, the application of differing police tactics and priorities, and different recording practices. Nonetheless, even recognising their limitations these comparisons have raised legitimate concerns which cannot be assuaged by reference only to the statistical inadequacies and these other factors.

46. For example, more meaningful comparisons can be made, especially with England and Wales, where the underlying statutory powers are very similar and non-statutory stop and search is excluded by Code A of the Police and Criminal Evidence Act 1984 (PACE). The disparity with England serves to illustrate the scale of the practice in Scotland, which was principally driven by the use of non-statutory stop and search. Stripping out potentially distorting features and inaccuracies, the statistics still demonstrate that the practice has been used proportionately more per head of population in Scotland than elsewhere. As Dr Kath Murray of Edinburgh University has stated:

> "… given the exceptionally large numbers involved, it seems fair to suggest that some broad conclusions can be drawn. Put another way, there's a sizeable margin of error. To illustrate this, let's say we take the half million searches recorded in 2013/4, subtract the number of recorded alcohol searches (on the basis that they were all confiscations under section 61 of the Crime and Punishment (Scotland) Act 1997, rather than physical searches), and then halve the total again (on the basis that many searches were 'made up' to meet targets) – the search rate in Scotland would still be 2.6 times higher than England and Wales. In other words, if we *more than halve* the number of purported searches, the numbers still seems unduly high."[13]

47. It is to be hoped that the recently introduced presumption by Police Scotland in favour of the use of statutory powers of search will already have resulted in the public experiencing a greater sense of procedural fairness, in other words a perception that the tactic of stop and search has been used fairly and proportionately. This should follow if the reasons for the search are more clearly focussed, understood and explained to the individual concerned. While the informality of non-statutory searches has been emphasised as an advantage of the tactic, it has undoubtedly also been a weakness in that officers have not always understood and explained, and the individual has not always understood, the reasons for the search. In particular there has been continuing concern that those searched in this way are not advised of their right to refuse to submit to search, or that they lack the capacity or confidence to do so[14]. In part this may have been the result of the lack of clarity for all participants where there have been no reasonable

[13] Murray, K. (2015) Evidence Based Policing: The Importance of Good Quality Data. Scottish Institute of Policing Research Blog, published September 2015.

[14] See SPA's Scrutiny Review – Police Scotland's Stop and Search Policy and Practice 2014, in particular Recommendation 7 and Blake Stevenson: Stop and Search in Scotland: Primary Research Scottish Police Authority Final Report
April 2014

grounds to suspect possession of a prohibited item or commission of any offence, and no requirement for any such grounds if proceeding on a non-statutory footing.

STOP

48. The "stop" aspect of stop and search seems obvious enough but is perhaps worth considering in a little more detail.

49. Not every encounter between a police officer and the public involves a "stop". In Scotland we expect our police officers to engage with the public in as friendly and approachable a manner as is consistent with the circumstances. Such engagement may involve the member of the public stopping but, for present purposes, our only concern is where this is not truly voluntary or where stopping is a matter outwith their control.

50. The approach of police officers in Scotland is often contrasted with that of officers from elsewhere. In general terms, officers in Scotland are often seen as less forbidding, more approachable and friendlier. In particular, police officers in Scotland benefit from comparison to the approach widely perceived as typifying that of, for example, the Metropolitan Police. The contrast is often commented on when members of the public outside Scotland, used to a particular style of policing, encounter Scottish officers in connection with large-scale policing activities at major public events or other situations involving crowd control. Police officers in Scotland and England also comment on the difference.

51. It is not within our remit, nor is it our intention, to seek to regulate every encounter or exchange involving police officers.

52. The "stop" we have in mind is when officers decide that they will, or may, interact with an individual in a public street by proceeding to search him or her. Areas excluded from our remit are listed in the draft Code of Practice but, specifically, our remit does not include consideration of stopping vehicles.

53. Accordingly, for present purposes, we are specifically concerned with any encounter involving "stop and search" of the person in a public place.

HISTORY AND MISSED OPPORTUNITY

54. This report is about the future of non-statutory stop and search. Consequently we do not intend to spend too long trying to describe the origins of the term or the history of the tactic.

55. The expression "stop and search" is well understood and recognised in England and Wales, although it has not been an aspect of common policing language in Scotland until very recently. It refers to specific police activity in public places, although it has become clear through the work of this Group that activity in Scotland is very different to that South of the Border, predominantly as a result of the continued existence of non-statutory stop and search in Scotland.

56. In terms of its history, it is clear that a high-volume or intensive approach to stop and search predates the formation of Police Scotland by more than a decade. An intensive approach to stop and search was introduced by Strathclyde Police in the 1990s in a series of high profile campaigns aimed at reducing knife crime and violence. These operations emphasized the perceived deterrent value of stop and search, as well as detection, and adopted a high-volume approach, facilitated by non-statutory tactics[15].

57. Stop and search was certainly an established feature of policing in Scotland at the time of a report on stop and search in 2002[16].

58. That report sounded some concerns that have come to be very familiar in the last two years. The fact that these were not acted upon may be seen as an opportunity missed in terms of avoiding the prevalence of the tactic as it has developed over the last 13 years.

> Page 94, paragraph 5.10 - *there is at the very least some disquiet among some officers about the concept of a consent or voluntary search, and a strong belief in some quarters that this has no place in Scottish policing, nor any basis in Scots law, and it would seem prudent for ACPOS to give some consideration to the whole area of consent searches, both from a civil liberties and a legal standpoint;*
>
> Page 101, paragraph 6.14 - *The issues raised by performance management in relation to searches need to be considered carefully. It is likely that, as the KPI (key performance indicator) approach spreads, indicators in relation to stop and search may be developed. Simple volume measures in relation to searches are likely to lead to a reduction in efficiency, as the number of consent searches will most likely have to rise further if targets are to be met. It is suggested, therefore, that forces consider carefully the way in which any performance targets in relation to searches are framed. We endorse some of the changes already made. We welcome the significant drop in the number of non-statutory stop/searches.*

59. Despite the high volume approach that was adopted in Strathclyde in the 1990s and continued thereafter, stop and search remained a low-profile issue in Scotland in the pre-reform period. Following the merger of the eight legacy forces into Police Scotland under the Police and Fire Reform Act (Scotland) 2012, stop and search surfaced as a high profile issue for the newly established single service following publication of new academic research highlighting the scale of use of the tactic and the disproportionate targeting of children and young people[17].

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[15] See http://www.heraldscotland.com/news/12620381.Operation_Blade_nets_4569_knives/, http://www.heraldscotland.com/news/12628956.Operation_Blade_cuts_Glasgow_apos_s_crime_rate/

[16] Police Stop and Search among White and Minority Ethnic Young People in Scotland, Reid Howie Scottish Executive Central Research Unit 2002

[17] Scottish Centre for Crime and Justice Research - Stop and Search in Scotland: An Evaluation of Police Practice, Kath Murray, January 2014.

SEARCH

60. The "search" aspect too may seem obvious enough but, again, is worthy of slightly more detailed consideration[18].

INCREASED USE

61. As for reasons and justification for the expanded use of the tactic since 2002, there are several possibilities. Some or all of these may have been a factor at different times. There may have been, and possibly still is, an element of the police and public believing that police officers have developed a "sixth sense" which allows them to recognise criminals instinctively just from first appearance and impression. Of course, on some occasions, officers recognise individuals they know to have previous convictions who are acting suspiciously but that is not the only situation where they act.

62. It is clear that targets and Key Performance Indicators (KPIs) in Police Scotland and some of the legacy Police Forces, especially Strathclyde, have been a significant factor, possibly the significant factor in driving up numbers and influencing daily practice[19]. This is despite opposition to a target-led approach from some within policing[20]. Development of the use of the tactic was also facilitated by weak regulation (the absence of any framework for non-statutory stop and search) and poor accountability. There was no nationally published data on recorded stop searches until June 2014, a fact that helps to explain the absence of proper scrutiny.

63. There is a perception among some, both within and outwith Police Scotland, that when the legacy forces were unified the Strathclyde approach became the Police Scotland approach. This is hardly surprising as the Chief Constable of Strathclyde Police, Sir Stephen House, became the first Chief Constable of Police Scotland. It should not have been unexpected, therefore, that Police Scotland would continue to use policies and practices that it believed would keep people safe based on the experience of reducing violent crime, particularly knife crime, in Strathclyde[21].

64. Whatever the precise reason or reasons, by 2015, indeed earlier, the predictions about the influence of KPIs in the 2002 Report had come to pass. This is despite the fact that Police Scotland representatives have stated that there were never targets for the volume of stop and search conducted(the official overall target latterly was for 20% of searches to be positive), although there was a widespread perception amongst officers that this was the case.

65. It seems clear that the use of targets, or KPIs, featuring stop and search, led to a proliferation in the use of the tactic, both before and following the establishment of Police Scotland[22]. Even some police sources have conceded that the extent of use of the tactic took it beyond any available intelligence and best use of officer hours. Despite repeated statements to the contrary from the Chief Constable and senior officers, individual officers felt under pressure to make sure that they carried out enough stop and searches to address what they felt was being

[18] See the start of the Stop and Search – Consensual/Non-Statutory section below.
[19] See response to Call for Evidence from ASPS
[20] *Ibid*; also Scottish Police Federation Parliamentary Briefing Note, The Police Use of Stop and Search, June 2015
[21] See response to Call for Evidence from ASPS
[22] See response to Call for Evidence from Association of Scottish Police Superintendents (ASPS)

required of them[23]. The targets/performance approach, and attempts to standardise its application across Scotland, have skewed the use of the tactic of non-statutory stop and search and its perception in the public mind to an extent that cannot now be taken wholly out of account. While the performance approach was modified at the start of 2015, that was done only just before our work started and there is little doubt that the residual effect of previous targets may still have been influencing the behaviour of officers and statistics, at least up to approximately March of this year.

66. Despite the caveat over the statistics, there is general agreement, from within and outwith Police Scotland, that non-statutory stop and search was used excessively. This is emphasised by the significant reduction in its use more recently, especially since April of this year. The same point can be made about statutory stop and search which has also seen significant reductions in use. There have been no complaints that this reduction in the overall use of stop and search has seen a reduction in the effectiveness of Police Scotland. Officers are simply carrying out their duties in ways that have been adapted to accommodate a shift in emphasis.

67. Intelligence has played its part in the use and development of the tactic although perhaps not always to the extent that it should.

68. Some crime has been detected by use of the tactic, although positive detection rates are far lower than they are in respect of statutory searches (which are based on reasonable suspicion) and the tactic has been used (or recorded as being used) at times when statutory powers were available and may well have resulted in the same outcomes. For example, it has become clear in recent months that some seizures of alcohol from children and young people have been recorded as non-statutory stop and searches. Discovery of small quantities of drugs has featured too, although relatively few weapons are recovered using non-statutory stop and search.

DETERRENT EFFECT?

69. A genuine and abiding conviction on the part of some, especially within policing, that stop and search acts as a deterrent is also part of the explanation for the extent of its use. However, there is an absence of evidence to support such a view, a fact highlighted in both the SPA and HMICS reports and in academic research. This is even acknowledged by those who hold the view. The absence of evidence of a deterrent effect is especially clear when stop and search is viewed in isolation from other activity of the police and other public services associated with early intervention (health, social work, education).

70. In effect, the evidence in support of the tactic as a deterrent comes from police officers who base their view mainly on their own experience and perceptions of effectiveness, even when unable often to separate it out from other aspects of their policing activities.

71. Of course, we recognise that there is no evidence to refute the view either but our approach, in part, has involved trying to see what justification and evidence existed for the tactic

[23] Blake Stevenson: Stop and Search in Scotland: Primary Research Scottish Police Authority Final Report April 2014

in light of its negative impact on public attitudes and the other concerns highlighted in this report. The absence of evidence of any deterrent effect should be considered in the context of keen academic and practitioner interest in this issue for approximately 15 years. This would certainly seem enough time to produce evidence if it were available. On that basis, we are unable to give much weight to claims of deterrent effect, at least for the tactic of non-statutory stop and search used in isolation.

72. The problem is that non-statutory stop and search has been allowed to develop without a clear, or indeed any, framework for its use, with training on its use either inappropriate, unsuccessful, limited or non-existent at times. Non-statutory stop and search seems to have happened in recent years because it happened in the years before that, driven more by performance approaches and impressions of effectiveness than by evidence of its positive impact.

A "POWER"?

73. Sometimes reference has been made to the police exercising a power of "consensual" search. No such power exists. What the police are doing when such searches occur cannot be said to be the exercise of a power. It has been pointed out that anyone can consent to a request for a search by anyone else. In strict legal terms that may be true. That does not mean that the person searching has, or has been given, a power of search.

74. In passing it is worth commenting on the comparison made with what could be done with consent by an ordinary member of the public. The example is extremely artificial as ordinary individuals do not go around asking to be allowed to search random strangers, with or without reason. None of the Group had ever experienced or even heard of this happening in public places outwith the context of airports, sports grounds and certain licensed premises where searches may be undertaken by non-police officers but the reasons are obvious and understood. The analogy is used to support the use of non-statutory stop and search but, as an entirely unrealistic scenario, it does not take us any further forward.

75. In any event, even when seeking to do what anyone else could do in theory, by asking someone to allow a search of their person, every police officer has a wide range of powers available to deal with any number of eventualities that could arise in the course of such an encounter. Neither the officer nor the individual is likely to overlook that fact, even if it is not mentioned, thus distinguishing it from any other situation, real or far-fetched.

LEGITIMACY

76. The development of non-statutory stop and search is of questionable legitimacy when one considers specifically the question of searching young people for alcohol, a major use of the tactic in Scotland, according to the statistics. The power of seizure of alcohol was given to the police by the United Kingdom Parliament in 1997[24]. At the time that power was being considered Parliament also considered giving the police a power of search for alcohol. The debate on the legislation is worth examining in some detail.

[24] In Scotland by section 61 of the Crime and Punishment (Scotland) Act 1997 and in England, Wales and Northern Ireland by the Confiscation of Alcohol (Young Persons) Act 1997.

77. At the time, the police in the UK did not have a power to search for alcohol. Parliament looked at the area and specifically decided not to give them this power. And yet, in effect, such a power was taken by the police, or at least continued and developed (it seems likely that the tactic was already in use at the time). Notwithstanding what were good intentions concerned with welfare and wellbeing, in particular of young people, and the sense of a gap without such a power[25], there is a question as to the legitimacy of this development to the extent that it involved actual searches as opposed to seizures. If the police had considered the terms of the Parliamentary debate, as they should have done, they would have realised that use of the tactic of non-statutory stop and search would have to cease. To the extent that police forces did not use the tactic, they could not start to do so. Parliament had provided them with a power of seizure and that was what they should use. If thought necessary, it would have been a simple matter to ask Parliament to reconsider and then try to make the case for having a power of search for alcohol. What actually happened meant that, in effect, in those situations where a search for alcohol took place, as opposed to a seizure, the will of Parliament was ignored without further debate or discussion.

78. The police must have a free hand, certainly without Government influence, when it comes to operational matters. Using the phrase "operational matters" does not, however, give the police carte blanche to make decisions for themselves about the limit of their powers. As Police Scotland has acknowledged in joining the calls for this public debate, it is for Parliament to define the boundaries for police activity, with the police able to operate freely, but subject to proper scrutiny and other boundaries (for example those set by human rights and equality law), within those limits.

79. As the whole approach towards searching young people for alcohol may have adversely affected the attitude towards the police of at least some of the public, this is much to be regretted, at least as a development without parliamentary and public debate.

80. Although aspects of this, and similar, police activity have been tested in the courts, the question there has been one of the admissibility of evidence obtained, for example, through searches which are challenged as unjustified, unlawful and unfair. As far as we are aware the Courts did not consider any challenges by, *inter alia*, looking at the legislation and Hansard from 1997 and declaring that the police were acting in a manner that was *ultra vires*. That most such court challenges have failed tells us only part of the story. This aspect of lawfulness and legitimacy seems not to have been argued or considered. In cases where searches feature some other irregularity, the court has the power to excuse these, a power it has exercised on many occasions[26]. This report will not, and does not seek to, change the approach of the Scottish courts to such cases. Fairness will remain the overarching test. What has already changed to some extent is police practice. It is in relation to police practice that we wish to see further change.

81. Without doubt there has been an element of the police and public wanting visible police activity, especially in particular areas, at particular times and involving particular groups, usually children or young people and often from deprived areas. Such activity will have inspired the confidence of some members of the public although it will also have alienated, or further

[25] SPA Scrutiny Report page 19
[26] See Report section headed Lawfulness

alienated others, especially those young people who have been targeted repeatedly, sometimes without any justification and often without anything being found. This is important because many young people are already alienated to a significant extent and evidence shows that policing practices targeted at "the usual suspects" have a negative effect on subsequent offending[27]. That raises the whole question of policing by consent which is still thought to underpin the approach to policing in Scotland. We address this topic below in the section headed "Consent".

CONSENT

82. Consent is one of the thorniest of the issues we had to consider. Our Recommendation regarding the future of non-statutory stop and search means that some of the complexities around consent can be avoided, although that is not why we have made the Recommendation.

83. The thinking behind the Recommendation appears throughout the report but especially in the section headed NON-STATUTORY STOP AND SEARCH – THE FUTURE.

84. In terms of the law, "consent" always means "informed consent", although the additional qualification "informed", despite its potentially far-reaching implications, is not seen as overly demanding in practice. The law generally presumes a capacity to consent on the part of all adults. Only if evidence demonstrates a lack of capacity in fact can the presumption be overcome. Although this presumption is not part of our remit, in looking at consent and capacity, it has seemed to us that there can be situations where capacity is presumed but does not exist. Identifying capacity in fact can be an extremely complex process, with experts like psychiatrists and psychologists unable to agree at times despite detailed assessment of particular individuals.

85. The reality of many assessments of capacity is that they have to be made by police officers, with little or no relevant training, of strangers, in a matter of seconds in the street. This is especially so where there are issues regarding the safety of the individual, other members of the public, or of the officers themselves.

86. We have received evidence of people with learning disabilities being the subject of stop and search in situations where they did not understand at the time what was happening[28]. In one example, an individual with mild learning disability did not know whether the three searches to which he had been subjected had been statutory or non-statutory. After hearing of his circumstances from Enable Scotland, a meeting was arranged at which Police Scotland tried to explain what had happened. As a result of this and other meetings arranged to explore his experience, the young man now has a more positive view of Police Scotland than the one he was left with after the searches. It seems certain that this young man's original negative experience will not be unique. Enable Scotland have been meeting with Police Scotland to try to address issues like this, but, even with improved awareness, assessing whether someone has a learning disability is not easy. Difficult questions arise about capacity and the implications of particular types of behaviour. As Enable Scotland said in their reply to the Call for Evidence:

[27] McAra, L. and McVie, S. (2005) 'The Usual Suspects? Street-life, young people and the police' (2005) *Criminal Justice* 5 (1) 5-36

[28] See response to Call for Evidence from Enable Scotland

"Police Scotland's Standard Operating Procedure (SOP) for Stop and Search lists some traits that a person may exhibit that might indicate reasonable grounds for suspicion for a statutory stop and search. In our response to the SOP review, ENABLE pointed out to Police Scotland that some of these same traits can often be seen in people with a learning disability or other additional support needs (e.g. autistic spectrum disorder) for reasons entirely unconnected to criminal or dangerous activities. For example they may find being in a public place difficult and become anxious or agitated easily. Therefore police officers should have at least a basic understanding of how learning disability might affect behaviour."

87. Leaving aside such difficult issues of capacity in the case of those with learning disabilities or the like, some in our Group felt that the power imbalance in the relationship between police officers and members of the public was such that "consent" could not be realistically understood, at least not in every case, other than as a product of that imbalance.

88. The same point has been made in court cases, both in Scotland and elsewhere.

89. See, for example, the observations of Lord Salvesen in the Scottish case of *Adamson v Martin*[29]:

"*It must be kept in view that the boy was only sixteen or seventeen years of age; that his mother was refused permission to accompany him, although she was his natural guardian, and that the request which was made to him to go upstairs and go through the various operations detailed had all the appearance of an order. It is nowhere suggested even in the defences that the pursuer or his mother was told the purpose for which his attendance was required outwith her presence. I doubt whether a boy of that age could validly give such a consent to his prejudice; but I am very clear that there is nothing from which we can infer consent. I suppose that, according to the defender, it was the pursuer's duty to have asked, before obeying the sergeant's request, what right he had to make it, and for what purpose he asked him to attend in another room; and if he was refused information on this subject to have absolutely declined to accompany the sergeant upstairs. I doubt whether even an adult, who was not something of a lawyer, would have thought of putting such questions or of taking up this attitude. The man who made the request had already taken upon himself to refuse to permit the boy's natural guardian to be present. He was clothed with apparent authority and must have known perfectly well that compliance was yielded to him in his official capacity and in no other. In order that the defender should establish such a defence, it would require, in my judgment, to appear from the pursuer's averments that the purpose of the request was explained to the pursuer and to his mother, and also the fact that the sergeant had no right to enforce compliance. A defence based upon consent might be sustained in such circumstances, but should not be inferred from mere acquiescence by a minor.*"

90. In the Canadian case of *R v Therens*[30], Le Dain J, in his dissenting opinion, said:

[29] 1916 SC 319 at page 327/328
[30] [1985] 1 S.C.R. 613

> "*Although it is not strictly necessary for purposes of this case, I would go further. In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.*"

91. Even police officers who have assisted us with our work have acknowledged the imbalance and the fact that it is this that causes many individuals to "consent" to being searched.

92. "Consent" can be a vexed issue, practically as well as legally[31].

93. The meaning of the word may seem obvious enough, but concerns in recent years that juries did not understand it gave rise to a change in the law in the area of sexual offences. In 2009, the Scottish Parliament decided to legislate to provide a specific definition of consent in sexual offences ("consent means free agreement"[32]). This followed detailed consideration of the issue and related matters by the Scottish Law Commission[33].

94. In practice, more so than in law, identifying genuine, informed consent can prove difficult. It is seen, generally, as a very case- or fact-specific exercise. The capacity of individuals to consent varies considerably. "Consent" must be informed. That has implications for the content of, and means by which, information is communicated, as well as the capacity of the individual to understand what is communicated. The problems involved are recognised also, for example, in medical matters, where issues of consent also arise. The medical approach to capacity may vary according to the gravity of the decision involved, so a patient may be considered capable of consenting to the taking of blood but not to undergoing a major cancer treatment. The law tends to be more sweeping than that in its treatment of consent, with capacity to understand and consent more readily assumed for all purposes when it comes to dealing with the police.

95. The legal capacity of children is a particularly complex issue[34]. Our modern law provides a system involving a general age of legal capacity at 16, with general and specific exceptions that allow younger children to enter into transactions. The application of those exceptions is fact-

[31] Dr Kath Murray, University of Edinburgh, The legality and legitimacy of searching on the basis of consent in the absence of reasonable suspicion
[32] Section 12, Sexual Offences (Scotland) Act 2009
[33] Report on Rape and Other Sexual Offences, Scottish Law Commission 2007, Sc Law Com No 209 particularly Part 2
[34] See the somewhat more detailed description of the law in the section on Children and Young People below.

specific and based broadly on the child's understanding of the decision and its consequences, although some apply further presumption as to children's understanding at a certain age.

POLICING BY CONSENT

96. The word "consent" is used in another way relevant to the present review.

97. "Policing by consent" is a phrase used to express the sense of a distinctive aspect of the tone and style of policing in Scotland, as well as in other parts of the United Kingdom. It captures the spirit of the nine Peelian Principles at the heart of policing in Britain since the early 19th Century[35].

98. The phrase is often used but its meaning is perhaps not fully appreciated until we compare policing here with other countries, even close neighbours. For all that the Peelian Principles originated there, some in Scotland have contrasted the policing style and community relationships in some English cities with that in Scotland.

99. Impressions of different policing styles between Scotland and England may have been affected to some extent by questions of politicisation, with policing before Police Scotland less prominent on the political agenda. In England, questions of policing, including stop and search, have been more prominent on the political agenda for decades.

100. Clearly "policing by consent" does not mean that everyone consents to, or agrees with, all police activity at all times, but it should mean that we have a general understanding of what the police service is doing in our name, and, importantly, why they are doing it. Maintaining such understanding and the general support of the public is essential for effective policing across Scotland.

101. Policing by consent has been such an important part of the general practice of policing in Scotland that it has also informed our thinking and recommendations.

[35] See Appendix. Although named after the then Home Secretary Sir Robert Peel it is thought that they were drafted by others.

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CODE OF PRACTICE

Recommendation 1

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.

102. Part of our Terms of Reference was to:

"develop a draft Code of Practice that will underpin the use of stop and search in Scotland."

103. In the area of stop and search we are contemplating, in Recommendation 8, a significant change in police policy, practice and culture. That is not an easy transition. Non-statutory stop and search has been an established part of policing in Scotland for a significant period. Some officers will only have practised policing when this tactic has been available, indeed perhaps even as a first resort in certain circumstances.

104. We consider that the type of transition we are recommending requires the very strongest of guidance and support.

105. The possibility of using a Code of Practice in this area was raised in the report of HMICS[36] and by Police Scotland in its report[37] to the Cabinet Secretary for Justice.

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

107. Police Scotland already has a Code of Ethics that emphasises integrity, fairness, respect and human rights[38]. A Code of Practice can assist in translating some of those high-level concepts into everyday policing.

108. Policing in England operates with several Codes issued by the Home Secretary, subject to Parliamentary approval, in terms of the Police and Criminal Evidence Act 1984[39]. These cover various matters: stop and search, arrest, detention, investigation, identification, interviewing detainees. In Scotland these areas have not been covered by Codes although there is some relevant Guidance, for example in respect of identification[40].

109. The police tactic of stop and search, even if carried out on a statutory basis, involves the use of powers or enforcement methods which should be the subject of effective recording, scrutiny and accountability. A Code can assist with these essential aspects as well.

