Release's response to the Home Office Consultation on amendments to PACE Code of Practice A

Release is the national centre of expertise on drugs and drugs law – providing free and confidential specialist advice to the public and professionals. Release also campaigns for changes to UK drug policy to bring about a fairer and more compassionate legal framework to manage drug use in our society.

Release welcomes the opportunity to respond to this Home Office consultation. We are pleased that the Home Secretary wishes to further improve police use of stop and search by amending PACE Code of Practice A to "make clear what constitutes 'reasonable grounds for suspicion' " and to emphasise "that officers who do not use their powers properly will be subject to formal performance or disciplinary proceedings." However, it is our opinion that the proposals do not go far enough to ensure that police stop and search powers are applied fairly and proportionately.

Release's consultation response will focus on the use of stop and search to detect drug offences, and other associated issues.

Finally, Release is a member of StopWatch (www.stop-watch.org) - we support the recommendations in their detailed response to this consultation, particularly the proposed wording revisions.

General

Overall the amendments seem sensible and there is a clear effort to make these provisions clearer and more accessible to police officers. The specific examples now entered into the provisions, although very basic, which will be helpful for police officers to understand the concepts being implemented. There is also an effort to highlight the dangers and consequences of improper use of these powers. Previously this PACE Code was quite dense and potentially difficult to read. These sections have now been broken down and this will probably lead to it being more easily digested by police officers.

Section 2.1

We welcome the inclusion of searches for controlled drugs under section 23 Misuse of Drugs Act 1971 as an example of a search requiring reasonable suspicion. However, it should be confirmed that these are just examples and not an exhaustive list of when the requirement for reasonable grounds for suspicion apply.

Section 2.2

The clearer explanation of the test for 'reasonable grounds for suspicion' in two parts should now be easily understood and applied by police officers. Release supports any attempt to make officers more accountable for the decisions they take, with the burden squarely on the police officer to be able to explain rationally why they have taken action. This is clearly desirable as the aim is to get police officers to think about their actions first and make an intelligent decision to carry out their duties knowing that they can provide a suitable explanation of their decisions thereafter. However, this does not go far enough as officers should *actually* explain the basis for their reasonable suspicion to the person being stopped and searched, rather than simply be able to perhaps some later time.

Section 2.2A

This section refers to *Note IB,* offering guidance on those who would be considered as having 'innocent possession'. There is a typographical error in the note as it should state: "Innocent possession means that the person does NOT have the guilty knowledge that they are carrying an unlawful item".

We are concerned that the statements made in relation to those under the age of 10 being searched does not properly address the safeguarding issues that should be in place in relation to very young children being subjected to stop and search. Firstly, it would be helpful if the evidence for the assertion that "It is not uncommon for children under the age of criminal responsibility to be used by older children and adults, to carry drugs and weapons and, in some cases firearms, for the criminal benefit of others" was provided.

As highlighted in our consultation response to the review of stop and search powers, Release is concerned that the issue of safeguarding is treated as an external one, rather than recognising that a

stop and search in and of itself can be damaging to a young person.[1] Note 1B again considers external circumstances as being the assessment as to whether a child's welfare and/or safety is at risk, and it is at this point that safeguarding procedures will be followed.

The suggested amendments do not address the lack of guidance and regulations that exist in relation to the stop and search of children, which is of deep concern. There appears to be no clear safeguarding procedures in place to ensure that the welfare of children is paramount when it comes to police interactions with young people. The 2006 ACPO 'Practice Guidance on Stop and Search', a 53 page document, has only the following advice for officers dealing with children as part of stop and search:

> Stopping and searching young or vulnerable persons can be particularly intimidating for them. Officers must clearly communicate the grounds for the search using simple and easy to understand language, and check that the person has understood the grounds before continuing with the search. [2]

Release and StopWatch sent Freedom of Information requests to all police forces asking them to provide copies of their safeguarding protocols/guidance. Of the 43 forces contacted, 20 provided no information and all but 2 of the remaining forces had no guidance related to the stopping and searching of children.

The two forces that did have specific guidance were the Metropolitan Police and Dorset police. The Met's guidance stated that when searching a child under the age of 10 there was no requirement for the presence of an appropriate adult. Additionally, the Met Police advises that officers should be aware of a child's vulnerability although there are no specific actions as to how this should be managed.

