

“Legislative gaps” and the possible abolition of consensual stop and search

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1. I have been asked to provide a note for the Independent Advisory Group on Stop and Search on the legislative gaps which might be left if consensual stop and search were abolished in Scotland. That note follows. I should note that it has been prepared in a very short timescale and is not intended to represent an authoritative or exhaustive review of the relevant law or principles, but I hope that it is of some assistance to the Group.

Background

2. At common law, the police may search the person of anyone they have lawfully arrested. Beyond this, however, there is (except in cases of urgency) no common law power of search. The principle remains that set out by the Lord Justice-General (Inglis) in *Jackson v Stevenson* (1897) 2 Adam 255 at 260:

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

3. However, there have been considerable statutory incursions into this “constitutional principle” over time.¹ There now exists a range of powers under which the police have a right to search a person for particular items. These powers generally – but not always – require a reasonable suspicion that the person concerned is in possession of such items.² However, Scots law also permits police officers to search with the consent of the person being searched. Where consent is given, no statutory authority (or warrant) is required.³
4. The legality of consensual searches means that it is not possible to establish whether the existing statutory powers would be sufficient were consensual stop and search to be prohibited simply by looking at the relevant Scottish law itself. The simplest way to attempt to answer this question, however, is to compare the Scottish powers with those applicable in England and Wales. In that jurisdiction, paragraph 1.5 of PACE Code A, which governs the use of police stop and search powers, provides as follows:

¹ See K Murray, “Policing, prevention and the rise of stop and search in Scotland: a brief history” (2015) 3(2) Scottish Justice Matters 5, available at http://scottishjusticematters.com/wp-content/uploads/Pages-from-SJM_3-2_June2015_Stop-and-Search.pdf

² Some of the powers concerned are noted in Renton and Brown’s *Criminal Procedure according to the Law of Scotland*, 6th edn by G H Gordon (1996, regularly updated) para 7-24; others are mentioned later in this note.

³ *Davidson v Brown* 1990 JC 324.

An officer must not search a person, even with his or her consent, where no power to search is applicable. Even where a person is prepared to submit to a search voluntarily, the person must not be searched unless the necessary legal power exists, and the search must be in accordance with the relevant power and the provisions of this Code. The only exception, where an officer does not require a specific power, applies to searches of persons entering sports grounds or other premises carried out with their consent given as a condition of entry.

- Code A also lists, in Annex A, the main stop and search powers available to police in England and Wales. While a more extensive study could be carried out were time available, Annex A of Code A may reasonably be taken as at least a reasonable starting point for establishing what powers of stop and search would be necessary in a system which does not permit consensual searches. Many of these powers do in fact apply in Scotland in addition to England and Wales.

Powers listed in Annex A of PACE Code A

Public Stores Act 1875 s 6	Extends to whole of United Kingdom
Firearms Act 1968 s 47	Extends to England, Wales and Scotland
Misuse of Drugs Act 1971 s 23	Extends to whole of United Kingdom
Customs and Excise Management Act 1979 s 163	Extends to whole of United Kingdom
Aviation and Security Act 1982 s 24B	Extends to whole of United Kingdom
Police and Criminal Evidence Act 1984 s 1 (in respect of stolen property)	Extends to England and Wales only. Equivalent provision is made for Scotland by the Civic Government (Scotland) Act 1982 s 60.
Police and Criminal Evidence Act 1984 s 1 (in respect of items made, adapted or intended for use in the course of or in connection with the offences of burglary, theft, taking a motor vehicle or other conveyance without authority, fraud, or offences of destroying or damaging property)	Extends to England and Wales only.
Police and Criminal Evidence Act 1984 s 1 (in respect of offensive weapons)	Extends to England and Wales only. Equivalent provision is made for Scotland by the Criminal Law (Consolidation) (Scotland) Act 1995 s 48.
Police and Criminal Evidence Act 1984 s 1 (in respect of fireworks)	Extends to England and Wales only. Equivalent provision is made for Scotland by the Police, Public Order and Criminal Justice (Scotland) Act 2006 s 76.
Sporting Events (Control of Alcohol etc) Act 1985 s 7	Extends to England and Wales only. Equivalent provision is made for Scotland by the Criminal Law (Consolidation) (Scotland) Act 1995 s 21.
Crossbows Act 1987 s 4	Extends to England, Wales and Scotland
Criminal Justice Act 1988 s 139B	Extends to England, Wales and Northern Ireland only. Equivalent provision is made for Scotland by the Criminal Law (Consolidation) (Scotland) Act 1995 s 49B.
Poaching Prevention Act 1862 s 2	Repealed for Scotland by the Wildlife and Natural Environment (Scotland) Act 2011. That Act does not include any power of search.

