



SCOTTISH EXECUTIVE

Justice Department
Criminal Justice Division

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23 August 2002

Dear Consultee

PROCEEDS OF CRIME ACT 2002: SECTION 293 CONSULTATION ON DRAFT CODE OF PRACTICE FOR CASH SEARCHES

1. The Proceeds of Crime Act 2002 received Royal Assent on Wednesday 24 July 2002. This Act contains a comprehensive package of measures focussing on the recovery of the proceeds of crime. Its provisions include a scheme for the recovery of cash in summary proceedings; this is contained in Part 5 Chapter 3 of the Act. That scheme includes a new search power. The Scottish Ministers are required under Section 293 of the Act to publish a draft Code of Practice in relation to the exercise by constables in Scotland of that search power. The Home Secretary is similarly required to publish a draft Code of Practice in relation to constables in England and Wales and Northern Ireland, and to Customs Officers throughout the United Kingdom.

2. This letter invites views on that draft Code of Practice, a copy of which is attached. **The deadline for responses is Friday 15 November 2002.**

3. Provisions relating to the recovery of cash are not new. Part III of the Criminal Justice (International Co-operation) Act 1990 introduced a power for police and Customs officers to seize cash discovered on import or export which is reasonably suspected of being derived from or intended for use in drug trafficking. An application could be subsequently made to a sheriff for the forfeiture of the cash. No conviction is required for the forfeiture of the cash to be ordered; cash forfeiture proceedings are civil proceedings and the civil standard of proof applies. These provisions were later consolidated into Part II of the Drug Trafficking Act 1994, which applies on a United Kingdom-wide basis.

4. The Proceeds of Crime Act expands and replaces the existing drugs scheme. The new scheme extends to cash related to all unlawful conduct and also provides for the seizure of such cash inland.



Search power

5. Unlike the previous legislation, the Act contains a specific power of search to support the powers to seize cash. Under previous legislation, Customs officers could rely upon their general powers of search which they have at the borders under the Customs and Excise Management Act 1979. Under the Proceeds of Crime Act 2002, the power to seize cash now extends inland and to constables, hence the new Code of Practice.

6. Before the Code of Practice can be brought into force, the Scottish Ministers have to make an order which has to be laid in draft before the Scottish Parliament and approved by resolution. The Code of Practice has to be in force before the cash scheme can be commenced.

Consultation Process

7. Section 293(2) of the Act provides that when the Scottish Ministers propose to issue a Code of Practice they must prepare and publish a draft; consider any representations made to them; modify the draft as appropriate; and lay it before the Scottish Parliament for approval. For the purposes of this process, the consultation exercise has been arranged to allow interested parties to be aware of this new power and to make any representation regarding the content of the Code of Practice. The Code of Practice is intended to be self-explanatory and so we would particularly welcome views on any passages that are confusing, ambiguous or lack clarity.

8. A copy of this letter and the draft Code is available on the Scottish Executive website, at:
<http://www.scotland.gov.uk/views/views.asp>

If you do not have access to the web, please telephone the number at the top of this letter to request any further copies.

9. A copy of the Act is available at :
<http://www.legislation.hmso.gov.uk/acts/acts2002/20020029.htm>

10. The Scottish Executive invites your comments on the draft code. It is standard practice within the Executive to make responses to consultation exercises publicly available after the closing date, unless the respondent specifically and clearly requests otherwise. They are usually placed in the Scottish Executive Library, Saughton House, Edinburgh, where members of the public may make an appointment to view them.

11. Please send your comments on the draft Code to the address below by week ending **Friday 15 November 2002**.

By post: POCA Cash Code Consultation
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12. We look forward to hearing your views.

CHRISTINE DORA

Criminal Justice Division

CODE OF PRACTICE FOR CONSTABLES IN SCOTLAND UNDER THE PROCEEDS OF CRIME ACT 2002

Introduction

1. This code of practice is made in connection with the exercise by constables in Scotland of the search powers conferred by section 289 of the Proceeds of Crime Act 2002 (“the Act”). The code is made under section 293 of the Act. There is a separate code of practice, made by the Secretary of State for the Home Department, in relation to constables in England and Wales and Northern Ireland and to customs officers throughout the United Kingdom.