---

[1]Release, 'Release's response to the Home Office Consultation on police powers of stop and search' <http://www.release.org.uk/sites/release.org.uk/files/pdf/publications/Release%20response%20to%20HO%20consultation%20on%20stop%20and%20search_0.pdf> accessed 20th October 2014

[2] ACPO, 'Practice Guidance on Stop and Search' (Centrex, 2006) p7 <http://content.met.police.uk/cs/Satellite?blobcol=urldata&blobheadername1=Content-Type&blobheadername2=Content-Disposition&blobheadervalue1=application%2Fpdf&blobheadervalue2=inline%3B+filename%3D%22436%2F865%2FPractice_Advice_on_Stop_and_Search.pdf%22&blobkey=id&blobtable=MungoBlobs&blobwhere=1283565271771&ssbinary=true> Accessed 20th October 2014

Dorset police have specific provisions relating to young people in relation to all street interventions which provides a general obligation to consider the welfare of the child.[3] Paragraph 4.9.4 of the policy states that the circumstances of the 'street intervention' may be such that it is felt that the parents, carers or guardians of the young person should be notified so that they are aware of the interaction between the police and the individual.[4] However, this is at the discretion of the officers once they have taken into account considerations such as location, time, capability of the individual stopped and the type of interaction.[5] Whilst this is at least a little more robust, Release would argue that it should not be discretionary and that when a child, especially one under the age of 10, is stopped and searched their parent, carer or guardian should be informed as a matter of course.

In relation to the other 41 forces, it is clear that the safeguarding protocols that are in place are not sufficient and do not address the welfare of children in the context of stop and search.

The welfare of a child must be central to any action carried out by the State in respect of young people. Other state bodies are usually robust in their safeguarding principles and procedures but yet the same cannot be said of the police forces across England and Wales. This is despite the fact that it is acknowledged that stop and search can be 'intimidating' for young people.

Release recommends that some clear guidance is developed through the PACE Codes of Practice in respect of the use of stop and search and children. It is our opinion that no child under the age of 10 should be stopped and searched without an appropriate adult present. Whilst this may create an onerous situation where young people would have to be taken to the station, it may deter police officers from using the power too often; currently a child under 10 is stopped and searched every week in London. We further recommend that there is a requirement for the age of the child to be recorded on the stop and search form – presently the Metropolitan Police are the only force that are recording this information.

---

[3] Dorset Police, 'P06-2009 Street Interventions or Encounters Procedure' (Dorset Police, 2009) <http://www.dorset.police.uk/pdf/P06-2009Street_Interventions_Encounters_ProcedureV1.0.pdf> Accessed 20th October 2014

[4] Ibid, p10

[5] Ibid

Section 2.2B

The confirmation that reasonable suspicion can never be supported by 'personal factors' is absolutely necessary, particularly given that stop and search is disproportionately applied to certain groups; generally young, poor and ethnic minority populations – those which are more visible and easily policed. Release's research into the policing and prosecution of drug offences found that black people were stopped and searched for drugs at 6.3 times the rate of white people, despite lower levels of drug use within the black community.[6] There is specific reference in this section to the fact that physical characteristics 'race, ethnicity, sexuality' cannot be factors to support reasonable suspicion, but it should be clarified that these are just examples and not an exhaustive list.

Subsection (b) confirms that "Generalisations or stereotypical images that certain groups or categories of people are more likely to be involved in criminal activity" cannot be used as a reason for stopping and searching an individual or vehicle in which they are a driver or passenger. However, this is directly contradicted in section 2.6 which asserts that if an officer has information about a group or gang carrying knives, weapons or drugs and they "wear a distinctive item of clothing or other means of identification to indicate their membership of the group or gang, that distinctive item of clothing or other means of identification may provide reasonable grounds to stop and search any person believed to be a member of that group or gang." Implementation of the practices contained in this section would involve nothing but generalisations and stereotyping, insomuch as someone wearing a baseball cap associated with a particular group who is known to possess drugs could be stopped and searched on that basis alone. That is not reasonable suspicion at all – stop and search in these circumstances must be limited to occasions where there is intelligence relating to a specific person or persons being in possession of an item unlawfully, not because they *might* be in possession by virtue of purported membership to a particular group. We will deal with section 2.6 substantively at a later point in this response, but felt it necessary to draw attention to the inconsistencies in relation to this portion.

