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11 January 2017

*Dear Naumann,*

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

I am writing to inform the Committee that I have today laid the above regulations before Parliament to bring into effect a Stop and Search Code of Practice.

The Code sets out the circumstances in which a search of a person who is not in custody may be carried out, the procedure to be followed in carrying out such a search, the record to be kept in relation to such a search and the right of someone to receive a copy of that record.

The regulations specify that the Code will come into effect on Thursday 11 May 2017. This takes into account the logistical implications for Police Scotland in terms of training and ensuring that the necessary arrangements are in place. A midweek date has been chosen as Police Scotland advises that there is typically a lower number of stops and searches carried out at this time.

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

I asked John Scott QC and the Stop and Search Advisory Group to help the Government revise the draft Code to address issues raised in the public consultation. The Group met on 11 October 2016, 14 October, 1 December and 9 December. There is consensus among advisory group members about all of the changes that have been made to the draft Code. Of most significance:

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

I hope the above information is helpful to the Committee.

A copy of this letter has been sent to Mary Fee, Convener of the Justice Sub-Committee on Policing

*Best wishes*  
  
**MICHAEL MATHESON**

**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*

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## **Part 1 The nature of Stop and Search; why it is used**

### **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 value.

1.2 Police work in Scotland is carried out in accordance with fundamental policing principles, agreed by Parliament and exemplified 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 be accessible, engage with communities, and promote measures to prevent crime, harm and disorder.

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

### **Primary Purposes of Stop and Search**

1.3 Stop and search can be used to achieve a number of different goals, but it has two primary aims in Scotland:-

- to promote public safety; and
- to help prevent and detect crime.

1.4 This Code is made under the Criminal Justice (Scotland) Act 2016. The purpose of this Code is to:

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

1.5 This Code governs all situations in which constables stop and search a person without first making an arrest, unless the search is expressly excluded, either under this Code, by statute, or by virtue of the search being subject to a separate statutory

Code or guidance as to its exercise. 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.

1.6 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.

1.8 The Notes for Guidance are not part of this Code, but are guidance to constables and others about its application and interpretation. The Annexes are part of the Code.

### **Securing public confidence and promoting community relations**

1.9 Searches are more likely to be effective, legitimate and secure public confidence when a constable's reasonable grounds for suspicion are based on a range of objective factors. The overall use of powers of stop and search 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. Constables must be provided with or otherwise have access to, and acquaint themselves with, such information.

1.10 This Code of Practice must be available to view online and at all police stations.

## 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:

- *In accordance with law.* That means in accordance with any legal duties imposed on constables, in particular under the Human Rights Act 1998 and the Equality Act 2010, as well as any requirements of the statute(s) under which the search is being conducted;
- *Necessary.* That means that the search is required to locate a harmful item or confirm the possession of an illegal item<sup>1</sup>; *and*
- *Proportionate,* both in the decision to carry out a stop and search *and* in the way in which a stop and search is conducted. In every case, a constable must balance the rights of the individual against the perceived benefit of the search.

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

- **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 person's possession; it will reflect the principles of good conduct and personal responsibility; and
- **Respect** – This involves two aspects. Firstly, a constable must ensure that – so far as is reasonably practicable - the person being searched understands why they are being stopped and searched. Secondly, the procedure must be carried out with respect for individual needs – including religious and cultural values and beliefs.

2.3 **Accountability** – The principle that constables carrying out stop and search are fully accountable for their actions, and that all stop and search activity is accurately recorded, and open to scrutiny.

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<sup>1</sup> "Item" includes "items".

## Part 2 When powers of Stop and Search may be used

### 3. Applicability of this Code

3.1 This Code applies to:

(a) all stops and searches of a person who is not in police custody carried out pursuant to a statutory power (see Annex A for a non-exhaustive list)

and

(b) Searches of a person carried out in accordance with a search warrant issued by a court in Scotland

3.2 This Code does not apply to:

- Searches of persons in custody
- Searches of persons under arrest
- Searches of vehicles and vessels that do not also involve a search of a person<sup>2</sup>
- Searches of premises that do not also involve a search of a person
- Searches under Schedule 7 of the Terrorism Act 2000 (which are governed by a separate code)
- Searches of persons and vehicles in specified locations authorised under section 47A of the Terrorism Act 2000 (which are governed by a separate Code)

3.3 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.

3.4 Notwithstanding paragraph 3.3, a constable must take all steps necessary to protect life.<sup>3</sup>

3.5 A court or tribunal must take this Code of Practice into account when determining any question arising in the proceedings to which the Code is relevant.<sup>4</sup>

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<sup>2</sup> This Code does not apply to a search of a vehicle or vessel alone, but the Code does apply to the related search of any person within a relevant vehicle or vessel.

<sup>3</sup> See, e.g. sections 20 and 32 of the Police and Fire Reform (Scotland) Act 2012.

<sup>4</sup> See section 75 of the Criminal Justice (Scotland) Act 2016.



#### **4. Legal Basis for Carrying out Stop and Search**

4.1 Reasonable grounds for suspicion is the legal test that a constable must satisfy before they can stop and detain a person to carry out a search under almost all statutory provisions. The usual requirement is a reasonable suspicion that the person has committed, or is committing, or is about to commit, a particular crime or is in possession of a prohibited article.

4.2 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 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, information and/or intelligence.

#### **Personal factors alone can never support reasonable grounds for suspicion**

4.3 The following cannot be used *alone* as the reason for stopping and searching any individual:

(a) a person's physical appearance with regard to the relevant protected characteristics set out in the Equality Act 2010, section 149, i.e. age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation (see Note 2)

(b) a person's clothing or general appearance

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

(d) the fact that a person has any previous convictions.