Deer Act 1991 s 12	Extends to England and Wales only. Equivalent provision is made for Scotland by the Deer (Scotland) Act 1996 s 27.
Conservation of Seals Act 1970 s 4	Repealed for Scotland by the Marine (Scotland) Act 2010; that Act contains its own search powers (s 126).
Protection of Badgers Act 1992 s 11	Extends to England, Wales and Scotland. The Scottish provision is now different from the English and Welsh one following amendments made by the Nature Conservation (Scotland) Act 2004, but a power of search is conferred in both cases.
Wildlife and Countryside Act 1981 s 19	Extends to England, Wales and Scotland. The exact terms of the provisions differ between the three jurisdictions following amendments made since 1981, but a power of search is conferred in all cases.
Terrorism Prevention and Investigative Measures Act 2011 Sched 5 paras 6 and 8	Extends to whole of United Kingdom
Terrorism Prevention and Investigative Measures Act 2011 Sched 5 para 10	Extends to whole of United Kingdom
Criminal Justice and Public Order Act 1994 s 60	Extends to England, Wales and Scotland. However, the Scottish provision is different from the English and Welsh one. The principal difference here is that the English power, following amendments made by the Serious Crime Act 2007, now extends to cases where violence has occurred and not only where it is anticipated.

Police and Criminal Evidence Act 1984 s 1

6. Section 1 of the Police and Criminal Evidence Act 1984 creates a power of search, on reasonable suspicion, in respect of stolen or prohibited articles. As noted in the table above, equivalent statutory powers exist in Scotland in respect of stolen articles and offensive weapons (which form one class of prohibited articles). The remaining prohibited articles are defined by subsections (7) and (8) as follows:

(7) An article is prohibited for the purposes of this Part of this Act if it is—

[...]

(b) an article—

(i) made or adapted for use in the course of or in connection with an offence to which this sub-paragraph applies; or

(ii) intended by the person having it with him for such use by him or by some other person.

(8) The offences to which subsection (7)(b)(i) above applies are—

- (a) burglary;
- (b) theft;
- (c) offences under section 12 of the Theft Act 1968 (taking motor vehicle or other conveyance without authority);
- (d) fraud (contrary to section 1 of the Fraud Act 2006); and
- (e) offences under section 1 of the Criminal Damage Act 1971 (destroying or damaging property).

7. There appears to be no direct equivalent of these powers in Scots law.

Poaching Prevention Act 1862 s 2

8. Section 2 of this Act, which remains in force in England and Wales, provides as follows:

It shall be lawful for any constable or peace officer in any county, borough, or place in Great Britain and Ireland, in any highway, street, or public place, to search any person whom he may have good cause to suspect of coming from any land where he shall have been unlawfully in search or pursuit of game, or any person aiding or abetting such person, and having in his possession any game unlawfully obtained, or any gun, part of gun, and also to stop and search any cart or other conveyance in or upon which such constable or peace officer shall have good cause to suspect that any such game or any such article or thing is being carried by any such person...

9. The entire Act was repealed for Scotland by the Wildlife and Natural Environment (Scotland) Act 2011. It is not immediately clear why no power of search is included in the 2011 Act. There is no reference to powers of search in the policy memorandum or explanatory notes which accompanied the Bill's introduction into the Scottish Parliament, nor in the Stage 1 Report (8th Report, 2010) of the Rural Affairs and Environment Committee on the Bill.

Criminal Justice and Public Order Act 1994 s 60

10. This section allows a police officer of the rank of inspector or above to give an authorisation for the powers conferred by the section to be exercised for a period not exceeding 24 hours. These powers allow a constable in uniform to carry out a stop and search – without a requirement of reasonable suspicion – for offensive weapons or dangerous instruments.

11. In order to give such an authorisation, the authorising officer must, under s 60(1), reasonably believe (under the legislation as it applies in Scotland):

(a) that incidents involving serious violence may take place in any locality in his police area, and that it is expedient to give an authorisation under this section to prevent their occurrence, or

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

12. In England, an alternative criterion was inserted by the Serious Crime Act 2007, as follows:

(aa) that–

(i) an incident involving serious violence has taken place in England and Wales in his police area;

(ii) a dangerous instrument or offensive weapon used in the incident is being carried in any locality in his police area by a person; and

(iii) it is expedient to give an authorisation under this section to find the instrument or weapon

13. Criterion (aa) does not appear to broaden the scope of the power significantly. On the face of it, if it satisfied, (b) should be also, as the person concerned could be unlikely to be said to have “good reason” for carrying the item. This objection was made when the 2007 Act was passing through the House of Commons, and the government’s response was as follows:

The effect of the new clause would be to fill a small gap, whereby the police are currently unable to use their section 60 powers following a serious violent incident if they do not anticipate a further incident taking place. Knife and gun crimes are often isolated incidents and are often not followed by any further incidents. (HC Deb 22 Oct 2007 col 68 (Mr Coaker)).

