

# Revisions to PACE Code A

## CONSULTATION RESPONSE



**31 August 2023**

### About StopWatch

StopWatch is a coalition of legal experts, academics, citizens, and civil liberties campaigners. We aim to address excess and disproportionate stop and search, promote best practice, and ensure fair, effective policing for all. Since forming in 2010, StopWatch has campaigned vociferously against the disproportionate use of stop and search, the use and expansion of exceptional stop and search powers, and the weakening of associated accountability mechanisms. Our campaigning includes research, legal and policy analysis, media commentary, political advocacy, litigation, submissions to national and international organisations, and community organising.

StopWatch welcomes the opportunity to respond to this consultation, regarding revisions required following Royal Assent of the Public Order Act 2023, changes agreed to in preparation for rescinding the Best Use of Stop and Search Scheme (BUSSS) and providing updates for both the ethnic categories found in Annex B and the start date of the Serious Violence Reduction Orders (SVRO) pilot which took place in April of this year.

In particular, we must note our regret over previous home secretaries' decisions to remove and eventually rescind BUSSS safeguards, and express grave reservations as to how standards of transparency and scrutiny can be maintained in their absence.

In summary, we believe that:

- **Several of the proposals made** [a, b, c] risk being **potentially superfluous to standards of conduct** regarding police stop and searches
- **Other proposals appear too broadly defined** [e, f], with a high degree of subjectivity and discretion granted to authorising officers' operational decision-making, at the potential expense of individuals' civil liberties
- We understand the necessity for certain proposals to be included in the Code [d, g, h, i]; we would also **urge the importance of ensuring that members of the public can scrutinise the implementation of the proposals** and utilise their outcomes as evidence in support of the fair and proportionate use of stop and search powers.

## Our response to the proposed changes [paragraphs a-i]

### [a] 'Officers must have due regard to the principles of stop and search mentioned in Chapter 1 of the code'

1. StopWatch has concerns about the adequacy and effectiveness of this proposed addition to the Code. An obligation to have 'due regard' to the principles of stop and search is both too vague in its meaning and volitional on the part of a police officer, and therefore potentially meaningless in the regulation of stop and search powers.
2. The legal definition of 'due regard', as per *R (Brown) v Secretary of State for Work and Pensions* (2008), suggests that officers must adhere to the principles outlined by LJ Aikens when exercising stop and search powers.<sup>1</sup> Officers must, *inter alia*: (i) be aware of their duty to have due regard to the principles mentioned in Chapter 1 ('general principles') of the code; (ii) consider the general principles before and during the exercise of stop and search powers; and (iii) exercise these general principles in substance, with rigour and with an open mind.
3. However, an obligation to have 'due regard' in this context is too open-ended and ultimately subject to the interpretation of individual officers to have any practical import. Officers are not under an express, non-discretionary obligation to adhere to the general principles when exercising stop and search powers. To that end, the meaning and scope of 'due regard' would inevitably depend on the respective circumstances and contextual factors surrounding an individual stop and search encounter, including the time and place of the encounter, as well as demographic factors such as the age, gender, and ethnicity of a detainee.
4. In the absence of an express obligation to adhere to the general principles, a duty to have 'due regard' will do little to reduce the disproportionate use of stop and search powers against black and minority ethnic communities.<sup>2</sup> Officers will still be able to, for instance, rely on personal factors such as race and ethnicity as 'reasonable grounds for suspicion' in situations where they may not deem it appropriate to 'have regard' to the general principles. This risk is enhanced in the context of stop and search provisions in the Public Order Act 2023. The misuse of protest-related stop and search powers would not only unlawfully deprive individuals of their liberty in individual settings, but would have a consequential chilling effect on the enjoyment of rights to freedom of association and freedom of expression.<sup>3</sup>

**[b] 'Officers who use stop and search powers during a protest, namely those referred to in section [Public Order Bill stop and search powers], have an additional duty to give due regard to the right to freedom of expression, freedom of assembly and must exercise any powers compatibly with Articles 10 and 11 of the ECHR (European Convention on Human Rights). The intrusion on the liberty of the person stopped or searched must be brief and detention for the purposes of a stop and search must take place near or at the location of protest'**

5. An additional duty to have 'due regard' to the right to freedom of expression, freedom of assembly, and exercise stop and searches compatibly with Articles 10 and 11 of the ECHR, when enforcing powers under the Public Order Act 2023, will likely do little to mitigate the risk of such powers being misused. As previously stated, officers would not be under an express, non-discretionary obligation to exercise their powers in compliance with the aforementioned rights.
6. On one hand, the courts have recognised that what constitutes 'due regard' is highly fact-dependant, with the precise nature of the duty being shaped 'by the function being exercised, and not the other way round'.<sup>4</sup> Any cursory consideration of rights to freedom of expression and freedom of assembly are thus unlikely to amount to an effective discharge of a 'due regard' obligation in the context of protest-related stop and searches, given the level of potential interferences with rights protected under the common law and the ECHR. Nevertheless, given the operational complexities associated with public order policing, the enforcement of a 'due regard' obligation in practice will likely render any assessment of compatibility with Articles 10 and 11 of the ECHR into a 'tick-box' exercise and divert officers' focus away from ensuring the enjoyment of such rights in practice.<sup>5</sup>
7. StopWatch is also concerned that this paragraph would provide little definitive and effective protection for Article 10 and 11 rights in the context of protest-specific stop and searches. The subjective nature of a 'due regard' duty would inevitably raise the risk of arbitrary interferences with Article 10 and Article 11 rights in circumstances where officers deem it inappropriate to 'have regard' for these principles. In contradistinction, an obligation to assess the necessity and proportionality of potential interferences with freedom of assembly and freedom of expression prior to the exercise of protest-related stop and search powers would likely be more conducive to ensuring compatibility with Articles 10 and 11 of the ECHR.