#### **Reasonable grounds for suspicion based on information and/or intelligence**

4.4 However, reasonable suspicion can be supported by information or intelligence that refers to personal factors. For example, intelligence might include a description of a person suspected of carrying an article for which there is a power of search. Such a description may refer to a person's physical appearance. Intelligence relating to a person's previous convictions or pending cases may be relevant in certain circumstances, for example where prior behaviour, in combination with other information or intelligence, provides reasonable grounds of suspicion for a search.

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, or

(b) crimes committed in relation to which such an article would constitute relevant evidence, for example, stolen property or an offensive weapon or bladed or sharply pointed article used to assault or threaten someone

4.5 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 members of the public. It also helps justify the use of powers of stop and search, 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**

4.6 Where there is reliable information or intelligence that members of a group habitually carry knives unlawfully or other 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, 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.

### **Reasonable grounds for suspicion based on behaviour, time and location**

4.7 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 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 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. A constable should always be alert to the possibility of innocent explanations for apparently suspicious behaviour.

### **Questioning to decide whether to carry out a search**

4.8 Constables have many encounters with members of the public which do not involve detaining people against their will. Constables do not require any statutory power to speak to a member of the public. There is no power for constables to stop or detain a member of the public in order to find grounds for a search. On the other hand, if reasonable grounds for suspicion emerge during such an encounter, a constable may detain the person to search them.

4.9 In some cases a constable will be in possession of information and/or intelligence, the quality or nature of which is such that a constable may reasonably decide that it is unnecessary to ask questions of a member of the public before detaining that person and conducting a search. Such cases will be relatively rare. In every other case, constables should follow the steps set out in paragraphs 4.10 to 4.13.

4.10 A constable who has reasonable grounds for suspicion may detain the person concerned in order to carry out a search. Before detention and carrying out a search, the constable should try to engage with the individual (see Chapter 5), and ask questions about the person's behaviour or presence which gave rise to the constable's suspicion.

4.11 Constables must inform a person being detained that they do not have to provide any information about themselves, or to say anything. However, members of the public have the right to volunteer information with a view to avoiding a search, and constables must afford members of the public an opportunity to provide information if they wish to do so. A constable must ensure that, as far as is reasonably practicable, the person understands what has been explained to them.

4.12 If, as a result of questioning the person before a search, or of 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, they are free to leave at will, and must be told that (see Note 5).

4.13 If, as a result of questioning the person, or of other circumstances which come to the attention of the constable, a constable's reasonable grounds for suspicion are confirmed, or if reasonable grounds for suspicion emerge during an encounter, the constable may detain the person to search them. 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.

4.14. Before searching, a constable must inform the person that they are being detained for the purpose of a search and take action in accordance with paragraphs 6.9 to 6.10 ("Steps to be taken prior to a search").

### **Searches of persons not suspected of an offence**

4.15 The exercise of some 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 (see Notes 3 and 4).

4.16 Some search powers are exercised to ensure the care and protection of the person being searched and/or to ensure the safety of others. The exercise of these powers does not depend on the person concerned being suspected of a crime. Under the powers in Section 66 of the Criminal Justice (Scotland) Act 2016 a constable may search a person who is being taken, or is to be taken, from one place to another. The purpose of a search under this section is to ensure that the person is not in possession of any item or substance that could cause harm to them or someone else.

4.17 Section 67 of the Criminal Justice (Scotland) Act 2016 gives constables power to search a person who is seeking to enter or attend, or who has entered or is attending, a relevant event or premises, where the person has consented to the search as a condition of entry imposed by the occupier or organiser. The purpose of a search under this section is to ensure the health, safety or security of people on the premises or at the event.

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

4.18 Section 60 of the Criminal Justice and Public Order Act 1994 allows for searches to be carried out in a particular locality, for a specific limited period of time, where an authorising officer believes that incidents involving serious violence may take place or that persons are carrying dangerous instruments or offensive weapons in that locality without good reason. The 1994 Act also lays down various steps which must be taken in relation to use of section 60 powers.

4.19 The powers under section 60 are separate from and additional to the normal stop and search powers which require reasonable grounds to suspect an individual of carrying an offensive weapon (or other article).

4.20 Where an authorising officer authorises any operation under section 60, they must, where practicable, inform relevant members of the community about the authorisation, both before and after any relevant action. The public should be informed of the purpose and outcomes of each section 60 operation.

4.21 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 relevant protected characteristics set out in the Equality Act 2010 (see Note 2).

4.22 Section 60(4A) of the Criminal Justice and Public Order Act 1994 also provides a power to constables in uniform to require a person to remove any item which the constable reasonably believes that person is wearing wholly or mainly for

the purpose of concealing their identity. This power can only be used if an authorisation given under section 60 is in force. Constables must ensure an appropriate balance between powers exercised under s60(4A) and the need to ensure respect for individuals, bearing in mind that some individuals wear items as a legitimate expression of their identity, and not with a view to concealing their identity for a criminal purpose (e.g. for cultural or religious reasons (and see Note 6)).

### **Powers to search persons in the exercise of a power to search premises**

4.23 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;

(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; and

(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.

4.24 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.

4.25 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.

4.26 Searches of a person authorised under a warrant do not require separate grounds in addition to those used to obtain the warrant. 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 or relevant protected characteristics (see Note 2).

## **Part 3 – Engagement prior to a search**

### **5. Engagement – Steps to be taken *before* conducting a search**

5.1 This Code does not affect a constable's ability to speak to a member of the public in the course of the constable's duties (see Note 1). Stop and search is only one aspect of policing. Engagement (i.e. how constables interact with members of the public and how members of the public interact with constables) can be a key factor in determining outcomes, including public confidence, as well, for example, as allaying suspicions or establishing or confirming grounds for search.