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[36] Recommendation 19

[37] s.8 of the Police Scotland Update Report for the Cabinet Secretary for Justice on Stop and Search proposes that "A code of practice may prove valuable in enhancing governance of how police officers use stop and search in Scotland".

[38] http://www.scotland.police.uk/about-us/code-of-ethics-for-policing-in-scotland/

[39] See brief account in paper by Professor David Mead, University of East Anglia, STOP AND SEARCH IN ENGLAND AND WALES UNDER THE HUMAN RIGHTS ACT

[40] LORD ADVOCATE'S GUIDELINES TO CHIEF CONSTABLES: GUIDELINES ON THE CONDUCT OF VISUAL IDENTIFICATION PROCEDURES

110. Given our Terms of Reference, and the fact that the idea of a Code of Practice was supported unanimously within the Group, we did not spend much time discussing the merits of a Code. As we gathered evidence and met interested people and groups, it was clear to us that the idea was welcomed almost without exception[41].

CODE OF PRACTICE – STATUTORY OR NON-STATUTORY

111. The HMICS Report and the Police Scotland Report both specifically suggested a statutory Code. For reasons highlighted elsewhere in this Report, we consider that the Code should be put on a statutory footing. This will allow for far greater clarity as well as due recognition of the importance of the Code. It will also address the issue about legitimacy mentioned in the Context section.

CODE OF PRACTICE – FURTHER CONSULTATION

Recommendation 2

That, ahead of implementation of the Code of Practice, further public consultation should take place on the terms of the Code. To assist in this consultation, a draft Code of Practice is included with this Report.

112. In producing a draft Code of Practice, whilst we looked at a number of possible models, the existence of a Code in a neighbouring common law jurisdiction which has been developed and refined over a considerable period led us to make use of PACE Code A[42], which applies in England and Wales, as a template, adapting it to the Scottish context. While PACE Code A is the product of different circumstances and operates within a different legal system, it has stood the test of time, in large part due to a regular process of review and revision. Much of the current PACE Code A is what would be produced if the process of drafting a Code were started with a blank sheet of paper.

113. The draft Code is confined to the areas within our Terms of Reference. That means that it does not apply to the search of vehicles or premises.

114. It is important to emphasise that the draft attached to this report is intended as a starting-point for the further necessary consultation, debate and discussion on what should be adopted as good practice.

115. The development of a Code will inform training. It is important that training should be aimed at instilling good practice rather than merely encouraging what has been deemed acceptable or excusable by the Court in the rather different exercise of considering questions of fairness and admissibility. As we point out elsewhere, there is one worrying example (whether to tell the individual in a non-statutory stop and search that they could refuse to consent) where Police Scotland training was pitched at what might be excused or tolerated by the Courts rather than what was known to be good practice.

[41] West Lothian Council's response to the Call for Evidence stated that "more information around a 'Code of Practice' is required before being able to answer this question."
[42] https://www.gov.uk/government/publications/pace-code-a-2015

116. For this aspect of our work we are grateful to the Scottish Government Legal Directorate, in particular David Johnston and Nicholas Duffy. We recognise that five months is not enough time to perfect a Code of Practice for use in Scotland. In addition, some of the contents of the Code may be determined by the Government's response to other Recommendations. That is why we make a specific Recommendation about further consultation on the terms of the draft Code we have produced. In its response to the Call for Evidence the Convention of Scottish Local Authorities (COSLA) strongly supported the development of a Code of Practice but stated that it "should not be developed in isolation, however, and should be developed in consultation with key stakeholders." Our Recommendation is consistent with that suggestion.

117. Discussion with the Information Commissioner's Office suggested that further consideration should be also given in the Code to data protection issues, for example, the recording and retaining of telephone numbers as a routine part of stop and search.

REVIEW AND REVISION OF THE CODE

Recommendation 3

That the Code of Practice should be reviewed at regular intervals of not less than every four years, with provision for earlier review being triggered at the request of the Chief Constable of Police Scotland, the Scottish Police Authority or Her Majesty's Inspector of Constabulary in Scotland. There should be specific provision for post-implementation review to take place two years after the initial Code comes into effect.

118. In England and Wales, PACE Code A has been reviewed and revised over time, following statutory consultation[43]. This allows the Code to reflect necessary changes over time and prevents it from becoming obsolete due to irrelevance.

119. In a Home Office report[44] on the statutory consultation process in 2014 it states:

> *"1.5 Statutory consultation is a critical element in the development of the PACE codes. It helps to ensure that the police continue to have the ability to exercise their powers effectively whilst at the same time ensuring the appropriate safeguards are in place. We are grateful to all those who took the time to consider the proposed revisions and to respond to the consultation."*

[43] Section 67(4) of PACE requires that where the Home Secretary wishes to amend the PACE codes, a statutory consultation must first be carried out. This consultation must include:
1 such persons who appear to her to represent the views of Police and Crime Commissioners;
2 the Mayor's Office for Policing and Crime;
3 the Common Council of the City of London
4 the Association of Chief Police Officers of England, Wales and Northern Ireland;
5 the General Council of the Bar;
6 the Law Society of England and Wales;
7 the Institute of Legal Executives; and
8 such other persons as the Home Secretary thinks fit.

[44] Police and Criminal Evidence Act 1984 ('PACE') Codes of Practice Consultation Response to Home Office consultation on PACE Code A (Stop and Search)

120. The 2014 consultation process "*sought views on proposed revisions to implement the Government's commitment set out in the Consultation on Stop and Search which is to: "Revise the Police and Criminal Evidence Act 1984 (PACE) Code of Practice A to make clear what constitutes 'reasonable grounds for suspicion' – the legal basis upon which police officers carry out the vast majority of stops. The revised code will also emphasise that where officers are not using their powers properly they will be subject to formal performance or disciplinary proceedings*".

121. Thus it will be seen that consultation can have a sharp focus, in addition to gathering general experience of, and views on, the operation of the Code.

122. The Home Office report provided a summary of consultation responses and outlined the Government's proposed next steps. It also explained the rationale for the proposed revisions to the Code. The relevant amendments came into force on 19 March 2015.

123. It seems to us that a similar approach should be taken in Scotland in respect of review, consultation and revision. The four year period we suggest can operate in broad synchronisation with the normal Parliamentary term in Scotland.

124. We recognise that review earlier than four years would be appropriate after the approval by Parliament of the first Code of Practice. To allow for consideration of all aspects of implementation we suggest a period of two years for that first review.

125. We also recognise that there may be specific circumstances suggesting an earlier review. We have recommended that such reviews could be triggered by the Chief Constable of Police Scotland, the Scottish Police Authority or Her Majesty's Inspector of Constabulary in Scotland.

IMPLEMENTATION OF THE CODE

Recommendation 4

That the Code of Practice should be issued by the Scottish Ministers, subject to Parliamentary approval as to commencement and, thereafter, on the coming into force of any proposed revision.

126. Having been given a number of options by the Scottish Government Legal Directorate as to how a Code might be implemented, we agreed that the best option was that the Code should be issued by Scottish Ministers but subject to Parliamentary oversight prior to commencement and revision.

DATA AND RESEARCH

Recommendation 5

That Police Scotland should provide regular reports to the Scottish Police Authority about the use of stop and search, including all relevant data on all recorded stops and searches, for the purposes of evaluating and monitoring use of the practice through public scrutiny. These data should also be released publicly on a regular basis by the SPA and by Police Scotland website so as to ensure openness and transparency and allow for wider research and monitoring purposes.

127. This recommendation has been made in view of earlier problems regarding the release and availability of data. It should be emphasised that the Recommendation matches what has already been accepted by Police Scotland as necessary and appropriate, and that significant improvements have already been made to the recording and management of stop and search data. Monitoring of these data is a key part of scrutiny and accountability, especially by the SPA. It is hoped that the wider release of the data will inform and support further research in this area.

128. Scrutiny of the data should also enable better understanding of all aspects of the use of stop and search and whether, for example, there are any issues relating to the disproportionate targeting of any group.

129. This review has been prompted in part by the reaction to the stop and search data which was made available from 2014. This helps to demonstrate the importance of evidence being made available to help avoid the development of unintended or disproportionate consequences for the public generally or any specific group, and to guide necessary positive change.

Intentionally Blank

ALCOHOL

Recommendation 6

That the Scottish Government should hold an early consultation on whether to legislate to create a specific power for police officers to search children under 18 for alcohol in circumstances where they have reasonable grounds to suspect that they have alcohol in their possession. Such a power might also extend to searching those suspected of supplying alcohol to those under 18. The Government should ensure that the consultation process engages effectively with children and young people. In introducing any such power care should be taken to ensure that there is no consequent increase in criminalisation of children and young people.

130. The possession of alcohol by children and young people has been offered repeatedly as a major aspect of the use of, and need for, the tactic of non-statutory stop and search. On the face of it there was some justification for taking a closer look at this area. Non-statutory searches of children and young people for alcohol seemed to make up a significant number of such searches.

131. However, creation of the new National Stop and Search Database, which has provided much better recording of police activity in this area, revealed that the bulk of incidents involving alcohol were recorded as seizures (previously consensual searches for alcohol and seizures had been collapsed together). Nevertheless, it is clear that searches have continued to be undertaken for alcohol, including some inappropriate use of statutory grounds which reveals both confusion over, and reliance on, its use. The sheer scale of the activity around alcohol underlines Police Scotland's view that this continues to be an area of concern and the inability to use search powers to remove alcohol from young people is a potential problem.

132. In his report Her Majesty's Inspector of Constabulary in Scotland wondered if an implied power of search for alcohol might be read into the power of seizure of alcohol. Subsequent legal advice has confirmed that there is no implied power of search within the current legislation. In part this advice was based on the fact that the United Kingdom Parliament had specifically decided in 1997 not to give the police such a power. The absence of such a power was mooted as "one of the great strengths" of the legislation as it was feared that the exercise of such a power might create tension and conflict between the police and young people[45]. This is something the Scottish Government and Scottish Parliament ought to keep in mind when exploring the merits of a new power to search for alcohol. Meaningful consultation with children and young people will be important in this regard.

133. The issue of whether this area represents a gap is complicated by the fact that the statistics for non-statutory stop and search seem to include what were in fact seizures. Such seizures were entirely lawful in terms of the legislation. On most occasions these seem to have happened without any further action or intervention, or the involvement of Child Protection partners. For the avoidance of doubt, we do not suggest that further intervention was necessary or appropriate in those cases.

[45] Dr Robert Spink, HC Deb 24 January 1997 vol 288 cc1165-206, Confiscation of Alcohol (Young Persons) Bill

134. Conversely, it has been suggested to us that, in the absence of non-statutory stop and search there could be circumstances where vulnerable young people could be at greater risk if the police had to rely solely on the power of seizure. It has been suggested that use of the tactic of non-statutory stop and search may have masked any such risk.

135. In relation to alcohol in the possession of children, one possibility would be the introduction of a power to search similar to the one recently made available in parts of England to Police Community Support Officers if reasonable grounds to suspect such possession exist. In Scotland, such a power to search could be added to section 61 of the Crime and Punishment (Scotland) Act 1997 which allows officers to seize alcohol. It would therefore adopt the existing statutory framework, providing the same test of reasonable grounds to suspect possession of alcohol by someone under 18 or by someone over 18 suspected of supplying alcohol to those under 18.

136. Such a power, with the requirement of reasonable suspicion, would be an improvement on the current situation, especially if supported by the recommended Code of Practice, but thought must be given to wider implications and alternatives. It has been suggested to us that complementary methods exist to address underage drinking, with more possible on the licensing front and monitoring of licensed premises.

137. Child welfare and protection has been given as a major justification for much that has happened through non-statutory stop and search, with emphasis on this justification especially prominent in relation to alcohol. We deal separately with more general aspects of child and adult protection, particularly necessity and proportionality. In relation to alcohol, the presence of a welfare/protection aspect is seen in the fact that the tactic has been used very frequently to remove alcohol from children and young people in circumstances where they may be placed at risk of becoming involved in crime or anti-social behaviour, or at risk of harm to themselves.

138. Our experts on children and young people were not entirely persuaded by this justification. If child welfare and protection was a justification, they asked whether there was evidence of further intervention and partnership working to deal with the issues thrown up by the possession of alcohol by children.

139. Specific child welfare and protection powers are available, and are used, which place welfare more obviously at their heart[46] (See Appendix 9 for Extract from National Guidance for Child Protection in Scotland 2014).

140. A power to search for alcohol would not be entirely uncontroversial[47]. Alcohol is not a prohibited substance. Possession of alcohol is not prohibited. The offences related to alcohol strike primarily at its sale or supply to children, for example, an adult buying alcohol for a child.

141. There was general agreement that the introduction of any additional power should not lead to unnecessary criminalisation, but, if required, should instead lead to a wider multi-agency preventative intervention, in which the police should play their part but which also requires the

[46] Anne Houston, OBE., FRSA., The Impact of Consensual Stop and Search on Children and Young People including issues around informed consent and child protection.
[47] See, especially, John Carnochan, OBE., QPM., Alcohol - Stop Search – Consensual or otherwise, 11 August 2015

efforts of other public agencies, and indeed families, where appropriate. This could easily be facilitated in appropriate cases within the context of the current youth justice practices in Scotland, including the Whole System Approach[48].

142. As a new power of search for alcohol would be used most often on children and young people, care would be needed to ensure that any deployment of the power was necessary and proportionate. This should be understood and accepted when it is realised that the involvement of the law is intended primarily to protect children, and to deal sensitively with their specific vulnerabilities.

143. Such a power would see continued police focus on children and young people. As the basis of the power is that an officer has reasonable grounds to suspect possession of alcohol, we would expect that it is would be used less indiscriminately than has been the position. The hope is that, even following a positive search for alcohol, most such young people would remain outwith the youth or criminal justice system.

144. If it is seen as no more than an extension of the power of seizure, the same sensible, common-sense approach should follow, with any further steps taken being commensurate to the circumstances and following an assessment of the specific risks, and involving the least intrusive measures available and appropriate.

145. We have been told such a power is necessary. Several serving and retired police officers have said that, in the absence of non-statutory stop and search, they would be satisfied that they can still perform their duties effectively, but only if given such a power in relation to alcohol.

146. A power of arrest already exists that could be exercised on the same basis as we propose for a power of search. Although we have been told that it would be unlikely to happen, we do not want to push police officers towards a new practice of arresting children suspected of possessing alcohol and potentially criminalising them unnecessarily. Police officers have stressed that they do not want this outcome either. It may be that some such situations can continue to be dealt with, in effect, by simply seizing and disposing of the alcohol.

147. For the sake of completeness it is worth pointing out that there is an existing criminal offence where children refuse to hand over alcohol. If a new power of search for alcohol were to be given, it may be appropriate to consider removing that offence for those under 18. This would be on the basis that a power of search on reasonable suspicion will recover the alcohol – which it is not, in itself, an offence to possess – and will potentially provide grounds for welfare concerns that should result in a proportionate (where necessary, multi-agency) intervention.

148. For our part, on balance, we have not been able to form a concluded view on this question on the evidence produced thus far. Accordingly, we recommend that there should be a further consultation on whether a specific power of search for alcohol is necessary and appropriate. The possibility of consultation on this issue has been welcomed[49]. Any consultation

[48] Murray, K., McGuinness, P., Burman, M. and McVie, S. (2015) 'Evaluation of the Whole System Approach to Young People Who Offend in Scotland'. SCCJR Research Report 7/2015. Edinburgh: SCCJR

[49] See, for example, the response to the Call for Evidence from Barnardo's Scotland

should have the benefit of greater reliable data on the relevant practices, both search and seizure, and a fuller opportunity to consult relevant stakeholders including children and young people themselves and those who work with them.

149. If such a power were to be introduced thought should be given to ensuring appropriate recording, monitoring and reporting processes are in place from the outset to guard against any inappropriate drift in use or unintended consequences.

TOBACCO AND NEW PSYCHOACTIVE SUBSTANCES

150. We do not consider that welfare considerations arise in the same way in connection with the possession of tobacco. Accordingly we do not extend our recommendation beyond alcohol.

151. Possession of New Psychoactive Substances (NPS) was also mentioned as a potential gap but there is specific legislation currently before the UK Parliament which will deal with search of persons for such items[50]. Such searches will be permitted where there are reasonable grounds to suspect possession of such a substance. They will also be covered in England and Wales by PACE Code A. They should be covered in Scotland by the Code of Practice referred to in Recommendation 1.

CHILDREN AND YOUNG PEOPLE

Recommendation 7

That the duty on constables to consider the child's best interests in s. 42 of the Criminal Justice (Scotland) Bill be amended so as to apply to a constable's decision to search a child (there defined as a person under 18) who is not in custody.

Separate mention is needed of children and young people in the context of stop and search. As at May 2014, over a third of all stops and searches were conducted on children between 10 and 19 years of age[51]. Eighty per cent of the 25,324 searches carried out by Police Scotland in relation to children aged 10 – 14 years old were non-statutory and 76% of the 157,368 stop and searches of 15 – 19 year olds were also non statutory. On this basis it is clear that children have been a significant target for non-statutory stop and searches.

152. Particular issues arise in considering the use of stop and search on children, including issues of consent. It is a long-standing (if at times inconsistently applied) principle in Scottish child law and policy, and indeed in our approach to young people who offend, that children must be treated as children first and foremost, taking account of their age and levels of maturity. Scotland's commitment to, and international obligations under, the United Nations Convention on the Rights of the Child and the ECHR require as much. The principles of "Getting it Right for every Child" (GIRFEC) apply in this area too[52].

[50] Section 35, Psychoactive Substances Bill 2015 – First Reading House of Commons 21 July 2015, having started in the House of Lords

[51] Scottish Police Authority (2014), 'Scrutiny Review – Police Scotland's Stop and Search Policy and Practice. Final Report and Recommendations – May 2014' p30 http://www.spa.police.uk/assets/126884/230479/scrutinytaskgroupreport

[52] http://www.gov.scot/Topics/People/Young-People/gettingitright

153. Section 58 of the Children and Young People (Scotland) Act 2014 imposes certain duties on corporate parents. The Chief Constable of the Police Service of Scotland is a corporate parent in terms of the Act. These duties, effective from 1 April 2015, may be relevant in the area of stop and search and should be considered as part of the consultation on a Code of Practice[53].

154. The law on children's legal capacity is not without its complexities[54]. Under our modern law[55], children attain a general legal capacity to enter into transactions at 16, but there is a general exception relating to transactions commonly entered into by younger children on terms that are not unreasonable[56], and several specific exceptions relating to certain decisions. The latter category notably includes instructing a solicitor in civil matters and making decisions about medical treatment[57], where the test to determine a child's legal capacity relates broadly to their understanding of the decision and its consequences. A presumption that children have the prerequisite legal capacity from 12 years of age applies in respect of instructing a solicitor, but not in medical decision-making.

155. While some general guidance may be gleaned from these provisions, there are significant differences in terms of the type of decision the child would be asked to make and the context in which a child's capacity to consent would be assessed. The specific exceptions above may be taken to suggest that professionals with the skills and the space to assess a child's capacity, and who may know the child, will make the assessment and identify the child in whose case the presumption at 12 ought to be rebutted. This is quite different from a police officer being required to evaluate the capacity of a child who, in all likelihood will be a stranger to them, and to do so in a short space of time and in a public place.

156. Evidence from children and young people suggests that they perceive a significant power imbalance between a police officer and themselves – an issue that is not, of course, limited to children and young people. There are different views in the Group about this argument, but a majority considers it to be a significant factor that raises further questions as to whether any consent obtained from a child in a typical stop and search encounter could be said to constitute 'free agreement'[58]. Virtually all of the evidence the Group received from, or on behalf of, children and young people suggests that they are unaware of the difference between statutory and non-statutory stop and search, casting further doubt over the relevance in practice of their purported free agreement to non-statutory stop and searches[59].

157. As one young person said:

> "I've never been asked to be searched and I've never asked for a reason, I thought they had a right to just stop you 'cause they're the police and they can do what they want. As soon as I see the police I know I'm getting stopped[60]."

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[53] See response to the Call for Evidence from Centre for Excellence for Looked After Children in Scotland(CELCIS)
[54] See the paper by Nico Juetten, Notes on Law Relating to CYPs' Capacity & Age Thresholds, 3 July 2015
[55] In particular, the Age of Legal Capacity (Scotland) Act 1991. For a full exploration of the law and its historical background, see Wilkinson & Norrie (2013), *The Law Relating to Parent and Child in Scotland*, 3rd Edition, Edinburgh: W Green, Ch. 5.
[56] 1991 Act, s. 2 (1).
[57] 1991 Act, s. 2 (4) and (4A) respectively.
[58] Anne Houston, OBE., FRSA., The Impact of Consensual Stop and Search on Children and Young People including issues around informed consent and child protection
[59] See, for example, the response to the Call for Evidence from Barnardo's Scotland
[60] *Ibid*

158. There are specific issues regarding children and young people who are, or have been, looked after or in care. Some of these overlap with what was pointed out by Enable Scotland about "suspicious" behaviour[61] which can arise with looked after young people and care leavers as well[62]. One care leaver to whom I spoke suggested that when the police encounter any individual, especially a young person, they should ask at an early stage whether the person is, or has been, looked after or in care. This knowledge could help to inform the whole encounter, including any assessment of behaviour. We recognise, however, that there are undoubted sensitivities around such an approach. It is difficult to frame questions that would obtain the relevant information without, at least in some cases, creating other tensions, trauma or grievance It would be both appropriate and advisable in the consultation process to seek evidence on this matter, and on other specific provisions in respect of children and young people that may be required in a Code of Practice.

BEST INTERESTS OF THE CHILD

159. A step we have identified as appropriate in relation to stop and search in the context of children and young people is a slight amendment to section 42 of the Criminal Justice (Scotland) Bill. At present it reads:

> *"42 Duty to consider child's best interests*
>
> *(1) Subsection (2) applies when a constable is deciding whether to—*
> *(a) arrest a child,*
> *(b) hold a child in police custody,*
> *(c) interview a child about an offence which the constable has reasonable grounds to suspect the child of committing, or*
> *(d) charge a child with committing an offence.*
>
> *(2) In taking the decision, the constable must treat the need to safeguard and promote the well-being of the child as a primary consideration. 25*
>
> *(3) For the purposes of this section, a child is a person who is under 18 years of age."*

160. We suggest an amendment by adding an item to subsection 1, namely "search a child". Logically, in terms of sequence, it may make more sense if our amendment is inserted at (a) and the other items re-numbered. It should also be understood that, while section 40 of the Bill refers to a power of search on arrest, our Recommendation does not apply to that situation. It is outwith our Terms of Reference. We intend the amendment to the section to apply to all statutory searches as explained in this Report and the draft Code annexed to it.

[61] See response to the Call for Evidence from Enable Scotland
[62] See response to the Call for Evidence from CELCIS

STOP AND SEARCH - CONSENSUAL/NON-STATUTORY

SEARCH

161. The definition of "search" will be an important part of any consultation process. It is an area where clarity is needed in the detail of the final Code of Practice. In the draft Code we have defined "search" in a deliberately wide sense. In part this is to try to reduce some of the uncertainty around the question "what is a search?" The Court has considered the question, for example, in cases like *Davidson v Brown*[63] and *Devlin v Normand*[64], where it was decided that handing over a bin or opening one's mouth on being asked, in effect, to do so by the police did not involve a search. The point is made elsewhere that the Court has been examining questions like this from a very particular perspective, specifically with the retrospective of knowledge of a prohibited item having been found. Nonetheless, while we recognise the differences we suggest consultation on the basis of the wider definition in the draft Code.

162. Not every encounter between a police officer and the public involves a search. Similar considerations apply as expressed in the section dealing with "Stop".

163. It is important to be clear as to what is meant by "search". Self-evidently, it will include strip searches and all intrusive searches, but, in terms of our draft Code it will also extend to the situation where an individual is asked to open their bag or their mouth, or turn out their pockets. In effect, it involves any situation where an officer is looking for an item which is not on open display or readily visible without further effort.

164. It also includes searches carried out under the general heading of protection of life or officer safety, which have been conducted to date without consent and without being recorded as searches.

165. Areas excluded from our remit are listed elsewhere but, specifically, our remit does not include searching vehicles or premises. Searches of vehicles of premises with consent will continue.

LAWFULNESS[65]

166. Questions of lawfulness overlap to a considerable extent with the issues considered above under the heading "Consent."

167. There is a wide range of views on the lawfulness of non-statutory stop and search, ranging from those who think that "consent" overcomes any problems and challenges, to those who say that the use of such a tactic can never be lawful due to the lack of sufficient connection to the general powers and duties given to police officers. The wide range of legal opinions offered in good faith makes it clear that there will be no consensus on this question.

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[63] 1990 SC 324

[64] 1992 SCCR 875

[65] In respect of lawfulness, apart from those papers specifically mentioned in the report, see also the responses to the Call for Evidence from Fred Mackintosh, Advocate and Senior Tutor for Criminal Court Practice in the Centre for Professional Legal Studies at the University of Edinburgh, and Dr Genevieve Lennon, University of Strathclyde.

168. At common law the position remains as set out by the Lord Justice-General (Inglis) in *Jackson v Stevenson*[66]:

> *"...a constable is entitled to arrest, without a warrant, any person seen by him committing a [crime], and he may arrest on the direct information of eye witnesses. Having arrested him, I have no doubt that the constable could search him. But it is a totally different matter to search a man in order to find evidence to determine whether you will apprehend him or not. If the search succeeds... you will apprehend him; but if the search does not succeed, you will not apprehend him. Now, I have only to say that I know of no authority for ascribing to constables the right to make such tentative searches, and they seem contrary to constitutional principle. If the constable requires to make such a search, it can only be because he is not justified in apprehending; and, without a warrant, to search a person not liable to apprehension seems palpably illegal. A constable... must make up his mind on what he sees (or hears on credible information) whether to arrest or not; and, if he does arrest in good faith, the law will protect him, whether his opinion at the time of the guilt of the person arrested prove accurate or not*[67]*."*

169. The approach of the Scottish courts more recently has been to say that non-statutory searches are lawful, even if the individual has not been informed of his right to refuse to consent[68]. It seems that the presumption of capacity has been extended to a presumption of knowledge of the right to say "no". There is perhaps a lack of coherence in the approach of our courts, with different decisions pointing to different underlying principles.