2. The code applies exclusively to searches conducted under section 289 of the Proceeds of Crime Act 2002. If searches conducted under Part 8 of the Act, under other legislation or at common law result in cash being seized under section 294, the provisions of this code do not apply.

3. The code should be available at all police stations for consultation by the police and members of the public. It should also be available at police offices at ports where the powers are, or are likely, to be used.

4. In this code:

reference to a person's rank includes a person acting temporarily in that rank

“cash” means notes and coins in any currency, postal orders, cheques of any kind (including travellers’ cheques), bankers’ drafts and bearer bonds and bearer shares found at any place in the United Kingdom. The definition of ‘cash’ can be amended by an order made by the Secretary of State under section 289(7) – constables should be made aware of any such order made.

General

5. The right to respect for private life and home - and the right to peaceful enjoyment of possessions - are both safeguarded by the Human Rights Act 1998. Powers of search may involve significant interference with the privacy of those whose premises and persons are searched and therefore need to be fully and clearly justified before they are used. In particular, constables should consider at every stage whether the necessary objectives can be achieved by less intrusive means. In all cases constables should exercise their powers courteously and with respect for the persons and property of those concerned. The possibility of using reasonable force to give effect to the power of detention and search should only be considered where this is necessary and proportionate in all the circumstances.

6. Powers to stop and search a person must be used fairly, responsibly, with respect for people being searched and without unlawful discrimination. The Race Relations Act 1976 as amended makes it unlawful for police officers to discriminate on the grounds of race, colour, or ethnic origin when using their powers

Scope of the search powers

7. The Act provides power for constables to search for cash where:

- (a) the constable is lawfully on any premises and has reasonable grounds for suspecting that there is on the premises cash which satisfies the conditions below; or
- (b) the constable has reasonable grounds for suspecting that a person (the suspect) is carrying cash which satisfies the conditions below.

8. The conditions are that:

- the cash is recoverable property (i.e. it is obtained through unlawful conduct or represents property obtained through unlawful conduct) or the cash is intended for use in unlawful conduct; and
- the cash does not amount to less than the minimum amount specified under the Act (currently £10,000 – this amount can be amended by an order made by the Secretary of State under section 303 – constables should be made aware of any such order made)

9. Where the power to search a person is exercised, the Act requires that the constable may require the suspect - so far as he thinks necessary or expedient - to permit:

- (a) a search of any article he has with him; or
- (b) a search of his person.

A constable may detain the suspect for as long as is necessary to search his person.

10. The powers conferred are civil in nature and exercisable only so far as reasonably required for the purposes of finding cash. The powers do not include the power to enter premises.

Reasonable grounds for suspicion

11. In order to exercise the search power a constable must have reasonable grounds for suspecting that cash meeting the conditions set out in paragraph 6 will be found.

12. Whether there are reasonable grounds for suspicion will depend on the circumstances in each case. There must be some objective basis for that suspicion based on facts, information and/or intelligence. The constable should take into account such factors as how the individual or premises were identified, previous intelligence on persons or premises, previous involvement with the persons or premises, and suspected links with criminal activities, whether here or overseas.

13. **Reasonable suspicion can never be supported on the basis of personal factors alone without reliable supporting intelligence or information or some specific behaviour by the person concerned.** For example, a person's race, age, appearance, or the fact that the person is known to have a previous conviction, cannot be used alone or in combination with each other as the reason for searching that person. Reasonable suspicion cannot be based on generalisations or stereotypical images of certain groups or categories of people being more likely to be involved in criminal activity. It should normally be linked to accurate and current intelligence or information

Authority to search for cash

14. Any decision to search for cash under the Act must, if practicable, be approved by a sheriff. Judicial approval is only likely to be impractical because of the immediacy of the circumstances of the case. This is more likely to be the case in relation to the search of a person than the search of premises. But constables must assess each case on its merits. There can be no assumption that judicial approval is impracticable for all searches of a person – constables **must** carefully consider any decision not to obtain such approval.

15. In order to obtain approval from a sheriff, a constable will need to make telephone contact with the clerk of the sheriff court, to arrange a hearing which can be held without notice and in private. The constable will need to:

- identify himself to the sheriff (giving name, rank, any warrant or other identifying number, and home station or place of work)

- lodge his written application
- explain to the sheriff the reasonable grounds he or she has for undertaking the search
- answer any questions that the sheriff may have.