5.2 Unless the circumstances described in the first sentence of paragraph 4.9 exist, before carrying out a search, a constable should try to engage with the individual (see paragraphs 4.10 – 4.13). Constables should use every-day language, build a rapport where possible, and treat everyone with fairness, integrity and respect.

5.3 Constables may, as a result of their engagement, decide not to search a person (see paragraph 4.12).

## **Part 4 – How Stop and Search powers are to be used, recorded and monitored**

### **6. Conduct of Searches – General**

6.1 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 disruption to a person being searched and to respect their dignity.

6.2 The co-operation of the person to be searched must be sought in every case, even if the person initially objects to the search. The law allows constables to use reasonable force. This means the minimum amount of force necessary to accomplish the lawful objective of the search which the constable is seeking to achieve.

6.3 The length of time for which a person may be detained must be reasonable and kept to a 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, or there is good reason to suspect has been, slipped into a person's pocket or bag, then subject to 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. Similarly, the recovery of a stolen or prohibited article (such as a knife) from a person's possession may provide reasonable grounds for a constable to suspect that they have additional items in their possession which would warrant a more extensive search.

6.4 The search must be carried out at or near the place where the person was first detained (see Note 7).

6.5 There is no power to require a person to remove any clothing in public other than an outer coat, jacket, gloves, headgear or footwear 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 7 and 8).

6.6 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. Similarly, subject to the restrictions on the removal of headgear, a person's hair may also be searched in public, having due regard to gender, identity or other relevant religious or cultural differences (see Note 6).

6.7 Where on reasonable grounds it is considered necessary to conduct a more thorough search (e.g. by requiring a person to take off more than an outer coat, jacket, gloves, headgear or footwear), then this should, where possible, be done out

of public view, for example in a police van, unless paragraph 6.8 applies, or a police station if there is one nearby (see Notes 7 and 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 (see Annex B for exceptions). These searches must be conducted in accordance with Annex C.

6.8 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 Annex C.

### **Steps to be taken prior to a search**

6.9 Before any search of a person detained for the purpose of a search takes place, the constable must take reasonable steps, if not in uniform, to show their warrant card to the person to be searched and - whether or not in uniform - to give that person the following information:

- (i) the constable's name and number (except where the constable reasonably believes that giving their name might put them, or another constable, 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 (except where the constable reasonably believes that giving the name of the police station might put them or another constable in danger);
- (ii) that they are being detained for the purposes of a search;
- (iii) the fact that they do not have to provide any information about themselves, or to say anything;
- (iv) the legal search power which is being exercised;
- (v) a clear explanation of the object of the search in terms of the article or articles for which there is a power to search; along with



## **EITHER**

(a) in the case of 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;

## **OR**

(b) in the case of the power under section 60 of the Criminal Justice and Public Order Act 1994 (see paragraphs 4.18 to 4.22), the nature of the power, the authorisation, and the fact that it has been given.

and

(vi) unless an exception in paragraph 9.1 applies, that the constable is required to make a record of the search and that they are entitled to a copy of the record of the search in accordance with the requirements set out in this Code. The constable must explain to the person to be searched what those requirements are (see also paragraph 6.12).

6.10 Constables must ensure, so far as is reasonably practicable, that the person understands why they are to be searched and what the search will involve. 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 their attention. If the person is Deaf or cannot understand English and is accompanied by someone, then the constable should try to establish whether that person is an appropriate person to interpret or otherwise help the constable to give the required information (see also Chapter 8).

### **Steps to be taken immediately after a search**

6.11 The person who has been searched should be given a receipt (see Note 12). The receipt should include the following information:-

- police powers of stop and search
- the right of a person searched to obtain a copy of the record of the search
- the right of a person searched to complain, including how to go about making a complaint

6.12 Constables should explain that a person who is subject to a search to which this Code applies is entitled (unless they have chosen not to give their name, address and date of birth - see paragraph 6.9 (iii)) to obtain a copy of the record of search, provided they ask for it from the police within 6 months of the date on which they were searched.

6.13 A person who is to be, or has been, searched is under no obligation to provide their name, address and date of birth and they should not be asked to provide those details for the purpose of completing the record. Constables should explain that the right to obtain a copy of a record of search will only apply where the person has provided their name, address and date of birth.

6.14 Where a constable who is conducting a search is called to an urgent incident, exceptionally, it may be wholly impracticable to provide a receipt. In that event, if the person has provided their details, the constable should verbally explain the circumstances and advise them that they can access a copy of the record of search by calling at any police station, unless *either* there are exceptional circumstances which make it wholly impracticable to make a record of the search *or* the person searched has not provided their name, address and date of birth.

## **7. Conduct of searches – additional considerations where a child or young person is involved**

7.1 This section of the Code is designed to offer constables assistance in recognising and understanding the needs of children and young people in relation to stop and search. It acknowledges that children and young people have different requirements to adults and that they may require additional support to help them comprehend and participate in the search process.

7.2 This section does not replace any requirements placed on constables elsewhere in the Code. Rather, it provides additional guidance and suggests ways in which constables can tailor their approach towards children and young people.

7.3 For the purposes of this code, children and young people are defined as those being under the age of 18.<sup>5</sup>; <sup>6</sup>

7.4 In taking a decision to search a child or a young person, a constable must treat the need to safeguard and promote the well-being of that child or young person as a primary consideration.<sup>7</sup> Where a constable believes it to be more harmful to a child or young person to carry out a search than not, then the search should not proceed and other measures to safeguard them should be considered.