14. It is not entirely clear how this answers the objection, but the best interpretation may be that the practical extension of the s 60 power effected by criterion (aa) is to allow authorisation of suspicionless stop and search where the police believe that *a person* is carrying a dangerous instrument or offensive weapon following an incident, rather than the “persons” envisaged by (b).⁴

Code A, Annex A powers with no direct equivalent in Scotland: summary

15. The above analysis has noted a small number of the “main stop and search” powers listed in Annex A of PACE Code A which have no direct equivalent in Scotland. In summary, they are as follows:
- 1) The power to search, on reasonable suspicion, for items made, adapted or intended for use in the course of or in connection with the offences of burglary, theft, taking a motor vehicle or other conveyance without authority, fraud, or offences of destroying or damaging property.
 - 2) The power to search, on good cause, for “game unlawfully obtained, or any gun [or] part of gun” where a person is suspected of “coming from any land where he shall have been unlawfully in search or pursuit of game”.
 - 3) The power to authorise searches *without* reasonable suspicion where it is reasonably believed that an incident involving serious violence has taken place and a dangerous weapon used in that incident is being carried by a person.
16. I am not in a position to comment on the extent to which searches in such circumstances are operationally necessary. I would note the following in respect of each of these powers:

⁴ Cf Interpretation Act 1978 s 6: “words in the plural include the singular” unless the context otherwise requires. But the context of s 60 of the 1994 Act appears to be the prevention of public disorder and the context may therefore require that the usual rule of interpretation does not apply.

- 1) The power to search on arrest may in many cases compensate for the absence of any such specific power (and in some cases, a person carrying such articles may be liable to arrest on the basis that they are suspected of one of the preventive offences under ss 57-58 of the Civic Government (Scotland) Act 1982).⁵
- 2) The absence of such a power appeared not to give rise to concern when the Bill leading to the Wildlife and Natural Environment (Scotland) Act 2011 was discussed in the Scottish Parliament.
- 3) As explained earlier, this particular power adds little to the power already available in Scotland under s 60 of the Criminal Justice and Public Order Act 1994.

Searching for alcohol

17. It will be noted that the main stop and search powers listed in Annex A of PACE Code A do not include any power to search for alcohol. This may seem odd, as a police officer has a statutory power to require a person under 18 to surrender alcohol (see, in England and Wales, the Confiscation of Alcohol (Young Persons) Act 1997 and, in Scotland, s 61 of the Crime and Punishment (Scotland) Act 1997).

18. The existence of a power of surrender, alongside the absence of any power of search, seems anomalous at first sight. It is, however, quite deliberate. The Confiscation of Alcohol (Young Persons) Act 1997 was introduced as a Private Member's Bill, but had government support. The Member of Parliament who introduced it (Dr Bob Spink) was quite clear in his view that the Bill should create only a power of confiscation. He explained this as follows:

The fact that the Bill does not give the power of search on the street is a great strength. It is right not to give the police such a power in these circumstances, because it could cause unseemly confrontations if youngsters decided, as they sometimes might, to act up in front of their friends. (HC Debs 24 Jan 1997 col 1170)

At the moment... the police may see a group of young people tanking up on cans of lager or bottles of whisky, but there is nothing they can do to prevent it. I am sure that the House will agree that that is complete nonsense. The Bill will give the police the power to stop such drinking. They will be able to step in and confiscate the alcohol before it becomes a cause of trouble, both for the public and for the youngsters. It is a common-sense approach. (ibid col 1166).

19. The confiscation power was narrowly targeted at a specific problem. This does not prevent a case being made for a search power, but such a power would not be the correction of an anomaly, for there is none. The creation of such a power would be an extension beyond what was quite clearly envisaged by Parliament in 1997.

20. Such a power does now exist to a limited extent in England and Wales. In 2005, the Serious Organised Crime and Police Act 2005 (Sch 8 Para 8) allowed designated Police Community Support Officers in England and Wales to be given a power to search for alcohol if they reasonably believed that someone under 18 had failed to hand it over when they were required to do so. Consent is required. This power, along with other powers of PCSOs, is noted in Annex C of PACE Code A. The specific basis for these powers being conferred is not immediately clear from the legislative record, and the Review Group may wish to consider whether it would be helpful to seek advice from police forces in England and Wales as to their practical significance.

⁵ That is: being in or on building etc. with intent to commit theft (s 57) and convicted thief in possession (s 58).