170. When looking for coherence it is important to remember the specific context for the court decisions often cited as authority for the proposition that such searches are lawful. In criminal cases, the crucial context is that a search has been carried out which has discovered some prohibited item or involved some other criminal offence being discovered or committed. If that were not so, there would be no prosecution. Whatever the circumstances of the search, the courts are being asked to exclude evidence of something actually found on the basis of a technical argument about lawfulness. There may have been a time when such arguments succeeded. If so, that time has passed in all but the most exceptional of cases. The retrospective nature of this exercise, with criminal activity actually detected, almost always tips the balance in favour of admissibility of the evidence, and therefore usually of conviction, or the refusal of appeals against conviction.

171. Even where a search or some other aspect of the police investigation has involved some irregularity, the Courts have usually been prepared to excuse this as long as there has been no demonstrable bad faith[69].

172. This is an area where the jurisprudence of the European Court of Human Rights does not advance the position very much[70]. The Court has not issued a decision in any case dealing with a

[66] (1897) 2 Adam 255 at 260
[67] See "Legislative gaps" and the possible abolition of consensual stop and search Professor James Chalmers, University of Glasgow 24 June 2015
[68] Brown v Glen 1998 JC 4
[69] *Lawrie v Muir* 1950 JC 19

police tactic such as non-statutory stop and search. The European Court's decisions on analogous areas do not suggest any likelihood of violations being found in the tactic if it is used subject to a framework by way of a Code of Practice or the equivalent. Without a Code the position may be different.

173. The absence of any definitive ECHR position has seen a number of possibilities considered by various legal experts. The main areas of possible challenge to non-statutory stop and search are:

1. Whether it is in accordance with law, and
2. Whether it is necessary in a democratic society and whether it is proportionate.

The absence of a clear legal framework is an issue in respect of 1, as are the issues around consent mentioned elsewhere in this report. In relation to 2, the relevant questions are:

i. is the objective of the measure sufficiently important to justify limiting a protected right?
ii. is the measure rationally connected to the objective?
iii. could a less intrusive measure have been used without unacceptably compromising the achievement of the objective? and
iv. in balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, does the former outweigh the latter? In essence, this question is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.

174. Notwithstanding the lack of any clear and simple answer, the vulnerabilities of non-statutory stop and search to challenge in this respect are obvious[71].

175. Despite the attitude of the Courts in some of these cases, the Scottish Human Rights Commission has made its position clear – in its view the tactic of non-statutory stop and search is unlawful.

176. It has said:

> *"The position of Police Scotland is that there is no need for a statutory basis for such stop and searches – and that the legal basis for such interference is consent. This creates a serious barrier in terms of being in accordance with the law. The fact that there is no law against the police doing something is not the test. The exercise of power by public officials, as it affects us as individuals, must be governed by clear and publicly accessible rules of law.*
>
> *In order to justify breaching the right to private life of an individual there needs to be a basis in domestic law and it must also being compatible with the rule of law, which is expressly mentioned in the preamble to the Convention and inherent in the object and*

[70] See paper by Professor David Mead, University of East Anglia, STOP AND SEARCH IN ENGLAND AND WALES UNDER THE HUMAN RIGHTS ACT

[71] *Ibid*

purpose of Article 8. Therefore the law must be: Accessible[72], Foreseeable [and] Precise. Those affected must be able to foresee the circumstances in which the law applies and the extent to which their rights will be interfered with in a given situation – so they may make choices (and perhaps take advice) accordingly[73]. There must also be sufficient safeguards to avoid the risk of the power being abused or exercised arbitrarily. Bearing in mind the large numbers of people, particularly children that are being subjected to this interference – the broad scope of non-statutory stop and search in Scotland – along with the scale at which it is used means brings the legality of the practice into question[74]."

177. It seems likely that the Courts here and in Strasbourg would hold that Article 8 of ECHR,[75] the right to respect for private and family life, is engaged by non-statutory stop and search, and that a search would represent an interference[76]. Questions would arise thereafter about whether the interference was justified in terms of paragraph 2 of the Article. Article 5, the right to liberty and security, could be engaged, although this is less likely. Article 14 may also be engaged if any interference in a Convention right is discriminatory in terms of sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The targeting of children and young people would have to be carefully considered and justified with regard to necessity and proportionality.

GAPS IN STATUTORY POWERS

178. We identified the question of gaps in powers as an important method of examining non-statutory stop and search. After all, if there were, in fact, no gaps were such activity to be excluded, it would undermine any claims for the tactic to be retained.

179. The first gap mentioned as requiring the continuation of non-statutory stop and search related to searches for alcohol. It is dealt with in the separate section above.

180. Welfare and protection issues more widely have also been mentioned as possible gaps if non-statutory stop and search is ended. The majority in the Group did not accept that there would be gaps in respect of wider welfare and protection issues, and there was unanimity that non-statutory stop and search was not the appropriate method of dealing with such issues. We deal with the subject in more detail later.

181. We have also been told that the tactic is a useful tool in disrupting crime at all levels of gravity, from low-level nuisance offences like graffiti through to serious and organised crime. In the former we were told that it has been used to search young people in parks for marker pens

[72] The Sunday Times v United Kingdom (1979) 2 EHRR 245
[73] Malone v United Kingdom (1984)7 EHRR 14; (*S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, §§
[74] Scottish Human Rights Commission, Policing and Human Rights , (SHRC, 29/10/2014.18 Also see SHRC Statement 2/2/2015)
[75] Article 8
1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
[76] See paper by Professor David Mead, University of East Anglia, STOP AND SEARCH IN ENGLAND AND WALES UNDER THE HUMAN RIGHTS ACT

or the like where there have been repeated complaints about graffiti. In the latter we were told that it has been used to 'remind' the organised gangs that the police are watching them, albeit it would tend to be used on lower-ranking individuals who may be more likely to be in possession of some incriminating item.

182. It seems to us that the police should be able to deal with such situations without relying on an entirely discretionary tactic like non-statutory stop and search. In such situations, even without non-statutory stop and search, the police will be able to engage with groups or individuals. What develops from that engagement may be reasonable grounds to suspect possession of a prohibited item, or a basis for detention on suspicion that the person has committed an imprisonable offence. If so, a search can occur then. The engagement alone may serve the purpose of 'reminding' individuals of the presence and interest of the police. That may suffice for the purposes of disruption.

183. In cases of serious and organised crime, the police have a range of options available, including intrusive surveillance and covert human intelligence sources. We do not understand policing in this area to depend on non-statutory stop and search.

184. We have also considered the paper by Professor James Chalmers of Glasgow University[77]. It suggests certain minor gaps or differences in powers as between Scotland and England.

185. Of the three he outlines:

- one(concerning poaching) is the result of deliberate decision by Parliament when the relevant legislation was repealed for Scotland in 2011;
- the second relates to a slight difference in legislation which gives a power of search without reasonable grounds in Scotland and England where serious violence is believed likely or persons are carrying weapons – it is not clear that the difference has any practical effect(we have been unable to find any record of the relevant power, section 60 of the Criminal Justice and Public Order Act 1994, having been exercised in Scotland);
- the third(power to search, on reasonable suspicion, for items made, adapted or intended for use in the course of or in connection with the offences of burglary, theft, taking a motor vehicle or other conveyance without authority, fraud, or offences of destroying or damaging property) seems minor and has not been mentioned in any evidence we have heard from police witnesses.

186. Indeed none of these three areas has been mentioned to us, suggesting that the question of gaps in these relatively minor areas is perhaps more theoretical than real.

187. On the question of gaps, therefore, the majority in the Group is satisfied that abolition of non-statutory stop and search will leave no significant gaps, subject to the question of searches for alcohol which is addressed above.

[77] "Legislative gaps" and the possible abolition of consensual stop and search
Professor James Chalmers, University of Glasgow 24 June 2015

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NON-STATUTORY STOP AND SEARCH – THE FUTURE

Recommendation 8

That the policing tactic known as "consensual" or non-statutory stop and search of the person in Scotland should end when the Code of Practice comes into effect. All searches by police officers in Scotland of persons not in custody should be thereafter be undertaken on the basis of statutory powers exercised in accordance with the Code of Practice referred to in Recommendation 1.

188. In our Group we were able to identify a number of areas of agreement at a fairly early stage, with these developing to some extent and allowing us to refine the areas of difference.

AREAS OF AGREEMENT

189. There was agreement that the tactic of non-statutory stop and search has developed without much debate until relatively recently, and with little public awareness that it made up approximately 70% of all stop and search. Concerns have been expressed about the proportionality of use of the tactic, with targets being seen to undermine use based solely or mainly on intelligence, and the percentage of positive searches actually reducing through increased use over time[78]. Some concerns were also expressed about how it had proliferated to this extent without wider consultation. The Group noted the dramatic downturn in the use of non-statutory stop and search in recent months and that improvements in reporting the data will allow better scrutiny to ensure that use of the tactic is not excessive in future.

190. Everyone agreed that Police Scotland has made considerable effort in changing the use of the tactic, even if more needs to be done. Significant improvements to processes and procedures have been made in a range of areas, including in recording, monitoring and practice development based on monitoring information. In effect, in a short space of time, Police Scotland has significantly reduced the use of the tactic and has shifted the balance of all remaining stops and searches from predominantly non-statutory to predominantly statutory (from approximately 70%/30% to 30%/70%).

191. It should be noted that the percentage of positive statutory searches has improved since the inception of Police Scotland on 1 April 2013, particularly since 1 June 2015 and following the introduction of improved processes. The relevant figures bear close scrutiny because they seem to demonstrate the benefits of targeted use of statutory stop and search, where positive searches are now around 30%, as opposed to the continuing use of non-statutory stop and search where positive searches are around 10%, dropping to around 3% if alcohol is excluded.

192. There was agreement that there should be no non-statutory searches of children, with the Group noting the many ways in which "children" can be defined, depending on the particular context. It certainly means those under 16, not just under 12, and should probably mean those under 18 too, as currently proposed in the Criminal Justice (Scotland) Bill.

[78] Fife Division (Police Scotland) Stop and Search Pilot Evaluation, Finding 2

193. The fact that non-statutory stop and search had been operating in uncertain circumstances was a source of concern. Members of the Group were troubled by police activity of such an extensive nature taking place where no reasonable suspicion was required and in an area unregulated in any meaningful way. Unfettered and unmonitored discretion in any police activity creates scope for abuse. We do not say that such abuse has taken place but even the possibility must be guarded against. Without a framework there was consensus that such activity might well be unlawful, from a domestic and an ECHR perspective. The absence of such a framework has opened up the scope for legal challenge in other areas in the past. Legislation in Scotland and the UK dealing with the Regulation of Investigatory Powers is an example of the provision of a framework where none existed, to cure an unlawfulness identified with particular regard to ECHR.

194. As a Group, we were not entirely satisfied that the whole, and only, answer on the lawfulness of the systematic use of the tactic could be found in decisions of the Courts in individual cases. The cases frequently mentioned in this context were looking at the admissibility of certain evidence. The context of the decisions was the actual detection of prohibited items or involvement in illegal activity. The test was one of fairness.

AREAS OF DIFFERENCE

195. Turning to the areas where there is continuing difference of opinion in the Group, these were more limited. There remains a difference of view as to whether the tactic of non-statutory stop and search should be ended completely. Differences on this key issue are related, in part, to a difference of view as to the lawfulness of non-statutory stop and search, and whether any unlawfulness can be cured. On these questions Police Scotland remained neutral, offering information and access to practitioners to assist Group discussion.

196. Some in the Group thought that concern about lawfulness and potential ECHR challenge could be met by having a framework such as might be supplied by a Code of Practice. That would allow greater clarity for the police and public if the tactic were to be allowed to continue. On the other hand, there were others in the Group who considered that, even with a Code of Practice, the unsatisfactory aspects of such an essentially wide discretionary power could not be resolved.

197. The majority consensus in the Group was smaller when it came to whether any unlawfulness could be cured. A minority is of the view that the tactic would be lawful if it were properly regulated and brought into line with statutory searches by means, for example, of a Code of Practice of universal application in relation to all stops and searches. They also highlighted that adults of capacity give informed consent to public authorities on a daily basis. Nonetheless, even that minority was of the view that the tactic should be carefully monitored with the benefit of the new data which is starting to feed through[79]. The minority consider that this data should be used to inform scrutiny of stop and search, particularly with regard to whether any gaps in statutory powers are identified. The minority preferred a precautionary approach to review to try to ensure that there were no unintended consequences of abolition.

[79] Although see continuing concerns of the Highland Council about the availability of data in its Response l to the Call for Evidence

198. The majority was of the view that there was sufficient evidence to be able to say with confidence that there will be no significant gaps if use of the tactic of non-statutory stop and search were to end.

LEGITIMACY

199. It is worth emphasising that the ultimate Recommendation on the tactic was determined by reference to views on its legitimacy, rather than questions of lawfulness. On the question of legitimacy, there are continuing differences, in particular in terms of how it is viewed by the public, or at least by sections of the public. Specifically, some felt strongly that the views of children and young people, and certain communities, towards the police have been damaged, with such damage likely to continue and spread unless the tactic is ended. Others pointed to evidence to suggest that the public were in favour of stop and search[80], and the obvious point, that those in charge at Police Scotland, despite - quite properly – staying neutral on the issue of what should happen in the future, must see value in employing the tactic, otherwise they would not use it.

THE "POLICE VIEW"

200. We acknowledge that there are genuinely held views in favour of, and against, the use of non-statutory stop and search, both within and outwith the Police Service. Over the last few months we have had contributions from retired and serving police officers of all ranks, in this jurisdiction and in England and Wales. What we heard from them demonstrates that there is no single "police view". Some officers were very positive about the tactic and seemed convinced that it has acted as a deterrent. Others were equally certain that it was counter-productive in terms of relations with the public, as well as a waste of resources driven mainly by targets and the need to be seen to be "doing something". Indeed some of the most persuasive critics of the tactic were from within the policing community. It is clear that opinion is driven by experience of its use and the context in which it has been perceived to be successful.

201. Some officers told us that they had never conducted a non-statutory stop and search. These officers did not feel that they had been impeded from carrying out necessary duties as a result.

202. Other officers explained that they had used the tactic primarily as a tool of prevention or early intervention, stopping groups of young people on their way to known trouble spots where fights with knives and weapons had taken place[81]. It has also been suggested that its use has been helpful to disrupt the activities of serious and organised crime groups, as well as low level nuisance offending.

203. We note that the Scottish Police Federation (SPF) and Association of Scottish Police Superintendents (ASPS) think that non-statutory stop and search should be retained. This is despite their vocal opposition to aspects of the practice, primarily related to the use of targets. As ASPS put it in its response to the Call for Evidence:

[80] http://www.sundaypost.com/news-views/scotland/our-poll-reveals-widespread-level-of-unhappiness-with-unified-police-scotland-force-1.842090 - 56% of 1,000 people said that they were in favour of non-statutory stop and search; see also response to Call for Evidence from ASPS

[81] See response to Call for Evidence from ASPS

204. *"Our observation is that the service has been erroneously focussed on the output activity of the number of searches conducted and their success rather than considering and developing more sophisticated measurements of performance."*

205. ASPS specifically state that they consider that abolition of non-statutory stop and search might leave gaps, especially regarding alcohol.

206. These different views may be explained in a number of ways. It may be to do with terminology, with officers behaving in very similar ways but labelling the relevant activity differently. It may be to do with training. It may also be to do with local police culture in a particular part of the country. There is no single clear reason for the wide range of occasionally contradictory views.

207. Interestingly, in England and Wales, where there is no equivalent to non-statutory stop and search, we were informed that there is no demand for its re-introduction (it was abolished there in April 2003). In a situation where the police will have to deal with very similar, indeed often identical policing situations, this highlights the fact that a police service can adapt to whatever necessary restrictions and scrutiny are imposed and still respond effectively. Importantly, rates of violent crime reduced in both jurisdictions despite very different trajectories in the use of stop and search over recent years.

208. In England and Wales, the approach to stop and search has been different for many years, and the emphasis continues to develop in a distinctive manner. We were told that, in the last 12 months in England, there have been active steps towards a more precise and accountable use of statutory stop and search powers. The ultimate objective is to make stop and search both fairer and more effective. And, despite an apparent rise in violent crime more recently in England, the Home Secretary has not softened her stance on ending disproportionate and ineffective use of stop and search[82]. As similar trends in violent crime are being suggested in Scotland it is instructive to note that the police response in England has been to look at an increase in the use of targeted statutory stop and search. It may be that, from time to time, there is an increase in the rate of particular types of crime in Scotland. It is clear that any such increases can be addressed by a range of measures, including statutory stop and search. Non-statutory stop and search is not a necessary part of the answer.

209. In England a definition of what constitutes a fair and effective stop and search encounter was developed between The National Police Chiefs' Council and The College of Policing:

A stop and search is most likely to be fair and effective when:

- *the search was a justified and lawful use of the power that stands up to public scrutiny;*
- *the officer genuinely believes the person has that item in their possession;*
- *the member of the public understands why they have been searched and feels that they have been treated with respect;*

[82] http://www.theguardian.com/law/2015/jun/22/met-police-to-step-up-targeted-stop-and-search-amid-surge-in-knife-crime

- *the search was necessary and was the least intrusive method a police officer could use to establish whether a member of the public has an item with them for use in crime and*
- *more often than not the item is found.*

210. Further guidance and training is being developed by The College of Policing to support this definition.

211. Early evidence suggests that an increasing proportion of searches in England and Wales are resulting in an arrest or positive disposal. This may be due to better use of intelligence, better judgements by officers and better understanding of, and compliance with, the requirements of PACE Code A on "reasonable grounds."

212. One potential impact of a fairer and more productive use of stop and search, already experienced in England, is likely to be an improvement in police legitimacy in the eyes of the public.

213. The short time for our review has meant that we have been unable to carry out any significant comparative work, other than on a limited basis with England. Throughout much of the world, many of the same policing problems and issues will feature. Terminology and solutions may vary, but each country will seek to find or adapt solutions best suited to its own particular circumstances. As some policing problems continue to become more international, so too will some of the solutions. As our work and suggested Code are reviewed and revised over time, it may be that some of these solutions from elsewhere will help to guide policing from good practice towards best practice in this and other areas.

PROPORTIONALITY

214. What is clear is that the tactic of non-statutory stop and search is just one aspect of policing in Scotland today. It has received disproportionate attention because it has been used disproportionately, particularly on children and young people.

215. It has seemed almost to become the default tactic in some areas, with targets and its prevalence distorting police activity to some extent, with officers engaged in mostly fruitless searches as opposed to performing other duties. It has certainly come to affect the public impression of police activity.

216. The most convincing justification for the tactic has been when it has been used in a targeted, evidence-led manner in conjunction with other interventions and partners. Such a package of measures and activity as part of early intervention has seen rates of violent crime successfully reduced in some areas, although it is not possible to separate out the role played by non-statutory stop and search in the overall approach.[83] Unfortunately, the use of non-statutory stop and search has proliferated even when it has not been used as part of such a package. Indeed, much of the time, it seems that it has been used in isolation. In effect it has seemed to some that the police have been using what appears to be a tactic of random stop and search, without sufficient regard to intelligence, effectiveness or public confidence.

[83] John Carnochan, OBE QPM, Alcohol - Stop Search – Consensual or otherwise, 11 August 2015

217. Targeting the "right people at the right time in the right place" sounds proportionate but it depends on having a framework that is understood by officers and the public alike, and a clear rationale as to what constitutes "right" in each of these contexts. It may be that, with the right framework, such an approach could once more become a police tactic which inspires public confidence. Such a framework is much more readily available with statutory stop and search, especially if underpinned by a statutory Code of Practice.

MOVING TARGETS

218. We recognised at once in our work that we faced a number of difficulties – a lack of clarity or at least the absence of a shared understanding of definitions in key aspects of police work in this area (specifically stop, search and consent, but also the addition of "interventions", a term which featured in Police Scotland material for a time); the possibility of gaps in police powers for activity that would be recognised as essential for the proper performance of their statutory duties; the lack of rigorous academic evidence in this area, including the poor evidence to substantiate some of the justification for retaining an ability to search without statutory authority, particularly in relation to claims of its deterrent effects.

219. Our work has involved, in effect, shooting at moving targets. Understandably, given the strength of criticisms made in a number of key reports, Police Scotland took the view that it would not be appropriate to await this report before making changes to the policy and practice of stop and search. We recognise that it would not have been a realistic option for Police Scotland to have waited for the outcome of this review before acting.

220. For our part, that meant, however, that it became less clear exactly what approach was being taken in practice, with some evidence that training (which is undoubtedly intended by those who designed it to improve the position) was taking some time to effect change in the manner intended.

221. Some concerns have also been expressed within the Group about the content of some of the training on stop and search. Even in the last few weeks of our work we spoke to senior officers who confirmed that training on non-statutory stop and search would not involve officers being told to advise individuals that they could refuse to agree to a search. Indeed they seem to have been told not to advise individuals of this right[84]. The most recent training materials employed by Police Scotland, which were provided to us, confirmed this. It is also supported by experiences reported to us, for example, by Barnardo's Scotland in its response to the Call for Evidence. This contradicts some of what we understood, and some of what we were told at other times, to the effect that individuals would always be told of their right to say "no". It runs contrary to the accepted recommendations in the SPA scrutiny review in May 2014[85], both that Officers should be trained about what constitutes consent and that individuals searched should be made aware of their right to decline. It also demonstrates the care needed when it comes to the interpretation of court decisions. It seems from what we have been told that the oft-quoted decision in *Brown v Glen*[86] has been used as justification for training officers to omit a warning

[84] Blake Stevenson: Stop and Search in Scotland: Primary Research Scottish Police Authority Final Report April 2014

[85] See Report section headed **REPORTS – SPA, HMICS, POLICE SCOTLAND**

[86] 1998 J.C. 4

that the individual can refuse to consent to a search[87]. In fact, what was said in that case is that "any request to hand over any item or for permission to search **does not require** to be accompanied by a specific warning that the request is one with which the person is not obliged to comply"[Emphasis added.] The Court does not suggest that such an approach is good practice, merely that it will not invalidate presumed consent. This decision should not have been used as the basis for training which may have exacerbated some of the issues identified around "informed consent." It is a simple point. It has been made repeatedly. It seemed to have been understood and accepted, and yet training has provided the opposite message to what should have been said. Officers and the public are entitled to expect better of training and training materials. Greater care will be required with the training that precedes the introduction of any change in the law on stop and search, and any Code of Practice.

222. Evidence from the Fife pilot suggested that the approach there, which should have been in part about identifying good practice in relation to non-statutory stop and search, in fact highlighted issues which it was subsequently recognised needed more fundamental consideration. For example, there was an increase in stop and searches in the early stages of the pilot, apparently arising from a misunderstanding on the part of officers of what was intended. Significantly, that increase in use of the tactic in the Fife pilot saw a reduction in the number of "positive" searches. These issues and others identified in the independent academic evaluation of the Fife pilot formed the basis for the authors' recommendation to move stop and search to a statutory footing and demonstrated to us how complex the tactic of non-statutory stop and search had become.

EVIDENCE

223. Our approach was to try to see what the evidence showed. It was clear to us that academic examination of the issues had been limited by difficulties in gaining access to data on stop and search (other than by Freedom of Information requests) and, when made available, the data were not sufficiently reliable to establish an accurate baseline for the use of stop and search. There was inconsistency in practice and recording, both under legacy force arrangements and under Police Scotland, as well as errors in maintaining records, meaning that a baseline of reliable data has been established only since June of this year with the establishment of the Police Scotland National Stop and Search Database. Even now there are gaps in the information that is being captured, a fact recognised by those involved in trying to extract all useful information from the input and being addressed by Police Scotland as its Improvement Programme progresses. As a Group, we have tried to assist in identifying other information that could be sought from officers engaged in stop and search and added to the data.

224. One approach for our Group might have been to recommend that more detailed recommendations should await better evidence from the data now being captured. On the other hand the Terms of Reference are such that recommendations are useful, perhaps even more necessary, in helping to shape good practice at a time of considerable flux.

225. Non-statutory stop and search has no doubt seen the discovery of prohibited items that could have been used in causing harm. To that extent one potential price to consider in looking

[87] Blake Stevenson: Stop and Search in Scotland: Primary Research Scottish Police Authority Final Report April 2014

at its abolition is the loss of detection of such items. On the other hand, there is evidence that more targeted and intelligence-led police activity generates more positive outcomes by way of discovery of illicit items, as demonstrated by the increased detection rate by the use of statutory stop and search in Scotland since at least June 2015. In England and Wales, an increased detection rate through better use of reasonable suspicion has been used as the measure of success for statutory stop and search for some years. And, of course, as the vast majority (around 90%, rising to 97% if alcohol detections are excluded) of non-statutory stop and searches find nothing, there is also a question about the best use of resources. Re-focussing on evidence and intelligence for such activity, and ending non-statutory stop and search should free up officers to carry out other duties, ensure searches produce better results and generate less negative public attitudes towards the police.

226. It seems clear that it has not been easy to train officers in the use of a tactic which needs no suspicion to justify it. Indeed, although unlikely, it could be exercised where the officer was positive that a person had nothing to hide and was guilty of no crime, and where any grounds for search were entirely flawed or unreasonable. As one officer put it, the tactic allows him to "satisfy his curiosity". In fairness to the officer he meant his professional curiosity, exercised as part of his duties as a constable, but the justification is rather telling, and the risks are obvious. Removal of consensual stop and search will, therefore, have implications for police officer training across the board (from new officers to experienced ranks).