7.5 Constables should ensure that the principles of fairness, integrity and respect apply equally to children and young people, as they do to adults.

7.6 Constables actions should be compatible with the child or young person's human rights. This Code has been designed to comply with the UN Convention on the Rights of the Child.<sup>8</sup> It is also consistent with the Scottish Government's GIRFEC (Getting It Right for Every Child) approach.

7.7 Constables should have an awareness of how the minimum age of criminal responsibility might affect their interactions with children and young people. For example, when responding to a child or young person's question about the potential outcome of a search, constables should be prepared to provide the appropriate response, based on whether the child or young person will (or will not) be held criminally responsible for their actions.

7.8 As is explained in paragraph 4.15, some stop and search powers do not depend on the person concerned being suspected of committing an offence in relation to the object of the search. A child or a child's pram may also be used to conceal an item on behalf of an adult. A constable who has reasonable grounds to

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<sup>5</sup> Where a constable believes a person to be under the age of 18, but they are unwilling or unable to provide their age, the constable should proceed as if the person is under 18.

<sup>6</sup> It is acknowledged that the definition of a „child“ varies across Scots law. For the purposes of this Code of Practice, however, the definition used is drawn from the UN Convention on the Rights of the Child. This is consistent with s.68 of the Criminal Justice (Scotland) Act 2016.

<sup>7</sup> S.68, Criminal Justice (Scotland) Act 2016

<sup>8</sup> <http://www.ohchr.org/en/professionalinterest/pages/crc.aspx>

suspect that a child or young 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 child or young person (see Notes 3 and 4). Constables should ensure that such searches are carried out in such a way as to minimise distress to the child or young person.

7.9 Where a constable believes a search is necessary, they should be aware of the inherent power imbalance that exists between a constable and a child or young person and how this may affect their interactions with them. It should not be assumed, for example, that because a child or young person is compliant and/or silent, that they are fully comfortable with a search being carried out. Equally, if a child or young person appears to be acting unreasonably, the root of such behaviour may be in fear or confusion.

7.10 Constables should be aware that, on occasion, children and young people may display behaviour which arouses suspicion of wrong-doing, but which is in fact related to a communication impairment, disability or additional learning support need. This may include gesturing, shouting or avoiding eye contact. When a search of a child or a young person is being considered, a constable should check whether the child or young person considers themselves to have such a disability, and if so, what additional support they might require to participate in a search (bearing in mind that a person with such a disability may have difficulty articulating the nature of that disability or what support they need).

7.11 Constables should use age-appropriate terms when engaging with children and young people, and avoid the use of technical or legal language, unless required to do so by law. Where, for example, a constable is required to state the statutory basis for a search, then they should also be prepared to explain this in terms the child or young person can easily understand. Constables should be aware that not all children of the same age will have the same level of understanding and, where practicable, should allow time for the child or young person to ask questions before a search begins.

7.12 Where it appears to a constable that a child/young person lacks the capacity to understand why a search may be necessary, or what a search may entail, then the presumption is that the search should not proceed. Consideration should then be made of how best to safeguard that child or young person, where it is believed that child or young person continues to be at risk of harm.

7.13 As stated in 7.4, the well-being of the child should be the primary consideration in deciding whether to proceed with a search of a child or a young person. That applies equally to children and young people with a learning disability or other type of disability. For example, someone who is autistic may be particularly sensitive to touch and might find a physical search over-whelming. Where a search is considered likely to have a detrimental effect on a child or a young person, then alternative safeguarding measures should be considered.

7.14 Constables should be aware that the status of a child or young person as looked after or care experienced can be relevant to how such people engage with constables; for example, they may find it more difficult to engage with the police as a

result of previous trauma. Constables should be alert to the possibility that a child or young person may be looked after or care experienced and if so, consider what additional support they might require. In doing so, constables should be sensitive about whether and how they ask questions about a person's status, bearing in mind that some looked after and care experienced children and young people can regard questions about their status as stigmatising, and also that their peers may be unaware of their status.

7.15 Children or young people who have experienced abuse may also react strongly to the prospect of being searched, particularly if they believe that the search is likely to involve strip-searching or intimate searching.

7.16 Even where there is no history of abuse, children and young people have reported that being searched by someone who is a stranger to them is both uncomfortable and intrusive.

7.17 Where a child or young person is becoming distressed during a search, consideration should be given to discontinuing the search or pausing it until a responsible adult can be present (where this is practicable and the child or young person wishes this to happen).

7.18 For the purposes of this Code, a "responsible adult" is defined as someone over the age of 18, with responsibility for the child or young person. This might include, for example, a parent or carer, an older sibling or a key worker. Their role is to support the child or young person and help them understand what is happening. Constables should note that a „responsible adult“ is distinct from an „appropriate adult“, a term which has its own meaning.<sup>9</sup>

7.19 When considering a search of a child or young person, a constable should attempt to minimise any embarrassment they might feel. This might include, for example, carrying out a search discreetly and away from a peer group. Where practicable, a constable should involve the child/young person in considering where the search should take place. A constable should not assume that places considered suitable for adults will be where a child or a young person would feel most at ease.

7.20 Any search of a child or a young person should be carried out by a person of the same sex (see Annex B). All searches should respect the dignity and privacy of the child or young person.

7.21 A constable should explain at each stage of a search of a child or young person what they are doing and why. Where a child requests a brief pause in the search (for example, to compose themselves) then this should be accommodated, where practicable. The search should be completed as swiftly as possible.

7.22 Where a strip search or intimate search of a child or young person is considered necessary, it must be conducted in accordance with Annex C.

