

## **Justice Committee**

### **Proceeds of Crime Act 2002 (Searches under Part 5: Constables in Scotland: Code of Practice) Order 2018 [draft]**

#### **Written submission from the Law Society of Scotland**

##### **Introduction**

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Criminal Law Committee welcomes the opportunity to consider and respond to the Consultation: Draft Code of Practice on the Exercise by Constables in Scotland of Search Powers Conferred by Sections 289 and 303C of the Proceeds of Crime Act 2002 (2002 Act) (draft Code). The committee has the following comments to put forward for consideration.

##### **General Comments**

Our interests in relation to the draft Code lie mostly in the remit of criminal lawyers who tend to be involved in the civil recovery proceedings of unlawful conduct post-conviction. Before any such proceedings commence in court, the actual items included, representing cash or a listed asset under Part 5 of the 2002 Act, may well have been seized during a search by constables in Scotland under sections 289 and 303C of the 2002 Act of the type covered by the draft Code. The purposes of the draft Code as to how such searches are to be conducted are clearly articulated under paragraph 1.6.

The draft Code is intended to replace the Code of Practice in Scotland issued under section 293 of the 2002 Act (which was brought into force on 1 June 2015 by Scottish Statutory Instrument 2015/220). The draft Code is made under section 303H of the 2002 Act and provides much greater detail as to the requirements imposed and to be exercised by police officers when exercising their powers under sections 289 and 303C of the 2002 Act than existed under the current Code. Clarification as to how such powers should be exercised is welcomed as it seeks to address the balance of the interests of the persons being searched and the State in undertaking the civil recovery of the proceeds as a result of unlawful conduct.

The draft Code should be read in conjunction with the draft Code of Practice issued under section 330G of the Proceeds of Crime Act 2002 Recovery of Listed Assets: Search Powers (England and Wales and Scotland) which sets out the detail as to how similar powers should be exercised in Scotland by the officers of Customs and Excise and immigration officers.<sup>1</sup>

The draft Code substantially incorporates the contents of the Code of Practice on the Exercise by Constables of Powers of Stop and Search of the Person in Scotland (laid before the Scottish Parliament on 11 January 2017)<sup>2</sup> (Stop and Search Code). This would be expected as the procedures and principles arising as a result of such searches would be similar.

We are fully in support of setting out such principles and procedures to be exercised when such searches are to take place. We have restricted our observations to those outlined below. Our only concern would be to reflect on the apparent length and detail of the draft Code where there may be some repetition and unnecessary complexity. These procedures need to be understood by all involved from the constables to the persons who are to be searched. These can be considered no doubt fully in the final version to be approved by Ministers in due course.

### **Observations on the draft Code**

These fall under three headings:

#### **Accessibility**

Paragraph 1.10 indicates the intention to ensure that the draft Code will be available to view online and at all police stations (in line with the Stop and Search Code). The current Code is available on the Scottish Government website. The draft Code needs to be available and accessible in all formats and languages to ensure that the principles of diversity and equality (expressed within the draft Code) is fully recognised and achievable. That is required in the interests of justice so that all have access and can understand what the draft Code involves.

We would repeat the same point in relation to paragraph 3.7. This paragraph does clearly recognise that there is a need to respect and ensure the interests of certain specified categories of persons who may be subject to such a search. However, there is an overriding interest of justice test that it is wider than just those specified. What might be better would be to state the principles of interest of justice test rather than appear to be rather restrictive. Where examples or categories are included, these should be for illustrative purposes only.

Constables should ensure that an understanding is achieved. That is paramount when considering the question of fairness. There does not seem to be any need for a

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/654931/CCS207\\_CCS1017194698-1\\_HO\\_Draft\\_Code\\_Listed\\_Assets\\_LO\\_RES.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/654931/CCS207_CCS1017194698-1_HO_Draft_Code_Listed_Assets_LO_RES.PDF)

<sup>2</sup> <http://www.gov.scot/Resource/0051/00512924.pdf>

qualification such as '*where appropriate and practical.*' This should not be a subjective test.

## **Monitoring and Review**

Though there may be no statutory requirement to review how the Code is working, in line with the Stop and Search Code, we would question some thought might be given to including some sort of arrangements to monitor and review as set out under section 9 of the Stop and Search Code.

There is a requirement under chapter 2 of the draft Code for a report to be sent to the Appointed Person (paragraph 2.43) where search powers are exercised without judicial approval. That report, while useful and important, cannot undertake a robust review of the operation and understanding of how the draft Code is working in practice which might be useful for such information to be considered in the future.

## **Miscellaneous**

We would highlight the following paragraphs where we thought that it might useful to reflect further:

Paragraph 2.8: In relation to the two step test outlined here, any suspicion must be related to the power of search being exercised.

Paragraph 2.15: This should specify the reasonable grounds for suspicion.

Paragraph 2.16: This should refer to the constable's actual possession.

Paragraph 2.17: Before a search is carried out, the constable should consider it appropriate to ask questions. It should not be a discretionary matter.

Paragraph 2.19: We wondered about the use of the terminology of 'allayed' which seems to mean merely 'satisfied'. This should also make it clear that the person is free to leave.

Paragraph 2.24: With reference to the third sentence, this seems unnecessarily complex.

Paragraph 2.25: The notice referred to should specify the person who is the intended subject of the search.

Paragraph 3.9: This should make it clear that it is the force '*that is considered to be necessary and proportionate in all circumstances*'.

Paragraph 3.16: We would stress that the person has the absolute right to refuse to supply information. That should be an over-riding principle and states at the start.

Paragraph 3.17: This should make it clear that the person being questioned is advised at the outset that there is no requirement to answer any questions.

Paragraph 4.3: Section 23 of the Police and Criminal Evidence Act 1984 does not apply in Scotland. There may be merit in seeking some other means to define 'premises' or alternatively, incorporating the specific definition from the English legislation in the draft Code.

Paragraphs 4.7 and 4.8/Paragraphs 5.6 and 5.7: We understand that the steps to be taken regarding provision of information set out respectively in paragraphs 4.7 and 5.7 need not be followed in any particular order. However, the requirement that the person does not have to provide any personal details and all that follows should be required to take place at the outset of the engagement. The need for operational flexibility as to how such procedures and information is provided is recognised, but the recognition of the right to remain silent is paramount. It must be observed in accordance with the principles of fairness and Article 6 of the European Convention on Human Rights.

Paragraph 6.1: Recognising that there is increased use of technology, there should be means for electronic recording.

We trust that this response is helpful for your purposes. We would be happy to answer or provide any further information if required.