Section 2.4

The reiteration of the need for information that is relied upon to be current and accurate, and the provision of examples of what information received from the public may constitute this, is helpful.

---

[6] Eastwood, N., Shiner, M. & Bear, D., *The Numbers in Black and White: Ethnic Disparities in the Policing and Prosecution of Drug Offences in England and Wales* (Release, 2013) p22

However, specific reference also needs to be made to what might conversely be considered inaccurate, outdated or irrelevant information. Furthermore, the fact that some information may be submitted falsely or maliciously should also be highlighted, along with the need to check the intelligence files for any entries regarding incorrect information.

Section 2.6

In addition to the points in relation to Section 2.2B, Release are also concerned about the application of these provisions "to organised protest groups where there is reliable information or intelligence that they arrange meetings and marches to which one or more members bring articles intended to be used to cause criminal damage in support of the group's aims." Not only is this making assumptions about someone's criminality based solely on their membership of a group, as determined by the wearing of distinctive item of clothing, it also has serious implications for individuals' human rights. Both the freedoms of assembly and association, and freedom of expression will be significantly compromised by this being put into practice. It would not be just or proportionate if, for instance, a member of a campaigning group was stopped and searched because they were wearing the group's branded t-shirt and that group were known to sometimes be in possession of articles used to cause criminal damage. Stop and search in these circumstances must be limited to occasions where there is intelligence relating to a specific person or persons being in possession of such an item at a particular meeting.

Section 2.6A

Release would urge caution in any situation where an officer bases reasonable suspicion solely on the behaviour of a person, in the absence of any other intelligence or information. The need to be able to explain why they have formed the opinion that someone acted suspiciously or nervously, with reference to specific aspects of the person's behaviour or conduct which they have observed, does not afford sufficient protection. It is right that a hunch or instinct which cannot be explained or justified to an objective observer can never amount to reasonable grounds, as people may act nervously or look like they are trying to hide something for any number of reasons. It would not be unusual for someone who had perhaps had a negative experience with the police to act nervously when they see an officer, but for it to not actually be suspicious. Furthermore, there are a number of medical conditions, including anxiety and panic attacks, which can cause someone to act in a

nervous or agitated manner that is in no way suspicious. We recommend that behaviour that does not amount to a specific physical action be deemed to be inadequate grounds to establish reasonable suspicion for a stop and search.

Section 2.8A

Whilst it is good to place responsibility on senior officers to ensure that all police officers have access to up to date intelligence and information, and that those officers have a duty to familiarise themselves with this, it does not go far enough. Release recommends that this is something which is actively assessed by the senior officer to ensure that they have complete oversight across what their officers are accessing and using to inform themselves.

Section 4.3A

As a person detained for the purposes of a search is under no obligation to provide their name, address and date of birth, and should not be asked to provide it solely for the purpose of completing the stop-search record, it should be made clear that an officer cannot demand this information. The Code could go even further and state that officers have no right to examine or record details from any of an individual's identity documents which may be found during the search. We have previously had an enquiry relating to a stop and search where officers had removed an ID card from a person's wallet and made a note of his personal details 'just in case' even though the outcome of the search was negative. This sort of practice, whereby the provisions of the Codes of Practice are circumvented through 'backdoor' methods, must be prevented.

Sections 5.5 and 5.6

These sections are welcome additions as they make it clear that officers who do not use their powers properly will be subject to formal performance or disciplinary proceedings. It is useful to confirm the negative effects of stop and search powers being misused as it links to Section 2.2, making officers more accountable for the actions. It is hoped that increased awareness that misuse of these powers will have a negative impact on the officers themselves, not just the person being searched and/or the wider community, will cause officers to think more carefully before exercising their powers. Monitoring and supervision by senior officers should ensure that where this does not

happen, officers are held to account for any wrong doing and learn how to respond effectively in future.