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<sup>9</sup>For more information, see Scottish Appropriate Adult Network National Guidance (2015): <http://www.scottishappropriateadultnetwork.co.uk/guidance>

7.23 Where a search takes place and no item is found and the child or young person has provided their name, address and date of birth, a constable should clearly explain how the information will be stored, the length of time it will be kept and the purposes for which it may be used.

7.24 Following completion of a search, a child or a young person should be supplied with a receipt, which should include age appropriate information about stop and search, and details of how to make a complaint if the child or young person feels that they have been treated unfairly.

7.25 Constables should be aware that children and young people can find it difficult to access complaints processes, which are often designed by adults for adults. Where a complaint is received by the Police from or on behalf of a child or young person, consideration should be given to how best to respond in an age appropriate, timely and child-centred manner.

7.26 Where a search has proved to be negative, constables should consider a child or young person's individual needs and circumstances, when deciding whether or not to make their parents (or other care-givers) aware of the fact that they have been stopped and searched.

7.27 Factors to be considered by constables may include: the age of the child; the circumstances in which the stop and search took place; any views expressed by the child or young person and any perceived on-going risk to the child or young person and/or others.

7.28 Where a child or a young person has expressed a view about whether their parents (or other care-giver) should be informed of a stop and search, and a decision is taken which appears to contradict that view, then constables should clearly explain to the child or young person the reasons for their decision.

7.29 Constables should be aware that some children and young people may be placed at increased risk by their parents being notified of a search. This would include, for example, a child or young person living in a household where there is a history of domestic abuse.

7.30 More generally, constables should consider whether informing a child or a young person's parents (or care-giver) might inadvertently suggest that their child has been involved in wrong-doing, when they have not.

7.31 As well as being subject to search, children and young people may also be witnesses to searches. Where an adult in the company of a child is being searched, constables should be aware of the effect such a search may have on them. For younger children, witnessing something they do not understand or being parted from their care-giver for the duration of the search can be particularly upsetting. Care should be taken to ensure that the child is reassured and that any separation from the care-giver is either avoided or kept to an absolute minimum.

7.32 Carrying out stop and search in a respectful and age appropriate manner is likely to minimise the damage it can cause to children and young people's

perceptions of the Police.<sup>10</sup> Constables should therefore be aware of the potential to build positive relationships with children and young people in their local community by following the steps outlined in this Code.

7.33 Children and young people may have additional support needs beyond those outlined in this chapter. It therefore important that constables also familiarise themselves with the content of Chapter 8 and consider how this may apply to children and young people.

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<sup>10</sup> Criminal Justice: Stop and Search Powers for Alcohol and the Minimum Age of Criminal Responsibility, Scottish Youth Parliament (2016). Available here: [www.syp.org.uk/stop\\_and\\_search\\_powers\\_for\\_alcohol\\_and\\_the\\_minimum\\_age\\_of\\_criminal\\_responsibility](http://www.syp.org.uk/stop_and_search_powers_for_alcohol_and_the_minimum_age_of_criminal_responsibility)

## **8. Conduct of Searches - additional considerations where a vulnerable adult is involved**

8.1 This section of the Code is designed to offer constables assistance in recognising the needs of vulnerable adults in relation to stop and search.

8.2 Vulnerability in this context refers to difficulties a person may have with understanding what is going on or communicating with the police

8.3 In practice, it may not always be obvious that a person has a vulnerability which might impact on the way that stop and search powers should be exercised. Constables must therefore always be aware of the possibility that a person to be searched may be vulnerable and tailor their approach accordingly.

8.4 Vulnerability is most likely to be encountered in situations where a person has mental illness, personality disorder, autism or a learning disability. These conditions are likely to impact on the way that the person is able to understand and communicate and constables must be aware of the need to modify their language, tone of voice and physical behaviours to assist in communicating.

8.5 Vulnerability impacts on whether a constable can search, and how any search should be conducted.

8.6 It is important to identify vulnerability early and constables need to consider the best method of identifying significant communication needs. This may require collaboration and communication between the police, other agencies and the individuals being searched and may involve obtaining support for the vulnerable person.

8.7 Constables must focus on assessing the individual's communication ability and consider whether any support is required to meet that need. That may often be achieved simply by asking the person to explain any difficulties they have. Some people carry documents which explain the issues they have, such as an "Autism Alert card" or a "Keep Safe" card. Or it may be that the person is with friends or family members who can assist or that there are others nearby or contactable who are able to help including any professional who knows the person well. In some circumstances, constables may require to seek suitable support (e.g. a responsible adult) to assist them in communicating with the vulnerable person. Constables should explore all avenues to ensure that the person is fully aware of what is happening to them. The vulnerable person must be able to understand the nature and potential significance of police actions and questioning, the nature and extent of their own rights, and to be able to exercise their rights in a meaningful way.

8.8 If suitable support is available, constables must balance their wish to search the person with the proportionality of detaining the person until the person who is to provide support can attend, which may take some time. In some circumstances, this may not be justifiable, and constables will need to consider any other options available to them, always having regard to any risk of harm to the person.