227. Most non-statutory stop and searches yield nothing (in fact the same is true even of statutory searches where reasonable grounds are required, although the proportion of statutory searches which yield a positive result is higher and has risen as Police Scotland make improvements to the tactic – about 30% by comparison to the rate for non-statutory which is only at around 10%). Consequently it might be thought that the greatest possible care should be taken in the decision as to whether to proceed with a non-statutory search at all, bearing in mind the potentially negative implications for the reputation and integrity of Police Scotland where some people come away from such encounters believing that they have been searched, often on numerous occasions, for no reason or, even worse, because of discriminatory practice, i.e. targeted because of their age, assumptions about their socio-economic status, or a combination of both.

228. In relation to recent evidence, the Fife pilot gave Police Scotland an opportunity, by trialling new approaches, to demonstrate the use of stop and search in accordance with the notion of "right time, right place, right people". Unfortunately something seems to have been lost in translation - the number of searches increased and the success rate decreased - albeit there has been learning from the Pilot which was welcomed and which has fed into the current Improvement Plan.

CONSENSUAL STOP AND SEARCH – CONCLUSION

229. Considering all the evidence, the majority on the Group concluded that the use of non-statutory stop and search should cease.

230. Much has been made of the supposedly unique approach to policing in Scotland which is said to be based on the consent of the public. The phrase "policing by consent" has been used as one defence of the tactic of non-statutory stop and search. This is to conflate two distinct uses of the word "consent". Where police activity is necessary, and is seen as lawful, legitimate and subject to appropriate accountability, questions of consent by the individual do not truly arise. On the other hand, where police action is essentially speculative or random, as seems to be the case with at least some non-statutory stop and search, and is of questionable lawfulness and legitimacy, with poor accountability, there is a real need to test the true extent of individual "consent" to what is happening on each occasion.

231. In essence, in view of the numbers, most non-statutory stop and searches involve entirely innocent members of the public going about their lawful business, or even going about no business whatsoever. They are stopped by the police in what involves, at least, a degree of inconvenience, and an infringement of their privacy, and, on occasion, their dignity. Nothing is found during the search and the individual is allowed to go on his or her way.

232. Where, even with improvements and some good practice developing, that is the paradigm, it is clearly important that the use of this tactic should be closely scrutinised. At the very least greater clarity is required for the individual and the police officers involved.

233. Unfettered discretion in state action of any sort is now anomalous. Each and every encroachment, intrusion or interference with a person's rights must be justified. It must be in accordance with the law, necessary and proportionate.

234. We have retained an open mind as to whether there has been any discriminatory use of police powers in this area but the evidence we have seen, and even anecdotal submissions, support what we had understood to be the position – on the whole stop and search, and particularly non-statutory stop and search, is used disproportionately on children and young people, in particular young men, in Scotland. The new data which are becoming available from the Police Scotland National Stop and Search Database should be routinely examined to check the position[88].

235. To a significant extent the tactic has been used on children and young people in areas afflicted with poverty and social deprivation. While our prisons are also full of people, mostly young men, from these areas, and there may be intelligence-led justification for some police action being targeted there, it is important to remember that this does not justify disproportionate interferences with people's rights and that many of the children and young people in these areas are the most likely victims of crime as well and subject to high levels of social vulnerability. Their confidence in the police can be negatively affected by encounters typified by unexplained and misunderstood use of power[89]. These children and young people

[88] See response to the Call for Evidence from Equality and Human Rights Commission
[89] See, for example, the responses to the Call for Evidence from Barnardo's Scotland, Highland Council and StopWatch

may be the victims, witnesses and jurors of tomorrow. At one time, more of them might even have considered a career as a police officer. It is important that such ambitions be encouraged and restored. We have seen some evidence of this in the process of engagement by the police with the public, especially young people, to discuss and explain stop and search. The unseen consequences of dented or broken public confidence, particularly in deprived areas of the country, should not be ignored. Policing with the "consent" of these communities is crucial because so much crime occurs there.

236. As John Carnochan, former co-Director of the Violence Reduction Unit, put it[90]:

> *"I believe now is the time to Police our communities a little differently. When the medication works and the patient's condition is stabilised or even improves we don't usually increase the dosage; that would be a waste of time, energy and resource and it often makes the patient worse. Now is the time for all agencies, including the Police, to engage with the communities, particularly the young people in our poorest areas in a positive way to help prevent violence. It was these young people who received by far the largest dose of the stop search medicine. It is them who have shown most improvement on this course of treatment. They now need help to stay healthy and violence free. Good community policing can help that happen."*

237. It will be seen that John Carnochan has arrived at the same position on non-statutory stop and search as the majority in our Group, albeit from a slightly different perspective. He believes that non-statutory stop and search had its part to play at a specific time and in a specific context, that context being the entrenched problem of violent crime, particularly knife crime, mainly in Glasgow and the West of Scotland. The evidence supports his view that the problem was successfully addressed and that circumstances have moved on. Notwithstanding his experience and knowledge of that context, recognising those changed circumstances even he now believes that the tactic should no longer be used.

238. Modern policing must rely on sophisticated intelligence products as well as aspects of traditional policing by consent. It should also be steered by debate on important issues of public interest, such as stop and search. Work continues to develop the intelligence framework for stop and search and other policing activities, and it is intended that this report should contribute to that wider debate. There is scope for better use of intelligence and evidence, including what has been learned from non-statutory stop and search. A genuinely intelligence-led approach will see more "positive" searches and inspire greater public confidence, thereby contributing to the essential ingredients of policing by consent. In the interim period, prior to the introduction of a Code of Practice, a more intelligence-led approach will encourage and support the recently introduced presumption in favour of the use of specific statutory powers. Emphasis on statutory powers is far more acceptable as such searches take place in an existing framework, and are far more readily subject to training and public information, and therefore better understood by officers and public alike. The focus in this aspect of policing should be on success of the tactic of statutory stop and search through evidence of detection rather than wider deterrence, which is difficult to justify or prove.

[90] John Carnochan, OBE QPM, Alcohol - Stop Search – Consensual or otherwise, 11 August 2015

239. Importantly, in the new policing landscape without non-statutory stop and search, statutory stop and search should resume its place as a much smaller, albeit crucial, part of policing.

IMPLEMENTATION

RECOMMENDATION 9

That careful consideration should be given to the implications of implementation of these Recommendations for Police Scotland, the Scottish Police Authority and for other stakeholders. The policy, practice and cultural changes required are extensive and should be the subject of a formal implementation programme, subject to effective governance and scrutiny arrangements, training and post-implementation review.

240. While training has begun to address the transition away from non-statutory stop and search in light of the presumption in favour of statutory stop and search, that process is still at an early stage. We also express concerns about aspects of the training in the "Moving Targets" section above. Clearly further training will be required if the tactic of non-statutory stop and search is ended completely and data on recorded searches will need to be monitored as a matter of routine. We do not want to see officers frozen in uncertainty due to a lack of confidence in the considerable statutory powers already available to them. That possibility could not be excluded if implementation were to be an early and sudden event. Training on statutory powers is an important part of general training but it is a fairly small part. Emphasis until recently on non-statutory stop and search has understandably led to gaps in knowledge and experience in the use of statutory powers.

241. Subject to the response to any consultation arising from our Recommendations, there may be a new power to be taken into account in training (the power to search for alcohol).

242. Addressing these changes will take some time. We believe that the process of implementing the various changes we recommend will be managed better, not least in terms of training, if it is done by use of the Code of Practice. In other words, training and other preparation will be made for implementation of the Code, and the other changes will take effect only when the Code comes into force. It will allow the focus of training to be on what the police can do, rather than on what they cannot do, albeit that question will have to feature to some extent in view of the history and experience of non-statutory stop and search.

243. Training is clearly crucial. The current legal situation is not entirely clear. Mistakes have been made where training has been providing answers in direct conflict with changes in policy (the example in the "Moving Targets" section relating to whether individuals should be told that they have the right to refuse to consent to a non-statutory stop and search). Our work is intended to provide greater clarity for individual members of the public and for the police. The greatest of care will be required to ensure that training does not create or perpetuate any inaccuracy or uncertainty.

244. Overnight change, even if well-intentioned, can be ineffective unless sufficient preparations have been made. A recent example of this was the change in policy on the part of

Police Scotland in relation to the use of non-statutory stop and search on children under 12. That was a change much more modest in its terms than what we propose and yet, attempted with only five days' notice, its implementation was unsuccessful. The HMICS Report deals with this in much greater detail, given the concerns about the mistaken continuation, albeit on a limited scale, of a tactic that police Scotland had undertaken not to use on children[91]. The announcement of a change in policy was obviously well-intentioned but its implementation saw confusion – some officers continued to use the tactic when they should not have done so, while others thought that the change in policy meant that they could not use statutory powers of stop and search on children, something that was not covered by the announcement.

245. If our Recommendations are accepted, similar confusion can be avoided if appropriate care is taken in implementation.

SECTION 60, CRIMINAL JUSTICE AND PUBLIC ORDER ACT 1994

246. In passing, in relation to implementation we wish to mention the power granted to the police by section 60 of the Criminal Justice and Public Order Act 1994. The section applies, albeit with some differences, in Scotland as well as England and Wales[92].

247. The section allows a police officer to stop and search a person without suspicion. Section 60 stop and searches can take place in an area which has been authorized by a senior police officer on the basis of their reasonable belief that:

> (a) incidents involving serious violence may take place in any locality in his police area, and that it is expedient to give an authorization under this section to prevent their occurrence, or
> (b) persons are carrying dangerous instruments or offensive weapons in any locality in his police area without good reason.

248. As stated elsewhere we have been unable to find any record of this power, available to the police in England, Wales and Scotland, being used in Scotland. In part this may have been due to the availability of non-statutory stop and search which could have been used in a similar manner if required.

249. The power may be exercised anywhere within a specified locality within a period of 24 hours (which can be extended for a further 24 hours).

250. The power has been used extensively in England. Its use has been controversial, often because it can be exercised without suspicion. For that reason, many of the criticisms of the power are similar to criticisms of the use of non-statutory stop and search[93].

251. In England some of these criticisms have been answered because English and Welsh forces have accepted voluntary restrictions on the authorisation and deployment of section 60 under the Home Office's 'Best Use of Stop and Search Scheme[94].'

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[91] HMICS Report, Audit and Assurance Review in relation to Stop and Search , paragraph 201 onwards
[92] "Legislative gaps" and the possible abolition of consensual stop and search
Professor James Chalmers, University of Glasgow 24 June 2015
[93] Genevieve Lennon, Position paper on Criminal Justice Public Order Act 1994 S60

252. In the same way, if they occur in Scotland, section 60 searches should be covered by the new Code of Practice. While this will not avoid legal challenges such as have happened in England, the existence of a framework supported by statute should help to ensure good practice in what would be a novel situation for police officers in Scotland. Any consideration by Police Scotland of use of the power under section 60 should include the various restrictions in practice in England and Wales which mean that use of the power is more circumscribed there than appears from the face of the legislation. For example, with specific acknowledgement to Article 8 of ECHR, the Scheme states that the power will be used only when deemed "necessary" rather than, as the section states, merely "expedient". This restriction is stated to apply even to those forces who have not yet signed up to the Scheme. As such restrictions were introduced in recognition of possible legal challenges, to address legitimate criticisms of the power and to reduce damage to public confidence, it is important that we take the opportunity to learn lessons from the English experience.

WELFARE AND PROTECTION ISSUES

RECOMMENDATION 10

That discussion should take place between Police Scotland and other partners and stakeholders, including the Scottish Government, regarding the most appropriate methods of dealing with children and vulnerable adults who come to notice for protection and welfare reasons during stop and search situations.

253. In the short time available we were able to reassure ourselves that there would be no gap, and that action is possible even where required on an emergency basis, whether carried out by police officers, social workers, medical staff or others. We did this following consultation with the Chairs of the relevant Child and Adult Protection Committees who could identify no gap other than possibly in relation to alcohol. We also received input from the Mental Welfare Commission.

254. Anne Houston, OBE., FRSA, Advisory Group member and National Chair of the Scottish Child Protection Committee Chairs' Forum, produced a helpful paper outlining the position on child protection (as well as considering the question of consent for children[95].)

255. Her paper states:

> *"The GIRFEC approach stresses the importance of understanding risks and needs within a framework of the child's whole world and wellbeing. Where it emerges that a vulnerable child is living in a situation with a high level of adversity, a detailed risk assessment should be carried out and advice sought from professionals with specialist knowledge and skills, for example, working with parental problematic alcohol or drug*

[94] https://www.gov.uk/government/publications/best-use-of-stop-and-search-scheme
The principal aims of this 2014 Home Office Scheme are to achieve greater transparency, community involvement in the use of stop and search powers and to support a more intelligence-led approach, leading to better outcomes, for example, an increase in the stop and search to positive outcome ratio. It has specific implications for section 60 powers, restricting availability and tightening the criteria (including the power being available only where deemed "necessary" rather than "expedient").
[95] Anne Houston OBE., FRSA., The Impact of Consensual Stop and Search on Children and Young People including issues around informed consent and child protection

use, or children with disability or communication difficulties. The National Risk Assessment Framework[96] provides guidance and specific tools to ensure an appropriate and full risk assessment is completed focusing attention on the three dimensions of a child's world: the child themselves; their family; and their wider environment.

In some child protection circumstances, urgent action is needed to protect the child from any further harm and the immediate safety of the child is the priority consideration, such as potentially the example given. Where such concerns arise and can be immediately verifiable – other examples include sexual assault or injury – risk assessment must be carried out straight away in order to guarantee the child's safety.

However, once these steps have been taken, practitioners will need to determine the longer-term safety of the child. Risk identification and management at this stage will focus on the likelihood of future significant harm to the child, the family's capacity for change and the interventions needed to reduce risk of that significant harm. In other circumstances, a specific, individual concern may be raised about a child and professional judgement will be needed to determine the likelihood and scope of any significant harm. Further investigation may be required to determine the nature and circumstances of events, and a balance will need to be struck between understanding what has happened and what may happen."

256. As well as child protection, adult protection was another area identified as representing a possible gap if non-statutory stop and search were ended[97].

257. As a Group we were not at all convinced that the use of such a tactic was an appropriate entry point for protection issues. It seemed to us that an approach predicated on the use of a police power of enforcement, or of its informal equivalent, might exacerbate some of the factors giving rise to a need for protection. Serious questions arise also as to the "consent" given by some of the vulnerable individuals in a protection/welfare situation.

258. That this was an area suggested as a possible gap highlights that police powers here are not sufficiently understood. In fairness, it seems that it is an area where there is a great deal of legislative provision (Adults with Incapacity (Scotland) Act 2000; Mental Health (Care and Treatment) (Scotland) Act 2003; Adult Support and Protection (Scotland) Act 2007) but a lack of clarity as to the most appropriate method of proceeding in some circumstances. This is a training issue for Police Scotland and other partners, especially local authorities who have the relevant primary duty to make inquiries into an adult at risk in terms of the 2007 Act. To whatever extent officers have been using non-statutory stop and search for adult protection, they should be told that other, more appropriate powers, are available. This explains our Recommendation that discussion should take place between Police Scotland and other partners and stakeholders regarding appropriate methods of dealing with children and vulnerable adults in situations involving protection and welfare issues.

[96] See Appendix
[97] See, for example, response to Call for Evidence from ASPS

REPORTS – SPA, HMICS, POLICE SCOTLAND

259. These reports were central to our remit and consideration of the subject of non-statutory stop and search (although specific mention of the SPA report was omitted from our remit in error). It will be seen from the reports that there was significant overlap of recommendations in the 3 reports.

260. They reflected the potential benefits of appropriate, intelligence-led use of stop and search, while also acknowledging the risks to policing by consent if inappropriately used.

SPA

261. The SPA Scrutiny Review[98] was the first piece of formal scrutiny of the practice of stop and search. The Review noted changes in practice in the use of stop and search following the inception of Police Scotland and concluded that there were risks in the way the tactic of stop and search was applied and how this affected different groups, in particular children and young people. It also reached the view that, inappropriately applied, the tactic had the potential to lead to a loss of public confidence and undermine the principle of policing by consent and highlighted questions around proportionality, training and recording practices.

262. The Review Report made 12 recommendations – ten for Police Scotland and 2 for the SPA - aimed at improving police practice, data recording and the understanding of the long and short term impact of the policy. In particular, the Review recommended: that Police Scotland should roll out analysis tools to ensure activity was truly targeted on "right people, in the right place at the right time"; that it should ensure consistent practice by reinforcing training for officers, in particular in relation to dealing appropriately with young people; that it should ensure use of the tactic was not impacting disproportionately on particular communities, again, in particular on young people; that it should ensure those searched on a non-statutory basis were aware of their right to decline; and that Police Scotland should make sure that data on stop and search activity was appropriately and accurately recorded. The Review also recommended that SPA commission research to establish the short and long term impact of stop and search on different groups and communities, in particular on young people and that it should publish comprehensive data on a regular basis. It welcomed the planned inspection by HMICS, in particular given concerns in relation to data recording.

263. Police Scotland accepted all recommendations and stop and search was the subject of on-going scrutiny by SPA[99]. The recommended research, comprising qualitative fieldwork approaches and quantitative survey approaches, and providing coverage across Scotland and across different social and demographic groups, is on-going and expected to report during 2015 and 2016.

HMICS

264. Following the SPA Review, the HMICS Report highlighted the need for change and made a number of recommendations that could result in significant reductions in non-statutory stop and

[98] SPA Scrutiny Review – Police Scotland's Stop and Search Policy and Practice: published May 2014
[99] See Timeline at Appendix

search across Scotland, whilst at the same time building a reliable evidence base to identify any operational practice gaps or vulnerabilities that may require future legislation. They recommended a general presumption amongst officers that stop and search encounters should be statutory, which, combined with improvements in recording practice, training, audit and supervision, should give communities across Scotland more confidence in the use of the stop and search and allow a more informed view on the future need for non-statutory stop and search. They also recommended that Police Scotland and the SPA consult with the Scottish Government on the potential development of a statutory Code of Practice for stop and search in Scotland. This was with a view to establishing clearly understood principles and safeguards for the public and providing clear and transparent guidance to officers.

POLICE SCOTLAND

265. The Police Scotland Report to the Cabinet Secretary for Justice recognized that the use of stop and search must strike a balance between public safety and fairness, be lawful, proportionate and justified. It described improvements being made by Police Scotland to policy and practice whilst acknowledging the public concerns surrounding the use of non-statutory stop and search and calling for an open, engaging and consultative review of its use in Scotland, together with more academic research. In particular, it described work being done to achieve a rebalancing from non-statutory to statutory stop and search, and to engage more effectively with children and young people to improve police stop and search practice. Police Scotland's report recommended that consideration be given to the development of a Code of Practice for stop and search in Scotland, particularly to improve its governance, and recommended that it should, in consultation with its scrutiny body the SPA, proactively publish stop and search data as well as reporting it directly at a local level to all 32 local scrutiny bodies.

ACADEMIC REPORTS AND RESEARCH ON STOP AND SEARCH IN SCOTLAND

266. Research in this area continues to develop, supported in large part by the Scottish Institute for Policing Research (SIPR) and the Scottish Centre for Crime and Justice Research (SCCJR), both of which were established in 2007. SIPR is a strategic partnership between Scottish universities and the key policing organisations and aims to develop new ways of connecting research and practice in Scottish policing. SCCJR is a collaboration of Scottish universities which aims to produce excellent research and promote the development of policy, practice and public debate about crime and justice in Scotland and internationally. Both of these organisations have played an important role in publishing and disseminating information about stop and search policy and practice in Scotland.

267. The current controversy over stop and search in Scotland was sparked by an Economic and Social Research Council (ESRC) and Scottish Government funded doctoral research study undertaken by Dr Kath Murray at the University of Edinburgh. Prior to Murray's research, there was surprisingly little attention paid to the use of police stop and search in Scotland. One exception was a small-scale, short-term study by Reid Howie Associates published in 2002 that was commissioned by the then Scottish Executive to coincide with the Stephen Lawrence Inquiry in Scotland[100]. It identified stop and search as a key tactic which had increased during the

[100] Police Stop and Search among White and Minority Ethnic Young People in Scotland, Reid Howie Scottish Executive Central Research Unit 2002

Operation Blade and Spotlight campaigns of the 1990s, but found there to be no racial discrimination in the use of stop and search in Scotland. Nevertheless, there was some evidence of adverse effects on young people in particular areas who experienced it on an everyday basis and felt harassed by the police. While finding that the tactic was commonly justified on the grounds of both detection and deterrence, this study did not determine how effective the tactic was in reducing or preventing crime. The Reid Howie report found some concern amongst officers over the use of consensual searches and recommended that ACPOS review the practice, from both a legal and civil liberties perspective. It also warned against using volume of searches as a key performance indicator as this was likely to reduce efficiency and effectiveness of the practice.

268. The impact of policing practices on young people was also examined by McAra and McVie (2005, 2007) in the Edinburgh Study of Youth Transitions and Crime[101]. This longitudinal study found that certain young people repeatedly came to the attention of the police in terms of stop searches, police warnings and charges, and tended to be treated as the 'usual suspects'. Such practices were most common amongst boys from low socio-economic status, deprived local communities and single parent backgrounds. Moreover, previous police contact was a key factor in predicting future police contact, even when other factors such as their offending behaviour was taken into account. They concluded that there was a serious risk of criminalisation amongst those young people (generally the most vulnerable and deprived in our communities) who were targeted through practices such as stop and search and repeatedly recycled around youth justice services with little or no support or effective intervention.

269. The subsequent research undertaken by Kath Murray and published by SCCJR found that police stop search rates grew exponentially from 2005 to 2010, particularly in certain police force areas (such as Strathclyde and Lothian and Borders), so much so that rates were estimated to be significantly higher than those in England and Wales by 2010[102]. Published figures suggest this gap between countries in stop and search continued into the next decade. A key reason for the massive gap between recorded stop and search rates North and South of the border was the use of 'non-statutory' stop and search in Scotland which were not permitted in England and Wales.

270. Murray noted that the justification for the use of this tactic in Scotland differed between those forces that used it reactively for detecting crime and those that used it proactively for deterrence purposes. Generally speaking, detection rates were highest in those areas which had lower rates of stop and search (especially of non-statutory search) overall; and there was little evidence of a significantly increased detection rate with an increase in stop searches (as such practices were not proportionate to the risk of offending). Murray found that the practice was highly targeted at young men from more deprived communities, although not – as Reid Howie also found – at minority ethnic groups. Murray warned that the unregulated use of stop and search had the potential to erode police-public relations, thereby reducing public confidence in the police and damaging the ability of the police to work in partnership with the community to

[101] McAra, L. and McVie, S. (2005) 'The Usual Suspects? Street-life, young people and the police' (2005) Criminal Justice 5 (1) 5-36.
McAra, L. and McVie, S. (2007) 'Youth justice? The impact of system contact on pat-terns of desistance from offending', European Journal of Criminology, 4(3): 315-345
[102] Murray, K. (2014) Stop and Search in Scotland: An Evaluation of Police Practice. SCCJR Report, 01/2014.
Murray, K (2014) Non-statutory Stop and Search in Scotland. SCCJR Briefing Paper, 06/2014.

tackle crime. Driven by such a concern, a review by the Scottish Police Authority reinforced Murray's research findings around the disproportionate and excessive targeting of certain groups of young people (SPA 2014).

271. In response to the intense scrutiny surrounding stop and search in Scotland, Police Scotland established a stop and search pilot scheme in Fife with three main aims: to improve the data on which stop and search was based; to improve accountability; and to improve the public confidence in the use of stop and search. The pilot was launched in Fife in July 2014, with the support of the newly established National Stop and Search Unit, and an independent academic evaluation was commissioned through SIPR and led by Dr Megan O'Neill (Dundee University) and Dr Liz Aston (Edinburgh Napier University). In April 2015, the Fife Pilot Evaluation report was published and while it reported on some very positive aspects of the pilot scheme, there were a number of negative and unintended consequences that did not wholly support the efforts of Police Scotland in their attempts to develop new protocols for stop and search, especially as regards to non-statutory searches[103].

272. The Fife pilot evaluation showed that during the period of the pilot scheme the number of searches increased by 42% on the same period of the previous year and the number of positive searches decreased. Meanwhile, a comparison area showed a 20% decrease in stop searches and only a marginal change in positive detections. The study also found high rates of non-statutory stop searches especially amongst young people aged under 25, which had already been highlighted as a problem in Murray's research. There was a lack of clarity amongst officers on the beat about the aims and procedures of the pilot, many of whom thought it was driven by political and media pressure, and an unintended consequence was that search rates were driven up by officers who believed that they were under pressure to achieve higher targets. Linked to this pressure to undertake more stop searches, the researchers found confusion over what constituted a stop and search for some officers in certain situations.

273. The pilot did result in more detailed and comprehensive reporting mechanisms using the 'right time, right place' framework which were more intelligence led, although a longer time period would have been needed to properly evaluate these. Routine auditing of management data was conducted during the pilot for the purposes of improving accountability, although these data did not form part of the evaluation. Data were also unavailable to evaluate any complaints about police stop and search or to assess the level of scrutiny applied under equality impact assessment. The pilot made significant enhancements towards improving public confidence, including improved consultation with community groups and increasing collaboration with external organisations. In addition, letters were issued to the parents/guardians of children who were stopped and searched during the pilot, although some concerns were raised about the tone and content of these letters and possible negative repercussions towards the children. And advice slips were issued to those who were stopped and searched, although these were not always issued consistently and it was felt that the content of the slips could have better reflected the premises underpinning consensual searches.

274. There was a mixed response from young people who were consulted about stop and search during the pilot and there was some concern that consultation sessions may have been as

[103] O'Neill, M., Aston, L. and Krause, A. (2015) The Fife Division (Police Scotland) Stop and Search Pilot Evaluation: Findings and Recommendations. Report published by University of Dundee and Edinburgh Napier University.

much about promoting the use of the practice than taking on young people's comments. There were similar comments in the evaluation about the use of social media, which only focused on promoting the positive outcomes of stop and search. Public opinion about the police was largely positive overall, but individuals who were critical of multiple and random searches had far less positive attitudes towards the police. These findings are supported by the Scottish Crime and Justice Survey 2010/11, which found that most people who experienced stop and search said the police were less interested in what they had to say than they would have expected, and that being searched made them feel annoyed, angry and embarrassed.