16. If judicial approval for a search is impracticable, a police officer of the rank of Inspector or above (a “senior officer”) should provide approval for the said search.

17. If an application for an authority is refused (either by the judicial or senior officer process) the constable must not make a fresh application for a search of the same person or premises unless he has new information.

18. Authorisation to search should be obtained prior to the actual search itself where practicable. The constable should explain to the senior officer the reasonable grounds he or she has for undertaking the search. The authority should only be given where the senior officer is satisfied that the necessary grounds exist. The senior officer should make a written record of such reasons. Oral authorisation should be supported by written authorisation as soon as that is reasonably practicable.

19. If approval by a senior officer for a search is impracticable, a search may be conducted without approval. It is unlikely that senior officer approval will be impracticable unless there is some problem making contact with an appropriate officer. However if a search is conducted without any prior approval, the officer must give an explanation of the reasons for the search to a senior officer as soon as that is reasonably practicable. The senior officer should take a written record of such reasons.

Reports to the “appointed person”

20. If a search is conducted without prior judicial approval - whether with or without senior officer approval the constable is required under section 290 of the Act to prepare a report in the following circumstances:

- if the search does not result in the seizure of cash, or
- if cash is released before the matter proceeds to a detention hearing, or
- if the court at a detention hearing does not authorise the detention of the seized cash for more than 48 hours after it was initially seized.

21. This report must set out why it was not practicable to obtain prior judicial approval and why circumstances led him to believe that the search powers were exercisable. These factors could include why the constable was on the premises where the search took place, what aroused his/her suspicion and why there was a need for an immediate search. If the prior approval of a senior officer was obtained, the report should state this, with the senior officer's reasons for approval, if practicable.

22. The report must be submitted to the independent person appointed under section 290 of the Act by the Scottish Ministers. The post holder's address is [...].

23. The report should normally be submitted within 7 days of the exercise of the search powers.

Steps prior to search

24. If the constable suspects that the person has cash concealed on his or her person, the constable must take the following steps:

- inform the person that he has reasonable grounds for suspecting that he or she has cash on their person which is more than the minimum amount and is recoverable property or is intended by any person in unlawful conduct
- inform the person that he has the power to search them under section 289 of the Act for the purposes of finding such cash
- produce any document authorising the search (if applicable)

- ask the person to confirm or deny whether they have cash on their person
- allow the person the opportunity to produce and hand over the cash

25. Before any search for cash takes place the constable must take reasonable steps to give the person to be searched, or the occupier of the property the following information:

- the constable's name (unless the constable reasonably believes that giving his or her name might put him or her in danger, in which case a warrant or other identification should be given)
- the fact that the search is being carried out under section 289 of the Proceeds of Crime Act 2002, and
- a clear explanation of:
 - (i) the purpose of the search; and
 - (ii) the grounds for the reasonable suspicion

26. Constables not in uniform should show their warrant cards or other suitable form of identification.

27. If the person to be searched does not appear to understand what is being said or the constable has doubts as to the person's ability to speak and/or understand English he or she should take reasonable steps to ensure that the person understands. Where necessary and practicable someone who can act as an interpreter should be identified.

Search of a person

28. The minimum amount of cash that may be seized is currently [£10,000]. This is set out in a statutory instrument [name and reference]. The statutory instrument should be available with the code. . This amount can be amended by a statutory instrument made by the Secretary of State under section 303 – constables should be made aware of any such order made and it should be made available with the code. There is no maximum amount of cash that may be seized.

29. All searches should be carried out with courtesy, consideration and respect for the person concerned. The co-operation of the person to be searched must be sought in every case, even if the person initially objects to the search. A forcible search may be made only if it has been established that the person is unwilling to co-operate. Constables might want to consider the possibility of using reasonable force as a last resort if this appears to be the only way in which to give effect to their power of detention and search.

30. The length of time for which a person may be detained must be what is necessary to carry out the search and kept to a minimum. The thoroughness and extent of a search must depend on what is suspected of being carried and by whom.

31. By virtue of section 289(3)(b) the search powers include the power to search a person. However this power does not extend to requiring a person to undergo an intimate or strip search. An intimate search is one involving a physical - and not just visual – examination of a person's body orifices. A strip search is any search that involves the removal of an article of clothing that:

- is being worn (wholly or partly) on the trunk and
- is being so worn either next to the skin or next to an article of underwear.