8.9 Speaking to constables may be a distressing experience for some vulnerable persons and the mere presence of the police may cause them anxiety and impact on their ability to communicate. Constables should therefore have regard to the following factors to mitigate these issues:

- Some vulnerable people may not understand personal space and may invade others' personal space or may need more personal space themselves.
- Use of the person's name at the start of each sentence will help them know they are being addressed
- Clear, slow and direct instructions will allow the person time to process information – the use of technical or legal language should be avoided
- Some autistic people with sensory issues will not like to be touched
- Extra time may be required for the person to fully process and respond and the person may need more breaks during the search
- Re-wording and repetition of questions in a different way may be helpful
- Language should be kept clear, concise and simple and short sentences used
- Vulnerable persons should have it explained clearly what is happening and, if appropriate, where the person is being taken and why
- Visual supports, if available, should be used to explain what is happening or, if the person can read, to be shown information in writing.
- If possible, physical contact should be avoided but if it is required, a full explanation should be given in advance
- Facial expressions and hand gestures should be kept to a minimum to avoid distracting the person

8.10 Where it appears that the person lacks the capacity to understand why a search may be necessary or to understand what that search will involve, then the presumption is that the search should not proceed. Constables will then need to consider what further action might be necessary to safeguard the person when they may be at risk of harm.

8.11 When conducting a search, constables should attempt to minimise any distress or embarrassment that the person might feel. Where practicable, constables should seek and take account of any views expressed by the person about the process, such as providing them with a choice of where the search can take place or how it might be conducted. The search should always be done discreetly and away from any peer group or other persons whom the person had been with when detained for the search.

8.12 When a strip search or intimate search of a vulnerable person is considered necessary, this must be conducted in accordance with Annex C.

8.13 Vulnerable persons may also be witnesses to searches and constables must be aware of the effect that such a search of another may have on them. Constables may have to explain the process to persons other than the individual being searched in some circumstances.

## 9. Recording requirements

9.1 When a constable carries out a search in the exercise of any power to which this Code applies, 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). It is unlikely to be practicable in most cases to make a record of a search under section 67 of the Criminal Justice (Scotland) Act 2016 (searches on entry to relevant premises and events, where consent has been given as a condition of entry imposed by the organiser).

9.2 The constable carrying out the search must make the record as soon as practicable after the search is completed (see Note 9).

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

- Details of the constable conducting the search (including the police station to which they are attached (but see 9.6 below).
- Details of the corroborating constable
- Time of search
- Date of search
- Locus of search (nearest address, private place or street)
- Name of person searched (if provided; there is no requirement for a person to provide their name if nothing is found, but it should be recorded if given)
- Age of person searched (if provided)
- Constable's estimate of the age of the person searched (if not provided and the constable estimates the person's age to be under 18 years)
- Gender of person searched
- Date of Birth of person searched (if provided)
- Address of person searched (if provided)
- Self - defined ethnicity and national origin of person searched (if provided) (see Note 11)
- Whether the search was a standard search (ie a search which is *not* a strip or an intimate search), a strip search within a police station, a strip search outwith a police station, or an intimate search (as set out in Annex C).
- 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
- 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 (see Note 10).
- In the case of a search of a person pursuant to a warrant the date the search warrant was issued and the fact that the warrant was produced.

### Searches which do not result in an arrest

9.4 The person who has been searched must be given – at the time of the search - a receipt which explains how they can obtain a copy of the record (see paragraphs 6.11 to 6.14).

### **Searches which result in an arrest**

9.5 If a person is arrested as a result of a search to which this Code applies, as well as the stop and search being recorded in accordance with this Code, the receipt should be placed within the prisoner's property bag and recorded on the national custody system.

9.6 Nothing in this Code requires the names of constables to be shown on the record of search or any other record required to be made under this Code where a constable reasonably believes that disclosing names might endanger themselves or other constables. In such cases the record should disclose the constable's warrant or other identification number and the police station which they are attached to, except where the constable reasonably believes that giving the name of the police station might put them or other constables in danger.

9.7 A separate record for each person searched must be available should a copy be required.

9.8 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.

9.9 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 where no search is conducted.

## 10 Monitoring and Supervising Stop and Search

10.1 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 proportionately 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.

10.2 Supervising officers must monitor the use of stop and search powers by individual constables to ensure that they are being applied appropriately and lawfully. They must also ensure that the practice of constables under their supervision in stopping, searching and recording is fully in accordance with this Code. Monitoring may take many forms, including: direct supervision of the exercise of the powers; examining records held on the stop and search database (particularly examining the constable's documented reasonable grounds for suspicion); asking a 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 police service should be identified as a result of such monitoring, with best practice identified and communicated proactively throughout the service.

10.3 Senior officers with local responsibilities for stop and search and those who have the national policy leads for stop and search must also undertake regular monitoring of the broader use of stop and search powers to ensure that they are used fairly and proportionately and, where necessary, take action at the relevant level. They 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.

10.4 Supervision and monitoring must be supported by the compilation of comprehensive statistical records of stops and searches at national, divisional 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 reviewed to determine the reasons and, where appropriate, action should be taken.

10.5 As soon as practicable after the end of each reporting year (ending 31 March), the Chief Constable of a relevant police service<sup>11</sup> must publish, as a minimum, information on how many times during the reporting year a stop and search was carried out in Scotland by constables of that service. In addition, so far as practicable, the information is to disclose:

- (a) the number of stops and searches carried out under each statutory power;
- (b) how many persons were searched on two or more occasions

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<sup>11</sup> "relevant police service" means the Police Service of Scotland and any other police organisation which has constables, as defined in section 73 of the Criminal Justice (Scotland) Act, exercising functions in respect of which Parts 1 and 2 of that Act apply.