275. The impact of the pilot scheme on individual officers was somewhat ambiguous. There was mixed reviews on the enhanced training programme developed during the pilot, which suggested that it had more impact on senior officers than those on the front line. Indeed, many police officers stated that the pilot had not had a major influence on their practice with regards to stop and search. The evaluation suggested that the focus of officers continued to be mainly on targeting specific individuals rather than using 'right time, right place' as intelligence on which to undertake searches. The pilot did have a significant impact on improving the systematic recording of stop searches by officers and there was a good and consistent understanding of the protocol in relation to not conducting non-statutory searches on children under age 12. Police officers were aware of the importance of treating people fairly and politely in individual encounters, but it was felt that they often resorted to consensual searches in an attempt to meet perceived targets. Overall, officers of all ranks struggled to articulate how the stop and search pilot had enhanced police procedure or improved public transparency, or what the outcomes of the pilot had been.

276. Since the initial publication of Murray's findings, Scottish policing has undergone a significant process of change. The introduction of a single force heralded a move towards more consistent policing practice over the country, including a shift towards greater use of stop and search in those areas where a high-volume approach was not previously the norm. More recent analysis by Murray notes that there was a significant increase in the rate of recorded stop and search in the East (including Fife) and North, whereas rates in the West (already much a higher) saw some reduction, especially during the second year of operation[104]. The recently introduced presumption in favour of statutory stop and search has changed the approach again, with rates of stop and search falling significantly from June 2015 onwards, and the ratio of statutory to non-statutory searches reversing completely. Further research will be required to fully understand the implications of the changes to stop and search that have occurred since the establishment of the new National Stop and Search Database.

277. In 2014, the Scottish Police Authority commissioned Blake Stevenson Ltd to conduct 60 interviews with police officers of different ranks as part of a broader review of stop and search[105]. This research also highlighted differences between the West of Scotland, where stop and search was generally seen as 'business as usual', and the East/North areas of Scotland, in which officers perceived a significant increase in stop and search activity. This study also raised concern about the accuracy of the stop and search data, as there were examples of both under and over-recording on the electronic system. While officers had a good knowledge and

[104] Murray, K. (2015) 'Stop and search in Scotland: A post reform overview', Scottish Centre for Crime and Justice Research.
[105] Blake Stevenson: Stop and Search in Scotland: Primary Research Scottish Police Authority Final Report April 2014

understanding of the legislation in relation to statutory powers, there was more confusion around the use of non-statutory stop and search, which highlighted the need for more training and confidence-building. There was a general consensus that non-statutory stop and search was a useful tool, although concerns about human rights and the issue of the right to refuse were raised as problematic. There was a strong tension between the perceived pressure to deliver on numbers and targets around stop and search and the desire to operate on the basis of intelligence-led policing.

278. Kath Murray is currently reviewing the literature around stop and search for the Scottish Police Authority. Her work indicates that:

- the effectiveness of stop and search in terms of crime prevention and/or reduction remains unclear, despite academic interest in the area for at least fifteen years[106].

- a sense of procedural fairness results in greater public support for the use of stop and search, while a sense of unfairness can damage the police relationship with the public, reduce confidence in reporting matters to the police and undermine the sense of police legitimacy generally.

- robust accountability mechanisms would be required in order to effectively regulate the discretionary use of stop and search.

279. The pace of change in Scottish policing in recent months presents challenges in terms of presenting current and timeous research. This change has been felt especially in the area of stop and search, when a more uniform approach was sought throughout the whole country with unification. This saw an increase in the rate of recorded stop and search in the East and North, while a high-volume approach was maintained in the West, albeit with some reduction[107]. The recently introduced presumption in favour of statutory stop and search has changed the approach again. From June 2015 onwards, overall search rates and the proportion of non-statutory searches dropped significantly. For officers in the East and North, these recent developments are likely to signal a return to a more familiar low-key approach to stop and search. Conversely, in the West, the rapid move away from a high-volume non-statutory approach to stop and search is likely to mark a departure from a long-standing way of policing. These observations have important implications for officer training and any associated research.

280. There remains much to be understood about the use of stop and search tactics in Scotland, and research needs will undoubtedly increase in the coming years as the practice evolves. There is still a lack of understanding about the implications of the significant use of the tactic of stop and search in Scotland on white, working-class teenage boys. This compares with extensive research on the use of the tactic in England and Wales on black and minority ethnic groups. Professor Ross Deuchar will shortly undertake research on this area, looking at the impact of policing on the attitudes of such young men. The SPA has also commissioned Blake Stevenson Consultancy to undertake a study in young people's experiences of stop and search.

[106] Miller *et al.* 2000, The Impact of Stops and Searches on Crime and the Community, Home Office Police Research Series Paper 127

[107] Murray, K. (2015) 'Stop and search in Scotland: A post reform overview', Scottish Centre for Crime and Justice Research.

APPENDIX 1

REMIT OF THE STOP AND SEARCH ADVISORY GROUP

The Police Scotland report published on 31 March 2015 confirms that children under 12 will not be subject to non-statutory or consensual stop and search.

The report also confirms that Police Scotland is now introducing a presumption against non-statutory or consensual stop and search for all other age Groups.

The purpose of the Advisory Group is to advise on the long-term policy that 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 is the right approach 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 that it reaches, including any consequent legislation or change in tactic 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 the 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 is not expected to deal with matters such as data quality, training, ICT, performance management and audit. These are matters for Police Scotland to take forward.

The Advisory Group should take full account of the Police Scotland review of Consensual Stop and Search, as reported to the Cabinet Secretary for Justice on 31 March 2015, and the HMICS Audit and Assurance Review in relation to Stop and Search, published on 31 March 2015[108].

This review in respect of consensual or non-statutory stop and search will deal with the position relating to adults and young people aged 12 and over. The tactic of stop searching children under 12 on a consensual or non-statutory basis has ceased and is therefore not in scope for the Advisory Group.

[108] While the Scottish Police Authority's Scrutiny Review of Stop and Search of May 2014 was omitted in error from the Terms of Reference, it has been taken into account in the same way as the other reports specifically mentioned.

APPENDIX 2

MEMBERSHIP

Membership of the Advisory Group

John Scott, QC, Solicitor-Advocate, Capital Defence Lawyers,
Convenor, Howard League for Penal Reform in Scotland; Executive Committee Member (and Past Chair), Justice Scotland
Rose Fitzpatrick, QPM, Deputy Chief Constable, Police Scotland
Craig French, Scottish Government Legal Directorate
David Harvie, Head of National Casework Division, Crown Office and Procurator Fiscal Service
Anne Houston, OBE., FRSA., Chair of the Scottish Child Protection Committee Chairs' Forum.
Nico Juetten, Policy Officer, Scotland's Commissioner for Children and Young People
Morag McLaughlin, Board Member, Scottish Police Authority
Professor Susan McVie, Professor of Quantitative Criminology, University of Edinburgh
Derek Penman, QPM, HM Inspector of Constabulary in Scotland, Her Majesty's Inspectorate of Constabulary in Scotland

Secretariat

Alan Nicholson, Head of Secretariat, Advisory Group
Stephen Jones, Scottish Government

APPENDIX 3

MEETINGS

The following formal meetings of the Advisory Group took place –

27th April, 2015
15th June, 2015
3rd July, 2015
9th July, 2015
30th July, 2015
18th August, 2015
28th August 2015

In addition, certain other meetings were arranged, involving police officers, young people and others with relevant experience or knowledge. Some individuals provided assistance but preferred not to be named.

23 June 2015	Meeting with Professor Alan Miller, Chair of the Scottish Human Rights Commission
7 July 2015	Telephone conference with Dr Megan O'Neill, University of Dundee
9 July 2015	Presentation by Deputy Chief Constable Adrian Hanstock, British Transport Police, National Strategic Lead on Stop and Search for England and Wales – followed by discussion with the Group
10 July 2015	Meeting with Karyn McCluskey, Violence Reduction Unit, Police Scotland
14 July 2015	Meeting with Chief Constable Sir Stephen House QPM
27 July 2015	Meeting with John Carnochan OBE, St Andrew's University, former Co-Director of Violence Reduction Unit, Police Scotland
5 August 2015	Meeting with several operational police officers and three officers involved in training
11 August 2015	Niven Rennie, ASPS
11 August 2015	Calum Steele, SPF
13 August 2015	Jackie Brock, Children in Scotland
18 August 2015	Carly Edgar from Who Cares? Scotland and a young person who had been in care
18 August 2015	Meeting with Chief Superintendent Barry McEwan, Head of Licensing and Violence Reduction Unit and another operational officer
19 August 2015	Reverend Dr Martin Johnstone, Church of Scotland
20 August 2015	Meeting with two former law enforcement professionals, Diligent World
20 August 2015	John Muir and Graeme Brooks, Inverclyde Anti Knife Group
24 August 2015	Colin McKay, Chief Executive, Mental Welfare Commission
25 August 2015	Nicola Vallance-Ross, Project Partnership Co-ordinator, Young Scot
27 August 2015	Dr Kath Murray, University of Edinburgh
27 August 2015	Telephone conference with Ken Macdonald, Assistant Commissioner (Scotland and Northern Ireland), and David Freeland, Senior Policy Officer, Information Commissioner's Office
27 August 2015	Telephone conference with Professor Ross Deuchar, Assistant Dean (Research, Enterprise and International), University of the West of Scotland

APPENDIX 4

METHODOLOGY

Three key reports were considered by the Group –

1. Scottish Police Authority's Scrutiny Review of Stop and Search, May 2014(omitted in error from the Terms of Reference but the third key report leading to this review);
2. HMICS Audit and Assurance Review in relation to Stop and Search, 31 March 2015;
3. Police Scotland review of Consensual Stop and Search, 31 March 2015.

There was other material already available which we considered. It is listed in Appendix 5.

In view of some of the changes in the recording of stop and search we asked Police Scotland for regular updates of data. We received these updates throughout the period of the review.

In view of the short lifespan of the review we did not have time for a full public consultation. We wanted to generate some evidence specifically on the matters covered by our Terms of Reference. Accordingly we issued a Call for Evidence. As we wished to receive evidence from some hard to reach groups and individuals, we also issued a more accessible version. We used networks, mainly involving those working with children and young people, to reach out separately from the Call for Evidence.

As our Call for Evidence was issued with a short time to respond, we agreed to receive responses after the initial deadline (3 July 2015). Some responses came in before that date but several came in after it. See Appendix 6 for the responses.

We requested papers on specific aspects of our Terms of Reference from experts in law, policing and justice. These also informed our meetings. These are listed in Appendix 5("Position papers").

Meetings were held with key individuals and organisations, as listed in separate Appendix 3. Most of these involved the Chair of the Advisory Group meeting the individuals or groups and feeding back on the meetings to the rest of the Advisory Group. Some individuals attended Group meetings to provide us with presentations on specific aspects of the Terms of Reference.

We used Group meetings to discuss the evidence and material outlined above.

APPENDIX 5

MATERIALS CONSIDERED

SCOTTISH GOVERNMENT:

Scottish Government - News Release - Stop and Search Review, 31 March 2015

Scottish Executive - Central Research Unit - Police Stop and Search among White and Minority Ethnic Young People in Scotland, 2002

POLICE SCOTLAND:

Police Scotland - Update Report for the Cabinet Secretary for Justice, 31 March 2015

Police Scotland - Update report for the Cabinet Secretary for Justice, 31 March 2015 (extract)

Police Scotland - Stop and Search Briefing Paper for the Scottish Parliament Justice Committee and the Scottish Police Authority, June 2014

Police Scotland - Code of Ethics for Policing in Scotland

Police Scotland - Know Your Rights

Police Scotland and the Scottish Police Authority - Responses to Stop and Search Scrutiny Enquiry, 30 October 2014

SCOTTISH POLICE AUTHORITY:

Scottish Police Authority - Scrutiny Review - Police Scotland's Stop and Search Policy and Practice, May 2015

Scottish Police Authority - Stop and Search in Scotland: Primary Research – Blake Stevenson – Final Report, April 2014

Her Majesty’s Inspectorate for Constabulary in Scotland and Her Majesty’s Inspectorate for Constabulary:

Her Majesty's Inspectorate of Constabulary in Scotland - Audit and Assurance Review of Stop and Search, Phase 1, 31 March 2105

Her Majesty's Inspectorate of Constabulary - Stop and Search Powers 2: are police using them effectively and fairly?, March 2015

THE HOME OFFICE:

Home Office - Police and Criminal Evidence (PACE) Act 1984 - Code A - Revised Code of Practice for the Exercise by Police Officers of Statutory Powers of Stop and Search, 19 March 2015

Home Office - Police Powers of Stop and Search - Summary of Consultation Responses and Conclusions, April 2014

ACADEMIC RESEARCH:

The Modern Law Review - Disproportionate and Discriminatory: Reviewing the Evidence on Police Stop and Search, Ben Bowling and Coretta Philips

Scottish Centre for Crime and Justice Research - Stop and Search in Scotland: An Evaluation of Police Practice, Kath Murray, January 2014

Scottish Centre for Crime and Justice Research - Non-Statutory Stop and Search in Scotland, Kath Murray, January 2014

Scottish Centre for Crime and Justice Research - Stop and Search in Scotland: A Post Reform Overview – Scrutiny and Accountability, Kath Murray, June 2015

Scottish Institute for Policing Research and Napier University Edinburgh - The Fife Division (Police Scotland) Stop and Search Pilot Evaluation, June 2015

POSITION PAPERS:

Carnochan, J, Alcohol stop searches, (ex-Police Scotland)
Chalmers, J (2015), "Legislative gaps" and the possible abolition of consensual stop and search, University of Glasgow
Houston, A (2015), The Impact of Consensual Stop and Search on Children and Young People including issues around informed consent and child protection.
Juetten, N (2015), Notes on Law relating to CYP's Capacity and Age Thresholds, Scotland's Commissioner for Children and Young People
Police Scotland (2015), Briefing Note: Non-Statutory Stop and Search, Police Scotland
Lennon, G (2015), Position paper on the legality and legitimacy of using searching on the basis of consent in the absence of reasonable suspicion, University of Dundee
Lennon, G (2015)(2), Position paper on Criminal Justice Public Order Act 1994 s.60, University of Dundee
Mackintosh, F, The legality and legitimacy of using searching on the basis of consent, University of Edinburgh and High Court of Justiciary Appeal Court
Mead, D (2015), Stop and Search in England and Wales under the Human Rights Act, University of East Anglia
Murray, K, The legality and legitimacy of searching on the basis of consent in the absence of reasonable suspicion, University of Edinburgh
Quinton, P and Glynn, N, College of Policing – Various training and policy documents.
Johnston, I (2015) - Stop and Search in Scotland: Potential legislative gaps, Police Scotland

APPENDIX 6

RESPONSES TO CALL FOR EVIDENCE

The Secretariat to the Advisory Group received 11 responses to the Call for Evidence. Of those, seven respondents gave permission for their responses to be published.

THE HIGHLAND COUNCIL

FAO Head of Secretariat
Independent Advisory Group on Stop and Search

Dear Sir/Madam

Thank you for seeking views for the Independent Advisory Group on Stop and Search.

The Highland Council's Scrutiny Committee considered the Group's Call for Evidence and wishes to respond.

Firstly the Council would like to express its concern about the lack of available police data on stop and search activity. The Council's Committee expects to have information at its meetings on how many stop and search actions are carried out in Highland, what proportion are statutory and consensual, what their geographic spread is, how effective they are, who is targeted and how that compares to elsewhere in Scotland. There has been no data available for over a year and the last data presented covered only the total number conducted. For 2013/14 over 4000 stop and search actions were carried out. It is difficult for Elected Members to perform their scrutiny role on this activity without the data referred to above. The Advisory Group is asked to take this concern into account.

The Local Police Commander has advised Members that around 25 per cent of stop and search activity is consensual in Highland and that it mostly relates to alcohol use because there is no legal basis to search for alcohol. He advises that the position in Highland differs from elsewhere in Scotland. With these assurances from the Local Police Commander, Members felt that there was a case for consensual stop and search but that there should be a code of practice to underpin its use. The code of practice should not only involve reporting on its use as outlined above, but also the following points:

1. Stop and search should be used in a targeted and justified way where there is reason to believe that an offence may be committed.
2. Stop and search should be focused on tackling issues of concern to the local community, with due respect taken for the rights of law abiding children and young people. No young person or population of young people should be disproportionately subject to stop and search.
3. Consensual search should not be based on a person's characteristics such as gender, race or age and the reporting of it should enable scrutiny of any potential discrimination.
4. Variations in the use of stop and search needs to be considered, based on risk, with different approaches enabled in different areas. This would apply not only across the country but should also be considered within Highland, for example the potential need for it may vary between the city and rural areas and during festivals and events that attract people from out with the Highlands.

5. Due regard should be made to community relations, given to the negative impact the use of stop and search could have on younger people who can feel intimidated by searches and how this might affect their future relationships with police. Also if it transpires that the majority of stop and search exercises yield a nil-return, then the process risks damaging relationships between the police and young people. In this case the use of consensual stop and search should be reviewed.

Finally, the Council wishes to highlight the importance of partnership working, so that the Council and other partners can work together to prevent offences being committed to reduce the need for stop and search.

I hope these comments are of use for the Group's work. We are grateful for the opportunity to contribute.

I attach a respondent information form as requested.

Yours sincerely

Gordon Morrison
Parliamentary Officer
Chief Executive's Office
The Highland Council
(01463) 702547
(sent on behalf of Carron McDiarmid, Head of Policy and Reform)

THE ASSOCIATION OF SCOTTISH POLICE SUPERINTENDENTS

SUBMISSION OF EVIDENCE TO THE INDEPENDENT ADVISORY GROUP ON STOP AND SEARCH

We are obliged for this opportunity to present the opinions of our members, comprising of Superintendents and Chief Superintendents, on search practices in Scotland. In so doing, it is our intention to address each specific question in the 'call for evidence' in turn.

The on-going validity of non-statutory stop and search

We should highlight that this submission will refer to 'search' rather than 'stop and search'. In our opinion, the latter term is one more commonly used in England and Wales where specific difficulties relating to the practice were identified some time ago and thus the phrase 'stop and search' brings with it some negative perceptions. It is our contention that these issues did not extend to Scotland.

Indeed, the use of search in Scotland was reviewed at various points prior to the creation of the Police Service of Scotland and the practices were considered to be both proportionate and ethical. Indeed, in 1999, following the publication of the MacPherson report, an ACPOS short life working group found that there was nothing to suggest that search powers were being abused or utilised to the detriment of a particular section of society in Scotland. 'The Stephen Lawrence Inquiry: Action Plan for Scotland' was published that same year by the Scottish Executive and again noted that there had been no criticism of search practices in Scotland. The authors of that document expressed the opinion that a bureaucratic burden would be created should the MacPherson recommendations be implemented in Scotland. Later that same year a steering group advised against the use of performance targets in relation to search but recommended that searches should be recorded. In 2005, the recommendation to record searches was implemented.

In 2007, Sir Stephen House was appointed to the position of Chief Constable at Strathclyde Police. It should be recognised that Sir Stephen is an officer who had learnt his policing style in England and Wales and had latterly been a leader in the Metropolitan Police Service. As such, he introduced a rigorous 'metropolitan' **performance management** style to Scotland, which included a strong focus on the police use of search as a means of tackling violent crime. Since that time a decline in violent crime has been evident in the former Strathclyde Police area and the use of search has been considered to be a contributor to this. Notwithstanding, divisional management teams were provided with targets in respect of the number of searches they were to conduct and these were increased annually. In the opinion of our Association, the challenge to achieve the target became paramount rather than the expressed desire of 'keeping people safe'. In order to achieve the target, increased numbers of individuals were asked to 'consent' to search and the number of searches recorded grew dramatically. Until that time 'consensual search' was not a term that was widely recognised in Scotland.

On appointment as Chief Constable of the Police Service of Scotland, Sir Stephen retained the performance target approach and this brought a much sharper focus on certain categories of criminality than had previously been experienced in other areas of the country, including the preventative element of search. The numeric target of 'number of searches conducted' was removed but a new numeric target 'positive success rate' replaced it. Divisional Commanders

were still encouraged to maintain volume searches particularly where an increase in violent crime was perceived.

This Association stressed our opposition to search targets at that time as we did not believe that they would produce a tangible result and were more likely to produce adverse behaviour. We highlighted that properly targeted search would more likely create a climate where individuals were unlikely to carry weapons thus making a percentage success rate hard to achieve. Moreover, whilst it was suggested that the success rate was being achieved and thus violence was reducing, the statistics showed low levels of seizure in respect of weapons and that the success rate was only being achieved by the inclusion of other items, most notably alcohol for which there was no power of search.

Our observation is that the service has been erroneously focussed on the output activity of the number of searches conducted and their success rather than considering and developing more sophisticated measurements of performance. These might include measurement of the reduction of incidences of harm and a greater use of strong local partnership solutions.

A majority of our members support the retention of search with 'consent' due to perceived gaps in legislation, of which the power to search for alcohol is one such gap. We believe that the 'numerical target' approach has been the malaise that should be addressed and not the traditional method of policing in Scotland which, after all, was supported in the most recent reviews following 'MacPherson'.

The ability or capacity of some people to consent to a non-statutory search

At present, 'consensual search' is conducted outwith a statutory framework and there is no requirement for an officer to inform the individual subject to that search of their right to refuse. Added to this, there is no legal definition of 'consent' in respect of search, which in itself makes it very difficult for an officer to know what they should or should not accept as being a sign of consent. The Police Service of Scotland has recently introduced its own internal policy in an attempt to clarify this situation.

Additionally, concern was expressed by the Scottish Institute of Policing Research in a recent evaluation of the 'stop and search' pilot in Fife about potential limitations in understanding by members of the community, particularly for some minority communities, brought about by language barriers.

That having been said, having discussed this matter with their local scrutiny panels and in their communities our members report that there remains a **high level of public support** from local communities and politicians for the continuance of 'consensual search'. Discussion within our Association has thus centred on the perceived need for an 'informed' consent.

We recognise the expressed concerns of media commentators and national politicians to the effect that the present form of 'consent' could be construed in certain circumstances as compliance or acquiescence based an imbalance of power in favour of the police. Therefore ASPS supports the proportionate use of 'consensual search' as part of an intelligence led **public engagement strategy**, but always with the informed consent of the individual being searched.

There is an acknowledgement that a requirement for properly informed consent to be given would partly address any potential imbalance of power, this is particularly acutely observed in police interactions with young people and vulnerable groups, such as those with mental health issues or substance dependency.

Search by consent does allow the police to work to the **greater good of the community** and intervene before offending behaviour escalates, thereby 'protecting' the rights of innocent parties who suffer the effects of such behaviour. Changing the present consent arrangements could remove some of the operational benefit that the conventional practice in Scotland has offered.

Whether the practice of non-statutory stop and search should be ended altogether
As stated, for the operational reasons outlined above, the majority of the Association's members who have expressed a view are in favour of retaining consensual search.

This could be achieved within the existing non-statutory frameworks, although we accept that codifying arrangements can achieve greater accountability. The overarching reason given by our members for retention of consensual search is that, in their professional judgement, it provides operational staff with the opportunity to intervene 'early' and prevent certain behaviours or conduct escalating to an antisocial or criminal level.

Whether there are certain situations where gaps in police powers exist and when non-statutory stop and search should continue or whether any such gaps should be addressed in an alternative manner
There is a real concern, based on the perception of the role alcohol plays in driving such behaviours, that there are insufficient legal powers to search for alcohol in the absence of search by consent and a gap would be created that could leave young people exposed to a risk of harm. Moreover, there are numerous examples of operational situations that arise where no legislative power exists to allow search and 'consensual' search has resulted. These are normally in respect of minor public order situations.

Whether the police should be able to search a person to safeguard that person's health and wellbeing
Policing practice often requires an element of search in situations where concerns for wellbeing have been the 'trigger point' when engaging with a young person or a particularly vulnerable person in a public place. This may merely be a search for documentation in their possession that might establish their identity or address in order to provide requisite assistance. Any change in practice must enable the police to render such basic levels of assistance.

Whilst these situations border on public health matters, it may be an area worthy of some further consideration as to what extent clarification of search powers would assist the police to support the wellbeing of such individuals. Tighter application of rules around the use of search may highlight shortcomings in other wellbeing provisions, such as provisions under children and young persons and mental health legislation.

Whether there should be a Code of Practice for police officers undertaking stop and search, and what the basis of any Code of Practice should be, for instance, an internal police code or a statutory code backed by legislation

A Code of Practice could bring a lot of benefits, including helping to achieve transparency and the promotion of public confidence in the police. To achieve these potential benefits, the Association is of the opinion that any such code would have to be externally based, with a requirement on the Police Service of Scotland to work within it.

It is our observation that a Code of Practice should address the extent to which 'consensual search' may be used. For example, should the public be willing to 'consent' to search as a condition of entry to certain public spaces? After all numerous young people accept submission to search prior to gaining entry to an entertainment venue without complaint. To what extent is that lawful and should such provision be applicable elsewhere?
There must be a balance between the rights of the individual, who is potentially the subject of a search, and the rights of the wider community to go about their business in peace and safety in respect of this particular issue.

The impact, if any, of stop and search on specific age cohorts, socio-economic groups, those with protected characteristics (as defined by the Equalities Act 2010), for example particular ethnic groups and/or people with disabilities etc.
Sixteen years on from the MacPherson Inquiries and a decade on from the acknowledgement that all searches should be recorded, it is our observation that the management information collated is insufficient to fully determine the true extent of the use of search on specific age cohorts, socio-economic groups and those with protected characteristics.