Issues not addressed

Section 60 Powers

There has been no amendment or restriction to the powers afforded under Section 60. This is explained in the Home Office cover letter to the consultation exercise:

> *"The section 60 stop and search power under the Criminal Justice and Public Order Act 1994 is not the subject of change as this does not require prior reasonable grounds for suspicion."*

More should be done to restrict the draconian powers granted under Section 60, and this is an opportunity to do just that. A 'Best Use of Stop & Search' Scheme was launched this year with the following revisions of Section 60 included:

Reducing section 60 'no-suspicion' stop and searches by –

- raising the level of authorisation to senior officer (above the rank of chief superintendent);
- ensuring that section 60 stop and search is only used where it is deemed necessary and making this clear to the public;
- in anticipation of serious violence, the authorising officer must reasonably believe that an incident involving serious violence will take place rather than may;
- limiting the duration of initial authorisations to no more than 15 hours (down from 24)

This 'Best Use' guide has been adopted by all 43 police forces – as such it would be sensible for this to form part of the Code of Practice.

Filming of Stop and Search procedures

It would have been sensible and worthwhile to offer some clarity on the rights of observers to film or record stop and searches being carried out as part of the amendments to be consulted on. Making it clear to police officers that observers do have a right to record would save a lot of conflict at the time of a stop and search where an observer intervenes. Further clarification on the police powers

to prevent recording and to seize recordings/recording devices would also be sensible, as this is an issue that often arises, especially given the prevalence of smartphones in society.

Strip Searches

Release is disappointed that the revision of PACE Code A did not address the issue of strip search as part of a stop and search.

It is our position that strip search should never be carried out as part of a stop and search. The principle of proportionality is central to this view, with the use of this power being wholly excessive in circumstances where someone is being detained to ascertain whether they are in possession of a prohibited item. The use of strip search can be a humiliating, degrading and frightening experience for the person subjected to it. It is our view that the threshold for initiating a strip search is woefully inadequate and that such a procedure should only be allowed in cases where someone has been arrested for an offence. It is difficult to see how the use of strip search to detect drugs, outside of arrest, is in any way protecting the public, but it clearly is a serious infringement of someone's individual freedom.

At the very least we would recommend that the Home Office bring in specific guidance under Code A of PACE detailing how such searches are carried out as part of a stop and search. It is insufficient to refer to Code C of PACE, Annex A, as this deals specifically with those detained at the police station as suspects. Additionally, there are clear requirements to record a strip search of a detainee in the custody record, the requirement to record when a strip search is carried out as part of a stop and search is not covered by Code C and leaves us in a situation where we do not know the scale of the problem, the efficacy of the power and whether the search is proportionate and necessary in the circumstances – arguably a strip search to determine if someone is in possession a small quantity of drugs is disproportionate. The highly intrusive nature of this power should be properly monitored and subject to external scrutiny this is currently not possible.

As highlighted in our response to the Home Office's consultation on stop and search powers, Release and Stopwatch recently submitted Freedom of Information requests to 43 police forces about the numbers of people being subject to 'strip-searches' outside of custody and arrest. Of those contacted not one force was able to provide the data requested, as recording of strip searches as part of a stop and search are not centrally recorded. Only 16 forces provided partial responses, with

all forces citing that they were unable to provide the data on excessive costs grounds (s12 Freedom of Information Act 2001). As one force stated: “There is no 'flag' to distinguish a more thorough or more intimate stop-search from a standard stop-search on systems currently in use, and as such there is no automatic way to retrieve relevant records.”

It is therefore our recommendation that in the first instance the strip searches should only be carried out when an individual has been arrested for a suspected offence. If this is not accepted then specific guidance on strip search as part of stop search must developed as part of PACE Code A and the use of the power should be recorded on the stop and search form and added to the central recording database – this is not an onerous proposal it would require one additional tick box and would take no additional time to enter into the database. Additionally, all strip searches carried out as part of a stop and search should be subject to internal and external monitoring. We welcome the Home Secretary’s decision to commission Her Majesty’s Inspectorate of Constabulary to review the use of the power. However, we think this is a real opportunity for the Home Secretary to ensure proper safeguards for what is unarguably an intrusive and humiliating for any individual.

Conclusion

Release supports the move towards reforming the way that stop and search powers are used by developing Code A. However, our position is that the proposed amendments do not go far enough to meet the intended aim. In fact, in some ways the changes would serve as a widening of powers and discretion, which is certainly not necessary or desirable. We recommend that further consideration be given to the proposed changes to ensure that reasonable suspicion searches are conducted fairly and proportionately.

For further information contact:

Kirstie Douse
Head of Legal Services
kirstie@release.org.uk
0207 324 2982