- (c) the age and gender, and the ethnic and national origin, of the persons searched
- (d) the proportion of searches that resulted in
  - (i) something being seized by a constable, including information as to the number of cases in which the item seized was of the type suspected by the constable at the outset of the search (See Note 13)
  - (ii) a case being reported to the procurator fiscal
- (e) the number of authorisations issued under section 60 of the Criminal Justice and Public Order Act 1994
- (f) the number of complaints made to a relevant police service about the carrying out of searches (or the manner in which they were carried out) in Scotland by constables of that service.
- (g) the number of receipts issued

## 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 constables and members of the community.

2 The "relevant protected characteristics" referred to in paragraphs 4.3, 4.21 and 4.26 are: age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

3 Innocent possession means that the person does not have the knowledge that they are carrying an unlawful item. Ordinarily such knowledge is required before arrest can be considered. Children under the age of criminal responsibility are sometimes 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 to break up criminal gangs and groups that use young children to further their criminal activities.

4 Whenever a child or young person under the age of 18 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 the relevant police service's Child Protection Policy, or equivalent policy (if it has one). 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 or young people 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, where appropriate.

5. Where a person is lawfully detained for the purpose of a search, but no search 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. Similar considerations may arise where headgear or other form of head covering is worn as part of their gender expression (e.g. headscarves or wigs), and again the constable should, where practicable, permit the item to be removed out of public view. Similarly, the touching of hair may be regarded as being disrespectful by individuals with particular beliefs, and accordingly should, where necessary, be conducted out of public view where possible.

7. 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 6.7 and 6.8) 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 near 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.

8. A search in the street itself should be regarded as being in public for the purposes of paragraphs 6.5 to 6.8, even though it may be empty at the time a search begins. Although there is no power to require a person to do so, and this should be explained to the person, there is nothing to prevent a constable from asking a person voluntarily to remove more than an outer coat, jacket or gloves in public. This would constitute a strip search (see Annex C).

## **Recording**

9. Where a stop and search is conducted by more than one constable the identity of all the constables involved in carrying out the search (including any constable supporting another constable who is physically carrying out the search) must be recorded on the record. Nothing prevents a constable who is present but not directly involved in searching from completing the record.

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

11. Constables should record the self-defined ethnicity and national origin 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. 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. If the “Not stated” category is used the reason for this must be recorded.

12. It is unlikely to be practicable in most cases to make a record of a search under section 67 of the Criminal Justice (Scotland) Act 2016 (searches on entry to relevant premises and events, where consent has been given as a condition of entry imposed by the organiser). If it is not practicable to make a record of a search under section 67, there is no requirement to issue a receipt in respect of that search.

13. In this context, “seized” means items found or recovered as a result of the search.



**List of main statutory powers of Stop and Search of the person  
(note: other statutory powers of search may also exist)**

Section 47 Firearms Act 1968 (firearms)

Section 23 Misuse of Drugs Act 1971 (drugs)

Section 60 Civic Government (Scotland) Act 1982 (stolen property)

Section 4 Crossbows Act 1987 (crossbows)

Section 11 Protection of Badgers Act 1992 (evidence of commission of an offence under that Act)

Section 60 Criminal Justice & Public Order Act 1994 (power to stop and search in anticipation of violence)

Section 101 Conservation (Natural Habitat etc) Regulations 1994 (evidence of commission of an offence under that Act)

Section 4 Wild Mammals Protection Act 1996 (evidence of commission of an offence under that Act)

Section 21 Criminal Law (Consolidation) (Scotland) Act 1995 (control of alcohol at sporting events)

Section 48 Criminal Law (Consolidation) (Scotland) Act 1995 (offensive weapons)

Section 50 Criminal Law (Consolidation) (Scotland) Act 1995 (knives)

Section 7 Protection of Wild Mammals (Scotland) Act 2002 (evidence of commission of an offence under that Act)

Section 11A Fireworks Act 2003 (possession of a firework in contravention of a prohibition imposed by fireworks regulations)

Section 66 Criminal Justice (Scotland) Act 2016 (power to search a person who is to be, or is being taken from one place to another, to ensure not in possession of an item that could cause harm to self or others)

Section 67 Criminal Justice (Scotland) Act 2016 (power to search on entry to relevant premises or events, where consent to the search has been consented to as a condition of entry imposed by the organiser)

## 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.
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 (see Notes to this Annex).

### 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.

### Searching of Transgender Persons

4. As transgender people may have biological characteristics which differ from the gender that they live in, there is potential for distress and embarrassment during searching. Application of the following guidance should minimise the potential impact when searching a transgender person.
5. If a search is begun without any knowledge that the person being searched is transgender and it only comes to light during the search then, unless the transgender person requests a different gender of searching constable to take over the search, the search should simply be completed as usual by the original searching constable.
6. If a person is thought or known to be transgender prior to a search being carried out, then the constables should ask that person

#### ***'Is there anything I need to know before I search you?'***

7. A female - male trans man who still has female physical characteristics may identify strongly as a man but may request to be searched by a female constable. In such a case, the trans man should still be referred to using male pronouns and treated as a man in all other ways except in terms of the gender of the constable who searches him.
8. A male - female trans woman who still has the male physical characteristics may identify strongly as a woman but may request to be searched by a male constable. In such a case the trans woman should still be referred to using female pronouns and treated as a woman in all other ways except in terms of the gender of the constable who searches her.

9. If a person is unwilling to make such an election, the constable should try and determine the gender in which the person lives their life. This is likely to be indicated by the name, title or gender on their main identity document e.g. drivers licence, bank card etc. If the person appears for example to live as a woman, they should be treated as such.

10. Once the gender of the constable conducting the search has been established, the search should commence. The transgender status and appearance of the person being searched should not be commented upon. If any physical variation is encountered due to gender reassignment during searching, the constable should maintain a professional and respectful manner as per any physical variation encountered due to disability during searching.

**Note:** It may be necessary to share information about the person's gender identity with other custody related organisations and other police staff. Such disclosure should only be made in relation to the transgender person when to do so would be relevant, legal, proportionate and fair.