We believe it to be essential that the highest quality management information is captured by the Police Service of Scotland and we are informed that revisions to internal recording process are designed to address these shortcomings. Quality management information will help provide full transparency of police activity and allow comprehensive and proper scrutiny, both internal and external to the organisation. We would further add that it is not just about who is searched but where, when and why they are searched and to what extent the reasons for commencing a search is commensurate with the outcome.

We would stress that one result of the intense scrutiny this matter has achieved in Scotland is the **levels of industry** that have been introduced to record searches and examine trends. A less labour intensive methodology must be employed as a matter of urgency. It was surely not the intention of the critics of current police practice that such valuable resource be diverted from their primary duties.

I trust that the foregoing is helpful to you and I should be glad to expand on any of the above matters in person if required.

Yours faithfully
Chief Superintendent Niven Rennie
President

ENABLE SCOTLAND

About ENABLE Scotland:
ENABLE Scotland was founded in 1954 by five families who came together to campaign for a better quality of life and equal opportunities for their children, who had learning disabilities.

ENABLE Scotland is now the largest voluntary organisation in Scotland of and for children and adults who have learning disabilities and their families. We have a strong voluntary network with around 5000 members in 40+ local branches and via individual and family memberships.

Around a third of our members have a learning disability. ENABLE Scotland campaigns to improve the lives of people of all ages who have learning disabilities and their families and carers. ENABLE Scotland also provides social care services to more than 2,000 people across Scotland who have learning disabilities or mental health problems.

Background:
On 26th November 2014 Linda Whitmore, ENABLE Scotland's Development Officer for Children and Young People attended the Cross Party Group for Children and Young People at the Scottish Parliament. The topic of the meeting was Young People and Policing. ACC Wayne Mawson and Inspector Angela MacLeod were at the meeting to talk about young people's engagement with Police Scotland. The subject of stop and search took up a good part of the discussion at the meeting. Linda had the opportunity to talk about the experience of a young man with mild learning disability who had been stopped and searched 3 times over the previous 2 years. This had a traumatic effect on the young man, whose anxiety when out in public was exacerbated by being stopped and searched. He does not know whether the searches were consensual or not, and has little understanding either of why he was searched or what his rights are with regard to stop and search.

After the meeting, Mr Mawson offered to meet with the young person personally, to listen to his story and find out what lessons could be learnt from it. This meeting took place at the end of April this year. The young person has also met with Inspector Craig Rankine, to talk about the Police Scotland Youth Volunteers and opportunities to assist with making training videos for probationers. The young person was also invited to attend the SPRA Family Day on Sunday 21st June 2015. As a result, this young man now has a much more positive perception of Police Scotland. However his story illustrates the fact that Police Scotland still has much work to do to improve their practice with regards to interacting with individuals with learning disabilities and other additional support needs.

ENABLE Scotland has had a further meeting with representatives from Police Scotland, including Inspector Ross McMath, to talk about how we can support Police Scotland in raising awareness of learning disability among probationers and more experienced officers. This work is on-going. We also submitted a response to Police Scotland's consultation on their Standard Operating Procedure for Stop and Search.

Specific issues:
1. Making assumptions based on appearance:
Police Scotland's Standard Operating Procedure (SOP) for Stop and Search lists some traits that a person may exhibit that might indicate reasonable grounds for suspicion for a statutory stop and

search. In our response to the SOP review, ENABLE pointed out to Police Scotland that some of these same traits can often be seen in people with a learning disability or other additional support needs (e.g. autistic spectrum disorder) for reasons entirely unconnected to criminal or dangerous activities. For example they may find being in a public place difficult and become anxious or agitated easily. Therefore police officers should have at least a basic understanding of how learning disability might affect behaviour.

2. Ability/capacity to give consent:
ENABLE Scotland has serious concerns that people with learning disabilities may give consent without fully understanding what is happening. This is because people with learning disabilities can tend to be more compliant than the general public or may be too embarrassed to admit that they don't understand the question.

A person with a learning disability may be able to give verbal consent for the search to take place, but have limited or no understanding of the procedure itself. More guidance is needed to assist officers to ask additional questions to ascertain that there is true understanding and not just compliance.

It is essential that officers understand the need to treat everyone with respect, give people ample time to reply to questions, and take into consideration that the person may have additional support needs that affect their communication or comprehension.

3. Understanding of rights:
A person with a learning disability is also less likely to understand what their rights are in relation to consensual stop and search i.e., that they are allowed to refuse consent for the search to take place. Even when they do understand what their rights are, a person with a learning disability may not feel able to refuse consent to be searched because of the perceived power imbalance.

ENABLE Scotland recommends that Police Scotland should ensure that they provide accessible information (preferably in an Easy Read format) about what rights people have with regard to stop and search. This would be in line with recommendation 45 of the Keys to Life[1] which states that "with immediate effect, justice organisations should ensure they develop easy read and other accessible information resources for all literature they produce that is available to the public."

4. Human rights approach:
ENABLE Scotland believes that Police Scotland's stop and search policies should be firmly grounded in a human rights approach. This would include specific reference to the relevant articles in the

Human Rights Act and the United Nations Convention on the Rights of the Child (UNCRC)[2] as well as clear indications of what these articles mean in practice for police officers.

5. Appropriate training for police officers:
The issues noted above all highlight the need for police officers to have a better understanding of learning disability and other additional support needs, including how these can affect behaviour.

ENABLE Scotland believes that training for all professionals in the criminal justice system, including police officers, who come into contact with people with learning disabilities and autistic spectrum disorders, should include the following elements:

- A basic understanding of learning disability, autistic spectrum disorders and other additional support needs
- Understanding the function of behaviour as a form of communication
- Communicating appropriately with people with learning disability, autistic spectrum disorders and other additional support needs

ENABLE Scotland would draw Police Scotland's attention to recommendation 48 in the Keys to Life which says "that all professionals involved in the criminal justice system should have access to the 2011 guide 'People with Learning Disabilities and the Criminal Justice System'[3] and consider how they can best support people in that context."

We would suggest that this guide be used as the basis for materials developed by Police Scotland for training probationers and experienced police officers in the afore-noted subjects.
For more information about any of the points raised above, please contact:

Kayleigh Thorpe
Campaigns and Policy Manager
Tel: 01698 737109
Email: Kayleigh.thorpe@enable.org.uk

1 Keys to Life (2013), Scottish Government, available here:
http://www.gov.scot/Publications/2013/06/1123
2 Scotland's Commissioner for Children and Young People (www.sccyp.org.uk) or Together (www.togetherscotland.org.uk) would be able to advise Police Scotland on children's rights in this context.
3 People with Learning Disabilities and the Criminal Justice System (2011), Scottish Government, available here: http://www.gov.scot/Resource/Doc/346993/0115487.pdf

CONVENTION OF SCOTTISH LOCAL AUTHORITIES

Independent Advisory Group on Stop and Search Call for Evidence

This response is based on previous representations made by COSLA elected members and soundings taken through our local government officer networks. It is underpinned by our four key principles:

- The empowerment of local democracy
- Integration rather than centralisation
- Outcomes rather than inputs
- Protection of local choice and accountability

Given local government's statutory role in police scrutiny, as outlined in the Police and Fire Reform (Scotland) Act 2012, we expect that the Independent Advisory Group (IAG) will also take the voice of locally elected members into consideration via local scrutiny committee arrangements or through their links with SPA Board members.

Based on the remit of the IAG and the suggested themes outlined in the call for evidence the response below focuses on the validity of stop and search as a tactic, the need to preserve local variation, the equalities implications and the need for a code of practice. While data collection is out of scope for this review, we have taken the opportunity to set out some of our concerns around this.

Validity of non-statutory stop and search

In response to the question on the validity of stop and search as a tactic we would support a clear statement or guidance ensuring that non-statutory searches were made only by exception. Reasons for non-statutory searches being made should be clearly demonstrated and recorded. We recognise the preventative community safety benefits of search as a general tactic.

With regard to the question of consent and those who are unable to or do not have the capacity to give consent for reasons related to health, it would make sense to develop a clear position on instances in which non-consensual searches may be made. Examples covered by this may include a police officer searching a person with dementia to gain identification or details of residence.

If a distinct category of search was developed in order to legitimise searches made to safeguard the health and well-being of a citizen, there would be a strong case for ending non-statutory searched altogether. Assurances would need to be offered, however, that this could not be used as a means of undertaking a non-statutory search by the back door (e.g. searching a young person for alcohol).

We note that consensual searches of those under 12 years of age fall out with the remit of this review; the impact of stop and search on young adults, however, should be closely considered. A survey of high schools in one local authority showed that more than one third of young people who had been searched believed the police officers to be 'judgemental'. Such findings are a reminder of the need for police officers to be conscious of developing a strong, trusting relationship with the population and this should begin with the youngest members of our community.

Local variation

When developing a policy on stop and search and a Code of Practice as suggested, it is imperative that variations in local circumstances and priorities are taken into account. It goes without saying that the same tactics that work in a densely populated urban area should not automatically be applied in a small, rural town and so Police Scotland must be able to tailor their approach to a wide variety of circumstances.

While we support Police Scotland's drive to ensure equality of access to services, COSLA believes this does not, by necessity, mean services should be delivered in a rigidly uniform way. COSLA would encourage dialogue to take place at a local level through community engagement and local scrutiny committee arrangements to allow Police Scotland to develop and agree approaches to stop and search which local communities are comfortable with.

In the spirit of joined up working and given Police Scotland's key role as a community planning partner, the approach applied to stop and search tactics should complement local priorities. For example, if knife crime is a particular issue identified by the community planning partnership or a community safety partnership, police officers' approach to stop and search should be based in that context rather than rigidly conforming to a nationally determined approach.

Equalities implications

COSLA and Police Scotland are signed up to the Scottish National Action Plan on Human Rights (SNAP) which sets out a vision for a Scotland in which everyone is able to live with human dignity. We would therefore seek assurances that the approach to stop and search adheres to SNAP and is based on the PANEL and FAIR approaches contained within the Action Plan.

In particular, Outcome 1 of the Action Plan seeks a 'Better Culture' in which people understand and can affirm human rights and organisations are enabled to put human rights into practice and are accountable for this. A sound stop and search policy would ensure that citizens are aware of their rights while being searched, are not discriminated against in the process and would enable Police Scotland, via the SPA and local scrutiny committees, to be accountable for putting human rights into practice.

Similarly, while we again note that under 12s are out of scope for this review, COSLA's elected members would seek assurances that GIRFEC principles were adhered to.

Finally, although the call for evidence does not ask for views on data reporting, COSLA believes as much data should be gathered as is practical in order to allow for a detailed analysis of the protected characteristics of those who are searched. This would allow for the equalities and human rights implications to be monitored.

Code of Practice

We strongly support the development of a Code of Practice being made available to police officers to guide their decisions and actions in relation to stop and search. This should not be developed in isolation, however, and should be developed in consultation with key stakeholders. In keeping with COSLA's aim to protect local choice and accountability, we would encourage this Code of Practice to be high-level with the ability to be adapted according to local circumstances.

Data collection

While the call for evidence expressly excludes data quality, training and ICT we would like to take the opportunity offered by this consultation to endorse the work currently being undertaken by Police Scotland to improve stop and search data recording. For any meaningful analysis to be made of stop and search as a tactic, robust and clear data must be available to all stakeholders. Section 45 of the Police and Fire Reform Act outlines that the local commander is required to provide the local authority with any reports that it requests on the carrying out of police functions in its area; statistical information on police complaints in its area; and any other information about the policing of its area that the local authority might reasonably require.

Stop and search data should therefore be recorded in a way that enables local scrutiny committees to analyse the information according to local priorities and, importantly, for that information to be disaggregated to suitably local levels (i.e. local authority, ward, etc.)

Finally, we would recommend that information is gathered on the home address of individuals who are searched. This would allow accurate profiling to be done and could help to inform targeted preventative work in which local authorities play a key role.

July 2015
COSLA

BARNARDO'S SCOTLAND

Key points
- **Many young people don't understand why they are being stopped and searched.**
- **Young people do not feel they have a choice, they often think police always have the right to stop and search them.**
- **This can lead to young people in certain areas and groups feeling targeted.**
- **It is often not possible for young people to distinguish between a non-statutory and a statutory stop and search**

Barnardo's Scotland response to the Independent Advisory Group on Stop and Search

We welcome the opportunity to respond to this call for evidence by the Independent Advisory Group on Stop and Search and we commend the Scottish Government for establishing the group.

Barnardo's is the UK's largest children's charity; we work with some of the most vulnerable and disadvantaged children and young people in Scotland; we do a wide range of work within the justice sector, both inside and outside the prison estate. We run over 120 services and work with over 20,000 children, young people and their families every year throughout Scotland.

We have multiple services and projects across Scotland which work with children and young people who display offending behaviour or who are involved in the justice system. However, as we know, the use of stop and search is not confined to children and young people who are engaged in anti-social or criminal behaviour, our response is therefore based on the views and experiences of a broad range of children and young people who are involved with our services.

The experience of our young people is that they are often not able to understand the difference between a statutory and non-statutory stop and search and this is often not made clear by police when they are stopped. More often than not, young people told us that the police do not explain that a search is 'voluntary'. No young person told us that they had ever been asked or informed by police that they had the right to refuse a consensual or voluntary search.

Young people also highlighted that the police do not tend to give reasons for the search. This lack of explanation and clarity about why they are being searched can lead to young people feeling targeted. This issue of being targeted was raised by a lot of our young people. In relation to this we are also concerned that the line between statutory vs. non-statutory searches is blurred, making it often impossible for the young person to know whether the police are working under statutory or non-statutory powers.

Barnardo's Scotland Project Worker
"We have been working with a number of looked after young people in residential placements who have experienced being stopped and searched in various places across Scotland (due to being in and out of authority placements). These young people have reported that the approach taken by police is varied.

Some have explained why they were being stopped and searched whilst others gave little reasons/explanations leading to the young people feeling targeted"

Similarly, although not directly related to stop & search:

Barnardo's Scotland Project Worker
"We have also dealt with an issue where looked after children and young people have been picked up by the police and returned to residential placements (some quite rural) despite being out on authorised 'free time'. The police would not believe them (as they were known to the police as being looked after) and took them back to the residential units. There may not have been searches involved but these experiences certainly gave the young people the impression they were being targeted"

Police do not have the statutory power to search a young person who they believe to be in possession of alcohol. Therefore the power used most often for dealing with anti-social behaviour related to alcohol is consensual or non-statutory stop and search. Whilst we understand the rationale behind this in terms of keeping young people safe from harm, we also know from experience that this can lead to young people being stopped, searched and targeted because of previous behaviour, peer group, geographical location etc.

This can lead to issues where young people do not trust police and are not willing to cooperate or contact police when there is a real problem, this can then be detrimental to their safety.

Barnardo's Scotland Project Worker
One of our services recently worked with a young person who has been stopped and searched on many occasions. For some of these searches he has understood why he has been searched; e.g. been drinking on the street, hanging around with young people who are known to the police. On other occasions he felt as though he was being targeted and was stopped and searched for no reason. I can remember at one point he was getting stopped nearly every day"

We believe one of the key elements to consensual stop and search is young people understanding and being able to exercise their rights. Most young people do not realise they have the right to refuse a consensual stop and search, and of those who do, the fear that refusal may lead to a stronger punishment may be enough to submit to a search, even though they have every right to refuse one. Some of our staff have anecdotal evidence of young men being adversely treated by police after they were informed of their rights, and then attempted to exercise them on their next encounter with police.

Below are some case studies from some of the young men we are working with in HM YOI Polmont about their experience of being stopped and searched (names have been changed). This workshop came about from a discussion on general rights with prison staff and some of the young men asked about what their specific rights were when they got stopped and searched, so they could be more informed.

Jack age 17
"I've never been asked to be searched, they jumped out of the car and started to search me, they never asked me anything. It's the same police that stop me all the time, they've got it in for me, they tell you that every time they see me I'm getting stopped until they get me off the streets. They said that they had suspicion of me carrying a knife, I've never had a knife, I don't carry knives. They just make things up, any excuse."

Ben age 17
"Boys get targeted more than the girls"
"They try and get as much on you so they can get you an ASBO"
"When they do they always try and bam you up so you lose the head and they can lift you"
"They definitely target young people especially me"

Declan age 16
"They pulled me 'cause I had dilated eyes, that's what they said but I had just woke up and started walking round to the shops"
"I've never been asked to be searched and I've never asked for a reason, I thought they had a right to just stop you 'cause they're the police and they can do what they want. As soon as I see the police I know I'm getting stopped"
"They're always trying to get me in the jail, they tell me that"
"It only bothers me when I'm sober, or on nothing and they stop me. I actually get harassed with them"

Liam age 16
"They waste my time, every time they see me they stop me. They never give me a reason, and I've never asked, they don't need a reason as they can do what they want. I feel as though they are out to get me. Just because I'm young they want to harass me"
Travis age 16
"When I got out of secure they were waiting for me, they never give you a reason, they don't have to. I've definitely never been asked for consent, that's a laugh even being asked that. I don't ask why 'cause I expect it when I see them. Most of the time I've given them no reason to be stopped. Sometimes I feel so frustrated."

Some of the above case studies highlight how the use of stop and search can often be used to target 'known suspects', young people who are known to the police, and perceived as being 'troublemakers'. This disproportionately affects young people, particularly young men in deprived communities. This is a concern for Barnardo's Scotland, we would only want to see children and young people being consensually stopped and searched if it was on the basis of a welfare concern.

We are concerned that the remit of non-statutory stop and search is so broad that young people can be searched for almost anything; there is a danger that police concern can be conflated with prejudice, personal judgements or previous interactions with a particular individual or group of individuals.

One of the main issues raised by the young men in the above case studies is that young people themselves are not aware of the distinction between non-statutory stop and search and statutory stop and search; this seems to only be a nuance understood by the police. As mentioned above, many young people are under the impression the police can "do what they want" they are not aware that in some circumstances they have the right to refuse to be searched. This indicates firstly that the police are not explaining to young people when searches are consensual and secondly that young people do not understand their rights in these situations.

We understand that Police Scotland have called for additional statutory powers to search young people for alcohol. We would be interested in wider discussion about this as we can see merit in such a move should the decision to abolish non-statutory stop and search be taken. Police should have the ability to search for, and remove alcohol from children and young people in line with GIRFEC principles, if the child or young person is putting their own health and safety at risk, this is a wellbeing concern and police should be able to deal with it as such.

However, if the power of non-statutory stop and search is retained, we would also welcome further discussion around duties on police to inform a child or young person of their rights at the point they are stopped, in line with obligations under the United Nations Convention on the Rights of the Child (UNCRC). As noted previously, when young people are taught about their rights by someone else they can be treated harshly by police when they try to exercise those rights. Therefore it would be useful to explore duties on the police themselves to inform young people of their rights at point of contact.

What we would like to see come out of the Independent Advisory Group is some recommendations for police behaviour. We would welcome a Rights Based Code of Practice for police, which runs alongside a programme of education and information for young people to make them aware of their rights, as too often trust and communication breaks down between police and young people.
We look forward to engaging further with this process as the Scottish Government and Police Scotland continue to look at potential reforms to the use of non-statutory stop and search.

For more information contact:
Mark Ballard, Head of Policy, Barnardo's Scotland
111 Oxgangs Road North, Edinburgh, EH14 1ED
mark.ballard@barnardos.org.uk / 0131 446 7028

STOPWATCH

Evidence to the Independent Advisory Group on Stop and Search

StopWatch is a coalition of civil society organisations, academics, lawyers, community workers, activists and young people which campaigns for fair and accountable policing, with particular reference to stop and search. We work to:

- Promote effective, accountable and fair policing;
- Inform the public about the use of stop and search;
- Develop and share research on stop and search and alternatives;
- Organise awareness raising events and forums;
- Provide legal support challenging stop and search.

Since forming in 2010, StopWatch has led a wide-ranging campaign against the disproportionate use of stop and search, the increasing use of exceptional stop and search powers and the weakening of accountability mechanisms. This includes legal and policy analysis, media coverage and commentary, political advocacy, litigation, submissions to national and international organisations and community organising. The unique mix of academics, activists, young people and lawyers has proved effective at challenging the current use of the tactic and drawing attention to the realities for those on the receiving end of police powers.

For more information on StopWatch and member organisations, please see: www.stop-watch.org.uk.

StopWatch's work has primarily focused on the use of stop and search by police forces in England and Wales and we have seen significant advances in the reform of this power over the last two years. It is our knowledge and experience of the situation in England and Wales, as well as our collective expertise on the issue of stop and search, that informs this submission.

Police stop and search is a highly influential point of contact between the police and the public. Stop and search in England and Wales is the ''litmus test'' for determining the state of community police relations[1]. When members of the public are treated fairly and with respect, they are more supportive of the police and more respectful of the law[2]. Research shows that unsatisfactory contact between the police and the public can have a negative impact on public confidence in the police, not only for the individual directly involved, but also for his or her family, friends, and associates[3]. Research demonstrates that levels of support and trust in the police are lower among people who have recently been stopped and searched, particularly if they experience the encounter negatively[4]. The data also show that positive stop and search experiences do little to improve trust and confidence in the police[5].

1 Metropolitan Police Authority (2004). Report of the MPA Scrutiny on MPS Stop and Search Practice. London: Metropolitan Police Authority. P4

2 Sunshine, J. and Tyler, T. R. (2003). 'The Role of Procedural Justice and Legitimacy in Public Support for Policing', Law and Society Review, 37, 3, 513-548; Tyler, T. R. (2006) 'Legitimacy and Legitimation', Annual Review of Psychology, 57, 375–400; Tyler, T. R. and Fagan, J. (2008). 'Legitimacy and cooperation: why do people help the police fight crime in their communities?', Ohio State Journal of Criminal Law, 6, 231-275; Hough, M., Jackson, J., Bradford, B., Myhill, A., and Quinton, P. (2010) 'Procedural Justice, Trust and Institutional Legitimacy', Policing: A Journal of Policy and Practice, 4: 203-2010.

3 Miller, J., Bland N., and Quinton P. (2000), 'The Impact of Stops and Searches on Crime and the Community,' Police Research Series Paper 127, London: Home Office.

4 Stone, V. and Pettigrew, N. (2000), 'The Views of the Public on Stops and Searches,' Police Research Series. Paper 129, Home Office: London.

5 Bradford, B., Jackson, J. and Stanko, E.A. (2009), 'Contact and confidence: Revisiting asymmetry in the impact of encounters with the police,' Policing and Society.

Police Scotland can only perform their job if they have the consent of the people. Solving crime relies directly on the willingness of communities as witnesses or victims of crime to pass on information and comply with the law. Unfair use of stop and search drives a wedge between the police and communities and jeopardizes their support of the police and their use of their powers.

In April 2014, the Home Secretary announced reform to stop and search in England and Wales declaring- "Nobody wins when stop and search is misapplied. It is a waste of police time. It is unfair, especially to young, black men. It is bad for public confidence in the police."

Another issue we are concerned about is the effectiveness of stop and search in detecting or preventing crime. The contribution of stops and searches to the detection and prevention of crime has been shown to be, at best, marginal because very few of the crimes that police-initiated encounters are designed to detect or prevent actually come to the attention of police officers[6] and police forces have not ensured that their officers use their powers in a focused and intelligence-led manner[7]. One crude measure of whether searches are effective or not is the proportion of those encounters which lead to an arrest[8]. On this measure, searches have been extremely ineffective because alongside the massive increases in their use over the last two decades, the arrest rate has decreased and shows the lack of a targeted approach to their use[9]. Powers which do not require reasonable suspicion have been even less effective and their lack of safeguards have meant that they have been used as a routine response to dealing with issues outside of their legal purpose, such as using terrorism powers to disperse groups of young people or deal with anti-social behaviour[10]. Therefore, it is important to view the use of stop and search and other police encounters as 'one tool in a tool box' of powers that may or may not be appropriate in a specific circumstance rather than as an essential general tactic to fight crime.

On 31 March 2015 Scottish Ministers announced the establishment of the Independent Advisory Group on Stop and Search (hereinafter 'the Advisory Group'). The Advisory Group launched a public consultation into the use of stop and search in Scotland, with particular regards to the issue of consensual stop and searches of people aged 12 and over (Police Scotland recently confirmed they would no longer use consensual searches in relation to those aged under 12).

The remit of the Advisory Group is to:

1. Consider and report to Scottish Ministers on whether a presumption against consensual stop and search [as proposed by Police Scotland] goes far enough or alternatively, if there should be an absolute cessation of the practice.
2. Develop a draft Code of Practice that will underpin the use of stop and search in Scotland.
3. Legislative options in relation to stop and search, including ways in which the Code of Practice can have a legislative basis; and

6 Miller et al., 2000

7 'Stop and Search Powers: Are the police using them effectively and fairly?', HMIC, 2013, http://www.hmic.gov.uk/media/stop-and-search-powers-20130709.pdf. It is of note that Section 163 stops were specifically excluded from the inspection.

8 Arrests rates arising from searches is often used as a crude measure of success but can only be used as an indicator because there are other outcomes that could arise, such as a warning or a fine, and many arrests do not then proceed onto conviction.

9 Michael Shiner and Rebekah Delsol (2015) The Politics Of The Powers in Rebekah Delsol & Michael Shiner (eds) Stop and Search: The Anatomy of a Police Power. Palgrave Macmillan

10 Simon Hallsworth (2006) Racial targeting and social control: looking behind the police. Critical Criminology 14(3) pp. 293-311

4. The use of statutory stop and search in relation to children and young people for more general safeguarding and wellbeing.

StopWatch will address each of these points in turn below:

1. Consensual stop and search should be abolished

The scale of stop and search in Scotland is of real concern, with the power being used at a rate of 977 searches per 10,000 of the population (both statutory and 'consensual' searches)[11] during the period April 2013 to December 2013. Compare this to the Metropolitan Police Service where the rate of stop and search for the same period was 306 per 10,000 of the population[12.] It is worth noting that 70 per cent of all searches carried out by Police Scotland were consensual[13.]