32. A person must not be asked to remove any clothing in public other than an outer coat, jacket or gloves. A search in public of a person's clothing that has not been removed must be restricted to superficial examination of outer garments. This does not, however, prevent a constable from placing his hand inside the pockets of the outer clothing, or feeling round the inside of collars, socks and shoes if this is reasonable or necessary in the circumstances.

33. If on reasonable grounds it is considered necessary to conduct a more thorough search this must be done out of public view. 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 an officer of the same sex as the person searched. It may not be made in the presence of anyone of the opposite sex unless the person being searched specifically requests it.

34. If the constable discovers cash during a search he or she should give the person who has possession of it an opportunity to provide an explanation of its ownership, origins, purpose and destination.

Search of premises

General

35. No right of entry is conferred by section 289 of the Proceeds of Crime Act 2002. In order to search for cash on premises a constable must be lawfully on premises. This would include a search of premises undertaken with the consent of the person entitled to grant entry to the premises. It would also include a search carried out when a constable has exercised a power of entry conferred by common law or by a search warrant granted in some other connection or power of entry conferred under some other legislation and circumstances subsequently lead him to believe that there is cash on the

premises. A search must be made at a reasonable hour unless this might frustrate the purpose of the search.

36. If it is proposed to search premises with the consent of a person entitled to grant entry to the premises the consent must, if practicable, be given in writing before the search takes place. The constable must make any necessary enquiries in order to be satisfied that the person is in a position to give such consent.

37. Before seeking consent the constable in charge of the search shall state the purpose of the proposed search and its extent. This information must be as specific as possible. The person concerned must be clearly informed that they are not obliged to consent.

38. A constable cannot enter and search premises or continue to search premises if the consent has been given under duress or is withdrawn before the search is completed.

Conduct of searches

39. Premises may be searched only to the extent necessary to achieve the object of the search. A search may not continue once the object of the search has been found - and no search may continue once the officer in charge of the search is satisfied that whatever is sought is not on the premises. (This does not prevent a further search if new information comes to light justifying such a search.)

40. Searches must be conducted with due consideration for the property and privacy of the occupier of the premises searched and with no more disturbance than necessary.

Recording requirements – searches of a person

41. A constable who has carried out a search in the exercise of any power to which this Code applies must make a written record of it at the time, unless there are exceptional circumstances that would make this wholly impracticable. If a record is not made at the time the constable must do so as soon as practicable afterwards. There may be situations in which it is not practicable to obtain the information necessary to complete a record, but the constable must make every reasonable effort to do so.

42. The constable must ask for the name, address and date of birth of the person searched, but there is no obligation on a person to provide these details and no power of detention if the person is unwilling to do so.

43. The following information must always be included in the record of a search even if the person does not wish to provide any personal details:

- the name of the person searched, or (if it is withheld) a description
- a note of the person's self-defined ethnic background, or that this information was withheld
- the date, time and place that the person was first detained
- the date, time and place the person was searched (if different)
- the grounds for making the search (and of any necessary authorisation if give)
- if a search is conducted without prior judicial approval, the reason for not obtaining such
- the outcome of the search (e.g. arrest, seizure of cash, no further action)

- a note of any injury or damage to property resulting from the search
- the identity of the officer making the search (subject to paragraph 21).

44. A record is required for each person searched, if more than one person is searched at the same time. The record of the grounds for making a search must, briefly but informatively, explain the reasons for suspecting the person concerned, by reference to the person's behaviour and/or other circumstances. If a person is detained with a view to performing a search, but the search is not carried out due to the grounds for suspicion being eliminated as a result of questioning the person, a record must still be made.

Recording requirements – search of premises

45. Where premises have been searched in circumstances to which this Code applies the constable in charge of the search shall make or have made a record of the search on returning to his normal place of work. The record shall include:

- the address of the premises searched
- the date, time and duration of the search
- the authority under which the search was made, including whether prior judicial or senior officer approval was obtained
- the name of the officer in charge of the search and the names of all other constables who conducted the search
- the names of any people on the premises if they are known
- details of any damage caused during the search and the circumstances in which it was caused
- whether any cash was seized.