### **Documentation**

11. The person's gender as established above must be recorded in the person's custody record or, if a custody record has not been opened, on the record of search or in the constable's notebook.

12. Where the person elects which gender they consider themselves to be but is not treated in accordance with their preference, the reason must be recorded in the record of search, in the constable's notebook or, if applicable, in the person's custody record.

### **Disclosure of information**

13. 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 While there is no agreed definition of transgender (or trans), it is generally used as an umbrella term to describe:

- anyone whose gender identity (including their gender expression) does not fully correspond with the sex they were assigned at birth. This is inclusive of
- trans women (people who were assigned male at birth but who identify as a woman)

- trans men (people who were assigned female at birth but who identify as men)
- non-binary people (who do not identify solely as men or women; instead their gender identity as between or beyond the man/woman binary or they have no gender)
- cross-dressing people (including people whose gender expression includes dressing in clothing which does not fully correspond with the sex they were assigned at birth but otherwise identify with their assigned sex).

A2 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 of this Annex. The guidance and instructions must comply with the Equality Act 2010 and should therefore complement the approach in this Annex.

## CONDUCT OF STRIP AND INTIMATE SEARCHES

In this Annex, the word „detainee“ is used to describe the person who has been detained for the purposes of the search.

### **A: Strip search**

1. A strip search is a search involving the removal of more than outer coat, jacket, gloves, headgear or footwear.

#### **Action**

2. A strip search may take place only if it is considered necessary to remove an article which the 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**

3. (a) The strip search must be authorised by a constable of the rank of Inspector or above.

(b) The reason for the search must be fully explained to the detainee

(c) A constable carrying out a strip search must be the same sex as the detainee (see Annex B);

(d) 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 B), except a responsible adult who has been specifically requested by the detainee and who has agreed to be present during the conduct of the search;

(e) Unless sub-paragraph (f) applies, whenever a strip search involves exposure of intimate body parts, constables must ensure that the number of persons who witness the search must be kept to the absolute minimum necessary, although there must always be at least two persons other than the person who is being searched present during the search. No person of the opposite sex to the person being searched who is not a medical practitioner or nurse shall be present. If the search is of a child or young person, the police should try to ensure that a responsible adult is present. Except in urgent cases, as in (f) below, a search of a child or young person may take place in the absence of the responsible adult only if the child or young person signifies in the presence of the responsible person that they do not want that person to be present during the search and that person agrees. A record shall be made of the child or young person's decision and signed by the responsible adult.

(f) The requirements set out in sub-paragraph (e) above may be departed from in cases of urgency, where there is risk of serious harm to the detainee or to others, but only to the extent absolutely necessary.

(g) The search shall be conducted with proper regard to the sensitivity and vulnerability of the detainee in the circumstances and every reasonable effort shall be made to secure the detainee's co-operation and minimise embarrassment. Detainees 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 put those clothes back on before removing further clothing;

(h) 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 a body orifice;

(i) 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 B;

(j) A strip search shall be conducted as quickly as possible, and the detainee allowed to dress as soon as the procedure is complete.

(k) Where it is decided that the detainee should be subject to a strip search, the reason for this should be recorded and the name of the authorising officer should also be included.

## **B: Intimate search**

4. An intimate search consists of the physical examination of a detainee'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.

### **Action**

5. Body orifices other than the mouth may be searched only under the authority of a warrant issued by a Sheriff.

6. The search is to be carried out by an Authorised Health Care Professional (HCP). Examination by a HCP can take place only with the consent of the detainee.

7. In the case of children or young persons, or a person who has a mental illness, personality disorder, autism or a learning disability, the seeking and giving of consent must take place in the presence of a responsible adult.

8. A constable of the same gender as the person to be searched is to be present to corroborate the search.

9. Before the search begins, a constable or designated detention constable, must tell the detainee that a warrant to carry out the search has been issued.

10 Except in urgent cases, and subject to paragraph 11 of this Annex, an intimate search of a child or young person or mentally disordered or otherwise mentally vulnerable person may take place only in the presence of a responsible adult. The responsible adult must be of the same sex as the person to be searched (see Annex B), unless the detainee specifically requests a responsible adult of the opposite sex who is readily available.

11. Except in urgent cases, an intimate search of a child or young person or mentally disordered or otherwise mentally vulnerable person may take place in the absence of a responsible adult only if the child or young person or mentally disordered or otherwise mentally vulnerable person signifies in the presence of the responsible adult that they do not want that person to be present during the search, and that person agrees. A record shall be made of the child or detainee's decision, and signed by the responsible adult.

12 Unless paragraph 13 of this Annex applies, whenever an intimate search occurs, constables must ensure that the number of persons who witness the search must be kept to the absolute minimum necessary, although there must always be at least two persons other than the person who is being searched present during the search. Subject to paragraph 10 of this Annex, no person of the opposite sex to the person being searched who is not a medical practitioner or nurse shall be present. .

13. The requirements set out in paragraphs 10 to 12 of this Annex may be departed from in cases of urgency, where there is risk of serious harm to the detainee or to others, but only to the extent absolutely necessary.

14 The search shall be conducted with proper regard to the sensitivity and any vulnerability of the detainee.

## **Documentation**

15. In the case of an intimate search, the following shall be recorded as soon as practicable:

- the date the warrant was issued and the fact that the warrant was produced.
- the fact that the appropriate consent was given by the detainee to the health care professional or (as the case may be) refused, and if refused, the reason given for the refusal (if any).
- which parts of the person's body were searched;
- who carried out the search;
- who was present; and
- the result.