Stop and search provides some of the most intrusive and contentious powers available to the police. This was acknowledged by the Her Majesty's Inspectorate of Constabulary (HMIC) in its 2013 report when it said:

> *For decades the inappropriate use of these powers, both real and perceived, has tarnished the relationship between constables and the communities they serve, and in doing so has brought into question the very legitimacy of the police service. Thirty years after the riots in Brixton, concerns about how the police use stop and search powers were again raised following the riots in England in August 2011[14].*

Whether in England, Wales, Scotland or Northern Ireland, stop and search has the potential to undermine police legitimacy, particularly if it is not carried out in a fair and legitimate manner, undermine police legitimacy and trust. It is therefore vital that stop and search should be fair. StopWatch's view is that use of the powers can only be justified when they are used to confirm or allay a genuine suspicion - that a person is carrying a prohibited item– based on objective facts that are reasonable. As stop and search is inherently invasive, it should only be used when necessary and lesser alternatives will not do.

The notion of a 'consensual' search is, in our view, inherently flawed and cannot meet the definition of a fair stop and search as outlined above. This is because it is impossible to give 'informed consent'[15] to police officers requesting that an individual agree to being searched. Consent in practice encompasses a range of states from approving agreement to grudging compliance. There are two important components of consent, 1) *knowledge*, the information required to understand the request and 2) *power*, the ability to make choices on the basis of that knowledge[16]. The nature of the relationship between the police and citizens makes an equal balance of power extremely unlikely. As a result meaningful consent is likely to be unattainable.

11 Scottish Police Authority (2014), 'Scrutiny Review – Police Scotland's Stop and Search Policy and Practice. Final Report and Recommendations – May 2014' p30 http://www.spa.police.uk/assets/126884/230479/scrutinytaskgroupreport

12 ibid, p10

13 ibid, p30

14 Her Majesty's Inspector of Constabulary (2013), 'Stop and search Powers: Are the police using them effectively and fairly?' London: HMIC, p3 http://www.hmic.gov.uk/media/stop-and-search-powers-20130709.pdf

15 We recognise that there is no doctrine of informed consent in English law i.e. that there is no single legal definition of informed consent. However the requirement for free and true consent comes from the development of case law which recognises the autonomy of each individual person.

Stop and search in England and Wales is governed by the Police and Criminal Evidence Act (PACE) 1984 and an associated Code of Practice[17]. Despite these regulations, the Inquiry into matters arising from the death of Stephen Lawrence identified particular concerns about the continued use of 'voluntary' or non-statutory stop-searches[18]. These concerns were reflected in Recommendation 61:

> *That the Home Secretary, in consultation with Police Services, should ensure that a record is made by police officers of all 'stops' and 'stops and searches' made under any legislative provision (not just the Police and Criminal Evidence Act). Non-statutory or so called 'voluntary' stops must also be recorded. The record to include the reason for the stop, the outcome, and the self-defined ethnic identity of the person stopped. A copy of the record shall be given to the person stopped.*

The practical significance of this recommendation was two-fold: first, the proposal to record all stops meant, in effect, extending existing regulations governing the use of stop and search to situations in which officers ask members of the public to account for themselves (i.e. their actions, behaviour, presence or possession of anything); second, the insistence on recording non-statutory stops represented a form of rule tightening as it sought to close a loophole that was widely used by officers to sidestep existing regulations[19]. Interviews with almost 2,000 officers found that operational officers made less than one recorded stop and search annually. This was in contradiction of their observations of street policing and reports from officers, where they would expect to carry out four or five stop and searches on a late shift[20]. Consent bridged the gap between the records and reality. In April 2003, PACE Code A abolished the right of the police in England and Wales to carry out 'consensual' stop and searches.[21]

Often officers used the process of trying to gain consent to assess suspiciousness. As the truism insists, only the guilty have reason to resist. If the 'consensual' nature of a search is disputed, it will usually boil down to the suspect's word against the officer's. Without a written record of the search (assuming that it had been accurately completed) there is no evidence that the search even took place. The social processes involved in a stop and search cannot be neatly divided into discrete actions. An encounter may begin with a consensual conversation, which may lead the officer to become suspicious and the suspect impatient. The use of voluntary searches allowed officers to circumvent the rules. Considering the scale of consensual stop and search in Scotland, with Strathclyde reporting in 2010 that 76 per cent of all their stop and searches were

16 Dixon, Coleman et al. (1990) 'Consent and the Legal Regulation of Policing' Cardiff University: Journal of Law and Society http://www.jstor.org/stable/1410158

17 Home Office (2015) *Police and Criminal Evidence Act 1984: CODE A*, London: Home Office; https://www.gov.uk/government/publications/pace-code-a-2015

18 Macpherson, W. (1999), *Inquiry into the Matters Arising from the Death of Stephen Lawrence: Final Report*, London: The Stationery Office. https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277111/4262.pdf

19 Sanders, A. and Young, R. (2006), Criminal Justice. Oxford: Oxford University Press; Shiner, M. (2010) 'Post-Lawrence Policing in England and Wales: Guilt, Innocence and the Defence of Organisational Ego', British Journal of Criminology, 50(5): 935-953.

20 Dixon, Coleman et al. (1990) 'Consent and the Legal Regulation of Policing' Journal of Law and Society p347-9 http://www.jstor.org/stable/1410158

21 PACE Code A (2003) was issued under section 66(a)(i) of the Police and Criminal Evidence act 1984. It was laid before Parliament on 11 November 2002 and brought into force in April 2003 by SI 1995/450. The current version of the Code (2015) in force states the following: "1.5 An officer must not search a person, even with his or her consent, where no power to search is applicable. Even where a person is prepared to submit to a search voluntarily, the person must not be searched unless the necessary legal power exists, and the search must be in accordance with the relevant power and the provisions of this Code. The only exception, where an officer does not require a specific power, applies to searches of persons entering sports grounds or other premises carried out with their consent given as a condition of entry."

consensual[22], it would appear that a similar pattern of policing is occurring to that of police in England and Wales pre 2003. This is important because it raises concerns that the majority of searches are occurring outside of the established regulatory framework.

Consensual stops are, by their very nature, likely to be seen as less procedurally just than those that are carried out with due regard for the established regulatory requirements, heightening feelings of police lacking legitimacy and trust. Stop and search in this context undermines the relationship between individuals, communities and the police. As discussed below children and young people are particular targets for consensual searches, with data from 2010 indication that 16 year olds in Strathclyde being searched at a rate of 1406 per 1000 of the population[23]! Through our work with Y.STOP[24] we have consulted with hundreds of young people who live in communities who suffer high levels of stop and search, their experiences and stories relay the real damage suffered by young people and their families, damage that has been occurring for decades.

Comments from YSTOP young participants

Treatment by police

Police attitudes can turn people into active criminals; their constant harassment means you don't fear jail anymore. If they really want to stop crime, they should break this mentality and engage people while they are young.

The police officer was not interested when I told her I was threatened with a knife. Said "I don't care I don't believe you". Mum had to report for me, but police more interested in the other boy's parents.

They do not investigate murders; my friend called police to tell them who a murderer was and nothing happened – it was never recorded. If I reported something to the police I am not sure they would do anything about it.

Views of police

Some police are kind, but you don't see them again. I do not trust the police, I feel it in my heart, in my blood.

I hear negative stories from family and friends e.g. they do not help when you report a crime, so I would not go to them. A friend got mugged and then arrested. I have heard we should not talk to police because they will shoot us.

Would not talk to police as they make us nervous and scared. They do not trust us.

You look like you are in a gang if you wear baggy clothes, belt, chains, big trainers, snapbacks. Police look at how people dress which is offensive. We are scared of gangsters, we need the police to protect us from them.

22 Murray, Kath (2014) 'Non-statutory stop and search in Scotland.' Edinburgh: The Scottish Centre for Crime & Justice Research, http://www.sccjr.ac.uk/wp-content/uploads/2014/06/SCCJR-Non-statutory-stop-and-search-FINAL-1.4.pdf

23 Murray, Kath (January 2014) 'Stop and search in Scotland: An evaluation of police practice' University of Edinburgh: The Scottish Centre for Crime & Justice Research, http://www.sccjr.ac.uk/wp-content/uploads/2014/01/Stop_and_Search_in_Scotland1.pdf

24 Further details here: http://www.y-stop.org/ Also look at: StopWatch and Open Society Justice Initiative (2013), *Viewed With Suspicion: The Human Cost of Stop and Search in England and Wales,* New York: OSF. http://www.stop-watch.org/uploads/documents/vws-report.pdf

CELCIS

Introduction

CELCIS is the Centre for excellence for looked after children in Scotland. We exist to improve the experiences and life chances of children and young people in Scotland who are 'looked after' by local authorities, and those who have left care. We do this by working alongside the professionals who touch their lives, and within the wider systems responsible for their care.

We welcome this opportunity to submit a written response to the Independent Advisory Group on Stop and Search. This is relevant to looked after children and care leavers, and we feel that the impact of 'stop and search' on this group could potentially be very different to its impact on their peers who do not have experience of being looked after.

Looked After Children, Young People and Care leavers

In July 2014[1], the total number of looked after children in Scotland was 15,580. This represented 1 per cent of Scotland's under-22 year old population. 91 per cent of the 'looked after' population lived in community settings [that is; with parents (4,144), friends and family (4,181), foster carers (5,533), prospective adopters (201) or other community placements (51)], with the remaining 9 per cent (1,470) in residential settings [that is; in residential homes (697), in residential schools (393), in secure accommodation (82),in crisis care (16) or other residential placements (282)]. It is important to note that that the vast majority of looked after children live in the community (91 per cent), rather than in residential care settings.

Further, children who are looked after at home with parents (27 per cent) and those who live with family and friends (27 per cent) make up over half of the looked after population.

Around 12 per cent of looked after children (1893) were recorded as having a 'primary additional support need' as of July 2014. Of these, 510 children are recorded as having 'multiple disabilities' (3.3 per cent), 274 children have a learning disability (with a further 46 having a specific learning disability), 146 children (<1 per cent) have an autistic spectrum disorder and 94 children have a physical or motor impairment and relatively small numbers have a visual or hearing impairment (48 and 12, respectively). The largest category includes 513 children recorded as having 'social, emotional and behavioural difficulties' (equates to 3.3 per cent of the looked after child population). Furthermore, disability status is recorded as 'not known' or unrecorded for around 15 per cent of all looked-after children in Scotland.

The statistics above begin to illustrate the heterogeneity of looked after children, young people and care leavers. This is an important point as it highlights the complexity of their lives. All children and young people have a right to have their dignity upheld and the practice of Stop and Search should not be exempt from this entitlement.

Looked After children, young people and care leavers' prior experiences and the relationship to Stop and Search

Safeguarding and welfare must be of paramount consideration when undertaking Stop and Search on a person under 18. Moreover, care leavers who are over 18 are also a very vulnerable group.

1 Scottish Government. (2015).Children's Social Work Statistics 2013-14. Available online at http://www.gov.scot/Topics/Statistics/Browse/Children/PubChildrenSocialWork accessed on 7/5/15.

This group has high levels of mental ill health, and are likely to have been exposed to multiple risk factors throughout their lives, and thus also require an appropriate safeguarding response.

This should be borne in mind when thinking about looked after children and young people and care leavers alongside our knowledge that looked after child, young people and care leavers are very vulnerable to exploitation. If looked after children, young people or care leavers are searched and illegal items are found in their possession, it would be helpful if the Police considered, in the first instance, whether the person is a victim who may have been exploited and has limited capacity to make their own choices, rather than designating them an offender immediately.

The impact of early childhood abuse and neglect on emotional development and the issue of developmental delay can have a significant impact on behaviour and impulsivity. This can manifest itself in looked after children and care leavers and may cause what is essentially non-criminal, attention-drawing behaviour, leading to a greater risk of Police attention/interaction and thus greater risk of stop and search. Emotional immaturity and mistrust of Police may then escalate, what might otherwise be, a benign situation.

In England and Wales looked after children and care leavers are over-represented in the criminal justice system: they are nearly twice as likely as their peers to be cautioned or convicted of an offence, and a third of children in custody have been looked after[2]. This over-representation in England of this population strongly suggests a similar pattern in Scotland. Indeed, a report from 2013 suggests that more than one third of young offenders in Scotland had experience of living in care[3].

Many looked after young people and care leavers are at risk of offending due to experience of past abuse, neglect or unstable living arrangements, both prior to and following their entry to the looked after system. These factors may impact on their coping skills, including the ability to act appropriately, to express themselves adequately and to conform to social norms. This means that they may be more likely to exhibit behaviours which could be deemed grounds to carry out a Statutory Stop and Search. In some instances, behaviour that appears to be troublesome may arise more from past difficulties than from any criminal intent; it is often a form of communication, reflecting distress or a desire for engagement. It would be helpful if all police officers had an understanding of the vulnerabilities of all looked after children (children who may be looked after in the community as well as those in residential settings) and care leavers.

Stop and Search as a practice

We feel that the key recommendations by Kath Murray (2014) are applicable to looked after children, young people and care leavers and would encourage the adoption of these:

Stop and search in Scotland: Key Recommendations

1. The primary aim of stop and search should be clarified. Currently, it is unclear as to whether the aim is to detect or deter. The appropriate legal and regulatory framework should put in place to support the primary aim.

2 Department for Education (2014) The Children Act 1989 Guidance and Regulations: Volume 2: Care Planning, Placement and Case Review [Supplement] https://www.gov.uk/government/publications/children-act-1989-careplanning-placement-and-case-review

3 Broderick. R, McCoard. S & Carnie, J. 2014. Prisoners who have been in care as 'looked after children'. 2013: 14th Survey Bulletin. Scottish Prison Service. P.5.

2. The use of non-statutory stop and search raises concerns in relation to procedural protection, consent, proportionality and human rights. It is recommended that this practice is phased out. Going forward, the use of stop and search should be underpinned by legislation.
3. The use of stop and search on children should be reviewed with a view to establishing a set of clear guidelines for practice. In 2010, approximately 500 children aged 10 years and under were stopped and searched by the police, suggesting that the current approach is out of kilter with the welfare oriented approach to juvenile justice in Scotland.
4. Open access data are required in order to make policing transparent, accountable, and to secure a public mandate on the use of stop and search. The use of non-statutory stop and search and all other types of search powers should be clearly distinguished within these data[4].
5. Recording procedures should be put in place to measure the prevalence of stop and search, that is, the extent to which the same individuals are subject to multiple searches.
6. Research shows that repeat adversarial contact can have a negative impact on future behaviour of young people (McAra and McVie, 2005), and tends to be associated with more hostile attitudes towards the police (Guardian/LSE, 2011). A measure of prevalence would therefore allow repeat searches to be monitored, and enable Police Scotland to address any concerns that may arise in relation to disproportionality. In order to ensure robust data standards and to bring Scotland in line with England and Wales, it is recommended that Police Scotland, in conjunction with the Scottish Government and the Scottish Police Authority, seek to secure accredited status for stop and search data with the UK Statistics Authority[5].
7. Stop and search data should be routinely analysed to assess whether police practice seems proportionate to local patterns of offending, for example, in terms of the types of crime that are most likely to be carried out, and the demographic profile of offending. Particular consideration should be given to the age profile of stop and search.
8. Research should be undertaken to explore the deterrent effect of stop and search. Given that high volume stop and search has been justified in terms of falling levels of recorded crime and offending, it is important to establish whether a robust relationship exists between the two factors.
9. It is recommended that in-depth qualitative research is undertaken to assess the impact of stop and search on police-community relationships in Scotland.
10. Finally, it is recommended that research is undertaken to assess the effect of performance management on officer decision-making, and to ascertain whether the use of Key Performance Indicators and numerical targets is likely to influence the patterning of stop and search.

Implementation of these recommendations would provide a clearer picture of the prevalence of looked after children, young people and care leavers in Stop and Search activity. It would also enable the looked after population to understand their rights in this area and know that they are line with their human rights. This in turn would help support and promote a greater degree of trust and communication between the Police and one of Scotland's most vulnerable groups of children and young adults.

It would be good practice, as recommended by All Party Parliamentary Group for Children inquiry into 'Children and the Police' (July, 2014)[6], to produce 'specific guidance on carrying out stop and search on children and young people, including advice on safeguarding and child protection and what action should be taken to protect vulnerable children, for example children in care or those at risk of abuse and exploitation'. We think, in general, that there is not enough consideration given to the potential impact of a Stop and Search on young people, relative to the perceived benefits of conducting a stop and search.

4 For an example of best practice, see Metropolitan Police Service stop and search data:
http://www.met.police.uk/foi/units/stop_and_search.htm
5 For best practice, see Police Powers and Procedures (Home Office):
https://www.gov.uk/government/publications/police-powers-and-procedures-in-england-and-wales-201112

In consideration of recommendation '7' above, the positive impact of Stop and Searches needs to be reviewed in line of any potential negative impacts. Research from 2000 in England[7] suggested that searches played only a minor role in detecting offenders for the range of all crimes that they address, and a relatively small role in detecting offenders for such crimes that come to the attention of the police. Therefore, based on the British Crime Survey, the research concluded that there were 106 crimes which, in theory, might have been detectable by searches for every search arrest for such crimes. Similarly, for every 26 such offences recorded by the police, there was one search arrest.

However, they made a more notable contribution to police arrests for these crimes, totalling an average of 13 per cent across a range of forces. This research also suggested that Searches appear to have only a limited direct disruptive impact on crime by intercepting those going out to commit offences. Based on the British Crime Survey, it is estimated that searches reduced the number of 'disruptable' crimes by just 0.2 per cent in 1997. Equivalent figures for recorded crime range from 0.6 per cent to 2.3 per cent for 1998/9. However, less is known about their localised effects in relation to areas specifically targeted by the police.

In addition, in terms of recommendation '8' above, research by McAra and McVie (2013)[8] draws attention to the 'usual suspects' - young people who become sucked into a repeat cycle of contact with the system which has damaging consequences in terms of inhibiting desistance from offending and in terms of youth to adult criminal justice transitions. They would suggest that we need to attend to the needs of children and young people who offend which will then help to bring justice to victims and communities.

In contemporary political debate, attention is readily focused on what is perceived as an irreconcilable tension between tackling the broader needs of young people who offend and delivering justice for communities and for victims of crime. We would argue that these are not alternative strategies: indeed justice for communities and victims cannot be delivered unless the broader needs of young people are addressed.(p.9)

If this is the case we need to ask how Stop and Search supports our ability to address these needs, or does it begin and then reinforce a cycle of negative contact with the justice system in which the looked after population and care leavers are disproportionately represented. From practice, we suggest that looked after children and young people are more likely to be known to local Police via children's homes/residential school interactions and thus more likely identified and 'labelled'. Particular attention needs to be paid to negative labelling and stereotyping of looked after children and young people. This can be mitigated through education and awareness-raising amongst Police, as to the primary causes of why children become looked after (i.e. abuse and neglect) and the possible impact of this throughout a person's life course.

6 All Party Parliamentary Group for Children inquiry into 'Children and the Police' (July, 2014). Initial analysis of information request to police forces.
Available at http://www.ncb.org.uk/media/1150494/appgc_police_data_report_july_2014_final.pdf
7 Miller, Bland and Quinton (2000) The Impact of Stops and Searches on Crime and the Community, Police Research Series, Paper 127.
8 McAra, L. & McVie, S., (2013) Justice for young people. Available online at:
https://d19ylpo4aovc7m.cloudfront.net/fileadmin/howard_league/user/online_publications/Justice_for_young_people_web.pdf

Stop and Search and the Police's Corporate Parenting Duties

It would be helpful to know what proportion of those who are involved in a 'Stop and Search' are, or ever were, looked after. Collation of such data as described would help to assess the extent to which looked after children, young people and care leavers are subjected to Stop and Search. In addition to helping the police to fulfil their Corporate Parenting duties under section 58 of the Children and Young People (Scotland) Act 2014 (including the duty to be assess the needs of eligible young people and to be alert to issues which may affect their wellbeing), this would address the suggestion made by Kath Murray in her research on the use of Stop and Search in Scotland regarding the impact of this type of policing on some of Scotland's most vulnerable children and young people and the subsequent effect on their attitudes towards the police:

The impact of stop and search on police-community relationships is beyond the scope of this research project. Nonetheless, based on the findings in the report, it seems reasonable to suggest that young people in some parts of Scotland might feel that the use of stop and search in their locality seems excessive and unfair. This observation suggests that further research is required in order to assess the effect of stop and search on people's attitudes towards the police[9].

Furthermore, consideration needs to be given to how the practice of Stop and Search may interact with the Corporate Parenting role, particularly for children and young people who are looked after at home. Especially given that a Stop and Search may inhibit the formation of positive relationships between young people and the police. As Corporate Parents, the Police will be encouraged to adopt a 'care proofing and positive default bias' approach in line with Scottish Care Leavers Covenant and this would necessitate them becoming much more proactive in terms of a welfare and wellbeing approach towards looked after young people and care leavers.

Thank you for this opportunity to provide a response. We would welcome any further discussions with the Independent Advisory group.

CELCIS Contacts

Dr Lisa Ann Kennedy
Policy Implementation Associate
lisaann.kennedy@strath.ac.uk
0141 444 8504

Dr Andrea Priestley
Policy Implementation Lead
andrea.priestley@strath.ac.uk
0141 444 8533

9 Murray, K. (2014) Stop and search in Scotland: An evaluation of police practice. University of Edinburgh. Available at http://www.sccjr.ac.uk/wp-content/uploads/2014/01/Stop_and_Search_in_Scotland1.pdf

APPENDIX 7

PEELIAN PRINCIPLES OF POLICING (circa 1829)

1. To prevent crime and disorder, as an alternative to their repression by military force and severity of legal punishment.

2. To recognise always that the power of the police to fulfil their functions and duties is dependent on public approval of their existence, actions and behaviour, and on their ability to secure and maintain public respect.

3. To recognise always that to secure and maintain the respect and approval of the public means also the securing of the willing co-operation of the public in the task of securing observance of laws.

4. To recognise always that the extent to which the co-operation of the public can be secured diminishes proportionately the necessity of the use of physical force and compulsion for achieving police objectives.

5. To seek and preserve public favour, not by pandering to public opinion, but by constantly demonstrating absolutely impartial service to law, in complete independence of policy, and without regard to the justice or injustice of the substance of individual laws, by ready offering of individual service and friendship to all members of the public without regard to their wealth or social standing, by ready exercise of courtesy and friendly good humour, and by ready offering of individual sacrifice in protecting and preserving life.

6. To use physical force only when the exercise of persuasion, advice and warning is found to be insufficient to obtain public co-operation to an extent necessary to secure observance of law or to restore order, and to use only the minimum degree of physical force which is necessary on any particular occasion for achieving a police objective.

7. To maintain at all times a relationship with the public that gives reality to the historic tradition that the police are the public and that the public are the police, the police being only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the interests of community welfare and existence.

8. To recognise always the need for strict adherence to police-executive functions, and to refrain from even seeming to usurp the powers of the judiciary of avenging individuals or the State, and of authoritatively judging guilt and punishing the guilty.

9. To recognise always that the test of police efficiency is the absence of crime and disorder, and not the visible evidence of police action in dealing with them.

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APPENDIX 8

DRAFT CODE OF PRACTICE

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

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Chapter 1 Introduction
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Annex A Non-Exhaustive List of Statutory Powers of Stop or Search of the Person

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

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Annex D Conduct Of Intimate And Strip Searches

Foreword

The remit of the Advisory Group included the task of developing a draft Code of Practice to underpin the use of stop and search in Scotland. A draft is attached.

As is explained in the Report, the Group strongly recommend that there should be public consultation on the contents of the Code before it comes into effect. Whilst there are a number of very good reasons for consulting the public on the contents of a Code, it will, in particular, enable the public and – in due course – the Government and legislators to take a view not only on what is in the current draft, but whether there are other matters which ought to be dealt with in the Code. The Group identified a number of such matters. For example, should the Code seek to deal with powers to require removal of face coverings? Should the Code apply to searches of the person carried out in the exercise of a power to search premises?

The current draft of the Code quite deliberately does not deal with every possible eventuality; it was recognised that the inclusion or exclusion of some matters would depend on the Government's response to the key recommendations in the Report and/or to the responses received during any subsequent consultation exercise.

Similarly, the draft does not seek to define certain terms, on the basis that they are matters for the Government and/or legislators to decide, in light of responses to the consultation exercise. So, for example, the term "child", which has a number of legal definitions depending on the context, is not defined.

The success of any Code will depend on it being practicable and effective, and that means for members of the public as well as the constables of Police Scotland, so their input will be vital. Obvious examples include the detailed contents of Annex A (a list of statutory powers of stop and search most commonly relied upon by constables), and Annex D (conduct of intimate and strip searches), both of which will benefit from further participation from stakeholders, including Police Scotland.

The number and frequency of revisions to the PACE codes in England and Wales bear testimony to the fact that such Codes are living documents, capable of and indeed requiring adjustment over time and in light of changing circumstances. The attached draft is intended to be a starting point; we hope that it will stimulate debate, and look forward to hearing and considering others views on how it might be strengthened and improved.

Introduction

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

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

- that the main purpose of policing is to improve the safety and well-being of persons, localities and communities; and

- that the police should achieve that purpose by policing in a way which is accessible to, and engaged with, communities, and promotes measures to prevent crime, harm and disorder.

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

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

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

1.5 The purpose of this code is to:

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

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

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

2. Principles governing stop and search

2.1 Recognising that stopping and searching members of the public is a significant intrusion into their personal liberty and privacy, all stop and search activity must be appropriate, as defined by this code.

To be appropriate it must be:

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

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

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

2.2 The primary purpose of stop and search powers is as a tactic in the prevention, investigation and detection of crime.

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

3. Applicability of this Code

3.1 This code applies to:

(a) all stops and searches of the person carried out pursuant to a statutory power (see Annex A for a non-exhaustive list); and

(b) Searches of the person carried out in accordance with a warrant issued by a court in Scotland and listed at paragraph 4.22

3.2 This code does not apply to;

- Searches of persons in custody
- Searches of persons under arrest
- Searches of persons detained under Section 14 of the criminal procedure (Scotland) Act 1995
- Searches of persons held under section 16 of the Criminal Procedure (Scotland) Act 1995
- Searches conducted in Custody areas or at Charge bars
- Searches of vehicles
- Searches of premises
- Searches carried out pursuant to a warrant issued by a court in Scotland (other than those listed in paragraph 4.22)
- Stops required under section 163 of the Road Traffic Act 1988
- Seizures (see paragraph 3.3)

3.3 Terminology

Statutory Stop and Search

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

Constables must not search a person, even if they are prepared to submit to a search voluntarily, where no statutory power to search is applicable, and they have no warrant to do so. The only exception, where a constable does not require a specific power, applies to searches of persons entering sports grounds or other premises carried out with their consent given as a condition of entry.

Seizure

A seizure occurs when items are surrendered, or are removed from an individual by a constable, for the purpose of safeguarding the health and well-being of that individual or any other, in circumstances where the stop and search tactic has NOT been utilised and no physical search of an individual has taken place. This code does not apply to seizures.

Positive Stop and Search

A positive stop and search is when an item is recovered where possession of same implies criminality on the part of the individual being searched or any other; or potentially compromises the safety of that individual or any other.

Recordable Stop and Search

Any stop and search to which this code applies.

4. Basis for Carrying out Stop and Search

Stop and search powers requiring reasonable grounds for suspicion – rationale

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

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

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

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

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

Personal factors can never support reasonable grounds for suspicion

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

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

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

Reasonable grounds for suspicion based on information and/or intelligence

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

(a) a person who has been seen carrying such an article.

(b) crimes committed in relation to which such an article would constitute relevant evidence, for example, property stolen in a theft (including by housebreaking), an offensive weapon or bladed or sharply pointed article used to assault or threaten someone or an article used to cause damage to property (e.g. under Section 52 of the Criminal Law (Consolidation) (Scotland Act 1995).

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

Reasonable grounds for suspicion and searching groups

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

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

(a) that the group in question arranges meetings and marches to which one or more members bring articles intended to be used to cause damage and/or injury to others in support of the group's aims;

(b) that at one or more previous meetings or marches arranged by that group, such articles have been used and resulted in damage and/or injury; and

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

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

Reasonable grounds for suspicion based on behaviour, time and location

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

Securing public confidence and promoting community relations

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

Questioning to decide whether to carry out a search

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

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

4.13 There is no power to stop or detain a person in order to find grounds for a search. Constables have many encounters with members of the public which do not involve detaining people against their will and do not require any statutory power for a constable to speak to a person. However, if reasonable grounds for suspicion emerge during such an encounter, the constable may detain the person to search them, even though no grounds existed when the encounter began. Reasonable grounds for suspicion however cannot be provided retrospectively

by such questioning during a person's detention or by refusal to answer any questions asked. As soon as detention begins, and before searching, the constable must inform the person that they are being detained for the purpose of a search and take action in accordance with paragraphs 5.9 to 5.12 under "Steps to be taken prior to a search".

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

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

(a) that incidents involving serious violence may take place in any locality, and it is necessary to use these powers to prevent their occurrence; or

(b) that persons are carrying dangerous instruments or offensive weapons without good reason in any locality.

4.15 An authorisation under section 60 may only be given by a constable of the rank of inspector or above and in writing (although the requirement for the order to be in writing need not be met immediately and can be satisfied when it is practicable to do so). The authorisation must specify the grounds on which it was given, the locality in which the powers may be exercised and the period of time for which they are in force. The period authorised may not exceed 15 hours.

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

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

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

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

4.20 Authority under section 60(4A) for a constable in uniform to require the removal of disguises and to seize them may be given on the same grounds as specified in paragraph 4.14.

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

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

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

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

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

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

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

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

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

5 Conduct of Searches - General

5.1 All stop and search activity must be carried out with courtesy, without prohibited discrimination, and with respect for the human rights of the person concerned. Where the person is a child, care is required to ensure that the best interests of the child are given appropriate consideration.

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

5.3 The co-operation of the person to be searched must be sought in every case, even if the person initially objects to the search. A forcible search may only be made if it has been established that the person is unwilling to co-operate or resists. Reasonable force may be used as a last resort if necessary to conduct a search or to detain a person for the purposes of a search.

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

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

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

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

5.8 Searches involving exposure of intimate parts of the body must not be conducted as a routine extension of a less thorough search, simply because nothing is found in the course of the initial search. Searches involving exposure of intimate parts of the body may be carried out only at a nearby police station or other nearby location which is out of public view (but not a police vehicle). These searches must be conducted in accordance with paragraph 11 of Annex D except that an intimate search mentioned in paragraph 11(f) of Annex D may not be authorised or carried out under any stop and search powers.

Steps to be taken prior to a search

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

(a) that they are being detained for the purposes of a search;

(b) the constable's name and number (except in the case of enquiries linked to the investigation of terrorism, or otherwise where the constable reasonably believes that giving their name might put them in danger, in which case a warrant or other identification number shall be given) and the name of the police station to which the constable is attached;

(c) the legal search power which is being exercised, and

(d) a clear explanation of:
- (i) the object of the search in terms of the article or articles for which there is a power to search; and
- (ii) in the case of:
  - the power under section 60 of the Criminal Justice and Public Order Act 1994 (see paragraph X), the nature of the power, the authorisation and the fact that it has been given;
  - all other powers requiring reasonable suspicion:
  - the grounds for that suspicion. This means explaining the basis for the suspicion by reference to information and/or intelligence about, or some specific behaviour by, the person concerned.

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

5.10 Stops and searches under the power mentioned in paragraph 3.1(b) may be undertaken only by a constable in uniform.

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

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

6. Recording requirements

Searches which do not result in an arrest

6.1 When a constable carries out a search in the exercise of any power to which this Code applies and the search does not result in the person searched being arrested, a record must be made of it, electronically or on paper, unless there are exceptional circumstances which make this wholly impracticable (e.g. in situations involving public disorder or when the constable's presence is urgently required elsewhere).

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

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

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

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

Searches which result in an arrest

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

Record of search

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

- Details of the constable conducting the search
- Details of the corroborating constable
- Time
- Date
- Locus (nearest address, private place or street)
- Name
- Age
- Gender
- Date of Birth
- Address
- Self - defined ethnicity
- Telephone number – (Although there is no requirement for a person to provide their telephone number it must be recorded if given. If a person does not provide their telephone number or does not have a telephone number, that fact is to be recorded)
- Type of search
- The legislation used
- The grounds on which the search is based, including the grounds for reasonable suspicion
- The outcome of the stop and search
- Details of any item(s) recovered
- Location of any items recovered i.e. front right hand pocket
- The stop and search reference number must also be recorded

In the case of a search conducted pursuant to the power under section 60 of the Criminal Justice and Public Order Act 1994, the nature of the power, the authorisation and the fact that it has been given.

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

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

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

6.9 A record is required for each person searched.

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

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

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

7 Monitoring and Supervising Stop and Search

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

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

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

7.4 In order to promote public confidence in the use of the powers, Police Scotland must provide the Scottish Police Authority and local authorities with information about stop and search activity. This should support the functions of the Scottish Police Authority under Section 2(1) of the Police and Fire Reform (Scotland) Act 2012, and assist local authorities in monitoring and providing feedback on local policing, in terms of Section 45 of the 2012 Act.

Suspected misuse of powers by individual constables

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

as a result of such monitoring, with best practice identified and communicated proactively throughout Police Scotland.

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

Notes for guidance

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

2 The "relevant protected characteristics" referred to in paragraphs [X] and [Y] are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

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

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

or

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

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

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

Similarly, any contact with children aged between 16 and 18 who are subject to compulsory supervision under the terms of the Children's Hearings (Scotland) Act 2011 should be reported to the appropriate authorities.

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

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

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

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

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

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

Recording

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

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

12 It is important for monitoring purposes to specify when authority is given for exercising the stop and search power under section 60 of the Criminal Justice and Public Order Act 1994.

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

14 Arrangements for public scrutiny of records should take account of the right to confidentiality of those stopped and searched. Anonymised forms and/or statistics generated from records should be the focus of the examinations by members of the public. The groups that are consulted should always include children and young persons.

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

ANNEX A Non-exhaustive list of powers of stop search of the person

[To be completed following consultation.]

ANNEX B – Example of Information to be Given to Persons subject to Stop and Search

Know Your Rights

Why do the police use stop and search?

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

When can police stop and search you?

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

Things you should know about stop and search

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

There are three different types of stop that police use:

1. Statutory Stop and search

This is when a constable believes that you are committing a crime and uses their policing powers to stop you and then searches:

- You
- Your clothes
- Anything that you are carrying- like a bag or wallet, for example
- [A vehicle you are travelling in]

2. Seizure

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

3. Vehicle Stop

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

Your right to complain

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

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

ANNEX C ESTABLISHING GENDER OF PERSONS FOR THE PURPOSE OF SEARCHING

1. Certain provisions of this Code explicitly state that searches and other procedures may only be carried out by, or in the presence of, persons of the same sex as the person subject to the search or other procedure. See Note A1.

2. All searches and procedures must be carried out with courtesy, consideration and respect for the person concerned. Constables should show particular sensitivity when dealing with transgender individuals (including transsexual persons) and transvestite persons (see Notes A2, A3 and A4).

(a) Consideration

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

4. When establishing whether the person concerned should be treated as being male or female for the purposes of these searches and procedures, the following approach which is designed to minimise embarrassment and secure the person's co-operation should be followed:

(a) The person must not be asked whether they have a GRC (see paragraph 8);

(b) If there is no doubt as to as to whether the person concerned should be treated as being male or female, they should be dealt with as being of that sex.

(c) If at any time (including during the search or carrying out the procedure) there is doubt as to whether the person should be treated, or continue to be treated, as being male or female:

(i) the person should be asked what gender they consider themselves to be. If they express a preference to be dealt with as a particular gender, they should be asked to indicate and confirm their preference [in writing?]. Subject to (ii) below, the person should be treated according to their preference;

(ii) if there are grounds to doubt that the preference in (i) accurately reflects the person's predominant lifestyle, for example, if they ask to be treated as a woman but documents and other information make it clear that they live predominantly as a man, or vice versa, they should be treated according to what appears to be their predominant lifestyle and not their stated preference;

(iii) if the person is unwilling to express a preference as in (i) above, efforts should be made to determine their predominant lifestyle and they should be treated as such. For example, if they appear to live predominantly as a woman, they should be treated as being female; or

(iv) if none of the above apply, the person should be dealt with according to what reasonably appears to have been their sex as registered at birth.

5. Once a decision has been made about which gender an individual is to be treated as, each constable responsible for the search or procedure should where possible be advised before the search or procedure starts of any doubts as to the person's gender and the person informed that the doubts have been disclosed. This is important so as to maintain the dignity of the person and any constables concerned.

b) Documentation

6. The person's gender as established under paragraph 4(c) (i) to (iv) above must be recorded in the person's custody record or, if a custody record has not been opened, on the search record or in the constable's notebook. 7. Where the person elects which gender they consider themselves to be under paragraph 4(b)(i) but, following 4(b)(ii) is not treated in accordance with their preference, the reason must be recorded in the search record, in the constable's notebook or, if applicable, in the person's custody record.

(c) Disclosure of information

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

Notes for Guidance

A1 Provisions to which paragraph 1 applies include:

- Example 1…

A2 While there is no agreed definition of transgender (or trans), it is generally used as an umbrella term to describe people whose gender identity (self-identification as being a woman, man, neither or both) differs from the sex they were registered as at birth. The term includes, but is not limited to, transsexual people.

A3 Transsexual means a person who is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of gender reassignment, which is a protected characteristic under the Equality Act 2010, by changing physiological or other attributes of their sex. This includes aspects of gender such as dress and title. It would apply to a woman making the transition to being a man and a man making the transition to being a woman, as well as to a person who has only just started out on the process of gender reassignment and to a person who has completed the process. Both would share the characteristic of gender reassignment with each having the characteristics of one sex, but with certain characteristics of the other sex.

A4 Transvestite means a person of one gender who dresses in the clothes of a person of the opposite gender. However, a transvestite does not live permanently in the gender opposite to their birth sex.

A5 The chief constable is responsible for providing corresponding operational guidance and instructions for the deployment of transgender constables and staff under their direction and control to duties which involve carrying out, or being present at, any of the searches and procedures described in paragraph 1. The guidance and instructions must comply with the Equality Act 2010 and should therefore complement the approach in this Annex.

ANNEX D – CONDUCT OF INTIMATE AND STRIP SEARCHES

A - Intimate search

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

(a) Action

2. Body orifices other than the mouth may be searched only:

(a) if authorised by a constable of inspector rank or above who has reasonable grounds for believing that the person may have concealed on themselves:

(i) anything which they could and might use to cause physical injury to themselves or others at the station; or

(ii) a Class A drug which they intended to supply to another or to export; and the constable has reasonable grounds for believing that an intimate search is the only means of removing those items; and

(b) if the search is under paragraph 2(a) (ii) (a drug offence search), the detainee's appropriate consent has been given in writing.

2A. Before the search begins, a constable or designated detention constable, must tell the detainee:-

(a) that the authority to carry out the search has been given;

(b) the grounds for giving the authorisation and for believing that the article cannot be removed without an intimate search.

2B. In the case of children, mentally vulnerable or mentally disordered suspects, the seeking and giving of consent must take place in the presence of the appropriate adult. A detainee who is not legally represented must be reminded of their entitlement to have free legal advice, and the reminder noted in the custody record.

3. An intimate search may only be carried out by a registered medical practitioner or registered nurse.

4. An intimate search under:

- paragraph 2(a)(i) may take place only at a hospital, surgery, other medical premises or police station;

- paragraph 2(a)(ii) may take place only at a hospital, surgery or other medical premises and must be carried out by a registered medical practitioner or a registered nurse.

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

6. When an intimate search under paragraph 2(a) (i) is carried out by a constable, the officer must be of the same sex as the detainee (see Annex A). A minimum of two people, other than the detainee, must be present during the search. Subject to paragraph 5, no person of the opposite sex who is not a medical practitioner or nurse shall be present, nor shall anyone whose presence is unnecessary. The search shall be conducted with proper regard to the sensitivity and vulnerability of the detainee.

(b) Documentation

7. In the case of an intimate search, the following shall be recorded as soon as practicable in the detainee's custody record:

(a) for searches under paragraphs 2(a) (i) and (ii);
- the authorisation to carry out the search;
- the grounds for giving the authorisation;
- the grounds for believing the article could not be removed without an intimate search;
- which parts of the detainee's body were searched;
- who carried out the search;
- who was present;
- the result.

(b) for searches under paragraph 2(a) (ii):

- the giving of the warning required by paragraph 2B;
- the fact that the appropriate consent was given or (as the case may be) refused, and if refused, the reason given for the refusal (if any).

8. If an intimate search is carried out by a constable, the reason why it was impracticable for a registered medical practitioner or registered nurse to conduct it must be recorded.

B - Strip search

9. A strip search is a search involving the removal of more than outer clothing. In this Code, outer clothing includes shoes and socks.

(a) Action

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

The conduct of strip searches

11. When strip searches are conducted:

(a) a constable carrying out a strip search must be the same sex as the detainee (see Annex D);

(b) the search shall take place in an area where the detainee cannot be seen by anyone who does not need to be present, nor by a member of the opposite sex (see Annex A) except an appropriate adult who has been specifically requested by the detainee;

(c) except in cases of urgency, where there is risk of serious harm to the detainee or to others, whenever a strip search involves exposure of intimate body parts, there must be at least two people present other than the detainee, and if the search is of a child or mentally disordered or otherwise mentally vulnerable person, one of the people must be the appropriate adult. Except in urgent cases as above, a search of a child may take place in the absence of the appropriate adult only if the child signifies in the presence of the appropriate adult that they do not want the adult to be present during the search and the adult agrees. A record shall be made of the child's decision and signed by the appropriate adult. The presence of more than two people, other than an appropriate adult, shall be permitted only in the most exceptional circumstances; Note: Paragraph 1.5A of this Code extends the requirement in this sub-paragraph to a strip search of a 17-year-old.

(d) the search shall be conducted with proper regard to the sensitivity and vulnerability of the detainee in these circumstances and every reasonable effort shall be made to secure the detainee's co-operation and minimise embarrassment. Suspects/accused who are searched shall not normally be required to remove all their clothes at the same time, e.g. a person should be allowed to remove clothing above the waist and redress before removing further clothing;

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

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

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

(b) Documentation

12. A record shall be made on the custody record of a strip search including the reason it was considered necessary, those present and any result.

Notes for Guidance

A1 Before authorising any intimate search, the authorising constable must make every reasonable effort to persuade the detainee to hand the article over without a search. If the detainee agrees, a registered medical practitioner or registered nurse should whenever possible be asked to assess the risks involved and, if necessary, attend to assist the detainee.

A2 If the detainee does not agree to hand the article over without a search, the authorising constable must carefully review all the relevant factors before authorising an intimate search. In particular, the constable must consider whether the grounds for believing an article may be concealed are reasonable.

A3 If authority is given for a search under paragraph 2(a) (i), a registered medical practitioner or registered nurse shall be consulted whenever possible. The presumption should be that the search will be conducted by the registered medical practitioner or registered nurse and the authorising constable must make every reasonable effort to persuade the detainee to allow the medical practitioner or nurse to conduct the search.

A4 A constable should only be authorised to carry out a search as a last resort and when all other approaches have failed. In these circumstances, the authorising constable must be satisfied the detainee might use the article for one or more of the purposes in paragraph 2(a)(i) and the physical injury likely to be caused is sufficiently severe to justify authorising a constable to carry out the search.

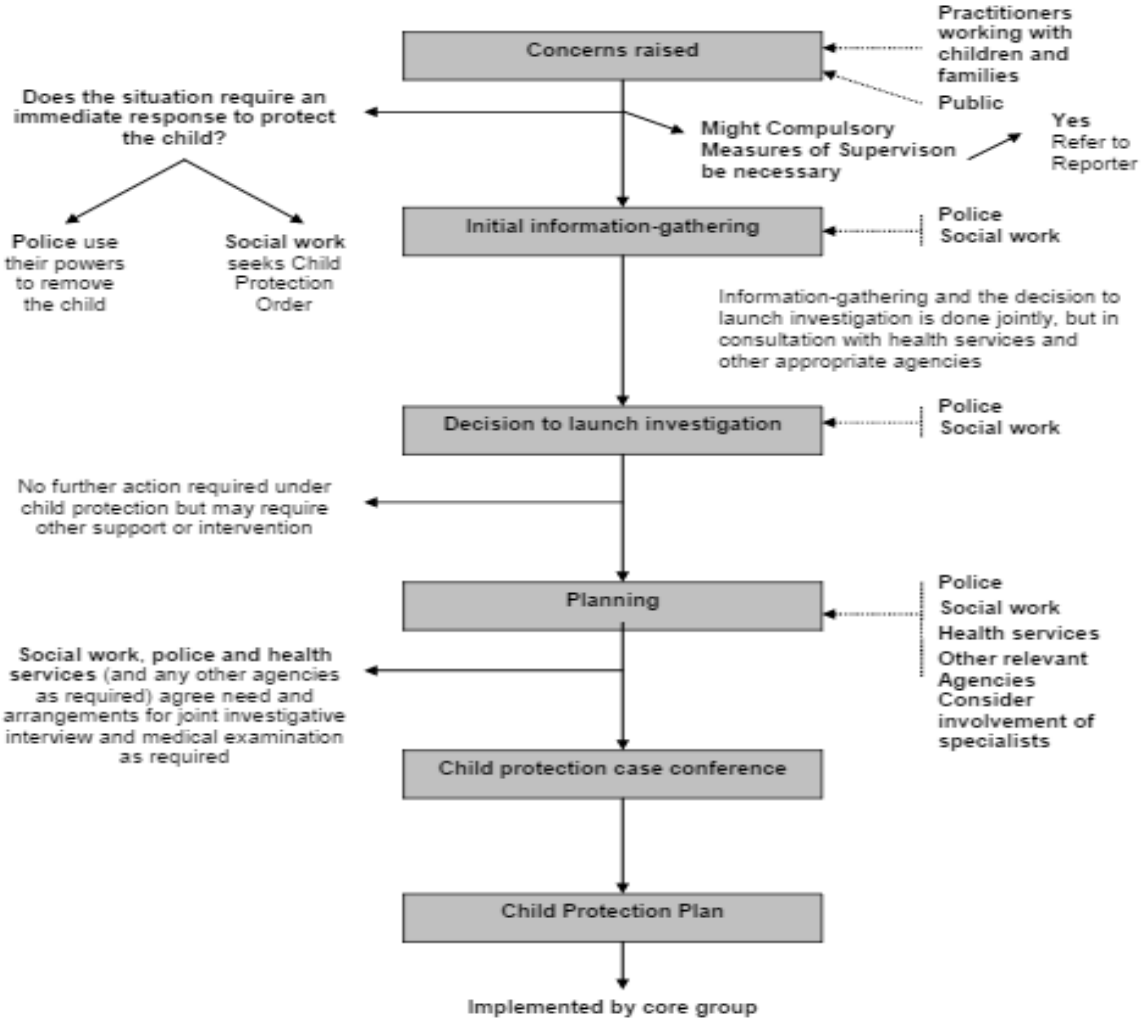
A5 If a constable has any doubts whether to authorise an intimate search by a constable, the constable should seek advice from a constable of superintendent rank or above.

APPENDIX 9

EXTRACT FROM NATIONAL GUIDANCE FOR CHILD PROTECTION IN SCOTLAND 2014

RESPONDING TO CONCERNS ABOUT CHILDREN

321. The process of responding to child protection concerns in diagrammatic form can be represented in the following way. However, it should be noted that at any stage, the process may be stopped if it is felt emergency measures are required to protect the child or no further response under child protection is necessary.



APPENDIX 10

TIMELINE

2012

OCT - DEC	Findings from University of Edinburgh doctoral research shared with key stakeholders. Research recommends move to a statutory model of stop and search.

2013

JAN	University of Edinburgh doctoral research, '**Searching Questions: The Future of Stop and Search in Scotland**' brings use of non-statutory stop and search to wider attention.
JUNE	**26th - SPA Public Board Meeting –** members request regular updates on stop and search activities. Police Scotland undertake to present a 'deep-dive' report at the next public board meeting.
JULY	**9th - HM Inspectorate of Constabulary** published a report covering England and Wales which found there was too little supervision, results were not always properly recorded and people were not being treated fairly.
AUG	**21st - SPA Public Board Meeting –** members agreed to undertake a **scrutiny review of** stop and search processes.

2014

JAN	Research report '**Stop and search in Scotland**' published by the Scottish Centre for Crime and Justice Research. Report brings use of non-statutory stop and search, the scale of police practice and the impact on young people to public attention.
MAR	Scottish Liberal Democrats announce intention to table amendments to the Criminal Justice (Scotland) Bill to place stop and search on a statutory footing.
APR	Publication of primary research by Blake Stevenson Consultancy on officer stop and search practices (commissioned by Scottish Police Authority).
MAY	**2nd - HMICS** announce a review of Police Scotland's stop and search processes (as part of work programme for 2014-15). **30th - SPA** scrutiny review published - 12 recommendations - 10 for Police Scotland, 2 for the SPA.
JUNE	**19th - Justice Sub-Committee on Policing –** members take evidence from Police Scotland and the SPA on stop and search. Police Scotland announces it will cease the practice of non-statutory stop searches of children aged 11 and under (from 23 June 2014).
JULY	**7th - Police Scotland's Fife Pilot** started (to run for 6 months).
OCT	**30th - SPA Public Board meeting** – Members discuss papers on progress made by both Police Scotland and the SPA on 30th May recommendations. Police Scotland indicate acceptance of all 10 recommendations and that steps are being taken to address them.
NOV	**14th - Police Scotland National Stop and Search Workshop** – Glenrothes **SPA begin Phase 1 of qualitative research over a two-year period** on the impact of stop and search on different groups of the community, particularly young people.
DEC	**17th - SPA Public Board meeting**: Stop and search high level data to be included in the SPA's Q2 performance report. **SPA qualitative research** - provisional results due.

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DEC – MAR	**Police Scotland - Fife Pilot** – Independent academic evaluation of Fife Pilot to be undertaken.
FEB	**4th - Police Scotland's Fife Pilot** concludes. **5th - First Minister** announces that, following the Pilot exercise in Fife, Police Scotland to consider whether the practice on non-statutory searches should be ended. **13th - SPA Board Meeting –** SPA reviews recent developments in relation to stop and search. **16th -** Non Government amendments are tabled to the Criminal Justice Bill to bring an end to non-statutory stop-and-search and sets SPA expectations of the proposed Police Review of Practice. **19th - Justice Sub-Committee on Policing –** stop and search evidence session with Police Scotland, SPA and SPF **24th - SPA Board Meeting** – consideration of Police Scotland response to SPA requirements at meeting of 19 February. **26th - Police Scotland - Short Life Working Group – first meeting**
MAR	**31st - Police Scotland's Stop and Search Working Group** to provide a final report to the SPA Board meeting on progress made on the 10 SPA review recommendations. **31st - Police Scotland –**update report to Cabinet Secretary for Justice on Stop and Search **31st - HMICS review of stop and search processes:** Audit and Assurance Review of Stop and Search. Guidance, Processes and Systems for Stop and Search. **Phase 1** Report published. **31st - CABINET SECRETARY FOR JUSTICE – ANNOUNCES THE ESTABLISHMENT OF A NEW STOP AND SEARCH ADVISORY GROUP TO BE CHAIRED BY JOHN SCOTT QC**. **Fife Pilot** – Independent academic evaluation of Fife Pilot to conclude. **Police Scotland Fife Pilot** – Independent academic evaluation of Fife Pilot concludes.
MAY	**Police Scotland Fife Pilot** – Independent academic evaluation of the Pilot. Police Scotland to issue final report on findings.

NOTES

Image: BBC

Edinburgh
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