**[c] 'Officers should take steps to ensure that they do not show partiality towards or against any specific protest group or social cause'**

8. The requirement that officers 'should take steps' to ensure that they do not show partiality towards specific protest groups or social causes is too vague and ill-defined in scope to have any practical import.

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9. There is no precise or definable threshold to be applied when assessing when an officer has 'taken steps', nor is there a requirement of 'sufficiency' to ensure the requisite due diligence in assessing any risks of impartiality. On one hand, an alternative obligation to have 'due regard' to the risks of partiality towards particular protest groups or social causes would require officers to follow a structured risk-assessment process akin to that outlined in *R (Brown) v Secretary of State for Work and Pensions* (2008). However, considering the potential chilling effect on rights such as freedom of expression and freedom of association, a mandatory obligation to not show partiality towards targeting specific protest groups or social groups would serve as a vital safeguard against the misuse of stop and search powers, and the attendant ramifications of such actions on common law and ECHR rights.

### **[d] 'Officers should not express personal views regarding a given protest topic'**

10. We believe that a mandatory and non-discretionary obligation against the expression of personal views is a welcome safeguard against officers' arbitrary enforcement of protest-related stop and search powers under the Public Order Act 2023.

### **[e] 'Communication of the authorisation of suspicionless powers from the Public Order Act where it is deemed operationally beneficial to do so by the officer granting the authorisation'**

11. StopWatch is concerned by the levels of subjectivity and discretion, as well as by the lack of definition, in the above-mentioned paragraph. Our concerns relate to the risks and potential abuse and overuse of a justification as broadly and indiscriminately framed as the 'operationally beneficial' standard. A high degree of subjectivity and discretion is involved when it comes to an authorising officer deciding what is 'operationally beneficial' in a given context.
12. The effect of such a provision, in the absence of a precise definition of the term 'operationally beneficial', could result in a blanket failure to communicate suspicionless stop and search orders. There is already a well-developed corpus of evidence that points to 'suspicionless' stop and searches being disproportionately used against ethnic minority communities compared to suspicion-based stop and search powers.<sup>6</sup> Adequate scrutiny and oversight is therefore essential in relation to decision-making on the use of these powers.

### **[f] 'Communication of the suspicionless powers under s60 of the CJPOA where it is deemed operationally beneficial to do so by the officer granting the authorisation'**

- See above.

**[g] 'Introducing a data collection requirement into the Code'**

13. StopWatch agrees in principle with proposals to introduce a data collection requirement into the Code. The monitoring and evaluation of data on stop and search encounters, including how often, why, and how powers are enforced, as well as demographic information pertaining to detained persons, serves a vital oversight function and ensures that evidence-based strategies can be devised to tackle existing disproportionality issues. Moreover, as a point of transparency, it is essential that recorded data is available and accessible to view, as a matter of public interest. A lack of transparency in the publication of police data inhibits the ability of civil society and the public at large to scrutinise potentially problematic police practices and their consequences on affected communities.
14. StopWatch and Liberty have previously drawn attention to the nexus between the absence of data collection requirements and the misuse of stops under section 163 (s163) of the Road Traffic Act 1998;<sup>7</sup> s163 stops are not subject to basic safeguards such as reporting requirements and codes of practice which govern other police powers, despite such powers being used approximately 5.5 million times in the 2010/11 year. Approximately five million of these stops went unrecorded because they did not involve a search.<sup>8</sup> This gap in oversight enables officers to circumvent the suspicion requirements of some search powers and increases the risk of detainees being stopped based on generalisations, stereotypes, and racial prejudice.<sup>9</sup> To that extent, a general data collection requirement that includes traffic stops as well as searches mitigates the risk of such issues arising in relation to stop and search powers that fall under the auspices of the Code.
15. However, for a data collection requirement to have any practical force, it is vital that additional provisions are put in place to ensure that information collected by forces is both accurate and comprehensive in nature. The children's commissioner for England, for instance, has drawn attention to how 'poor quality data mean[s] that police forces struggle to readily account for the number or circumstances of strip searches of children they have conducted'.<sup>10</sup> The commissioner also highlighted how the absence of national data on intimate searches facilitates the disproportionate use of such powers against Black children, with there being 'no transparency on the consistency of practice between forces'.<sup>11</sup> Additional provisions ensuring the accuracy and quality of data collected under the Code would enable forces to adequately take stock of stop and search powers that are liable for misuse, and work towards rebuilding trust with under-protected and overpoliced communities.

**[h] 'Updating the ethnic categories found in Annex B to reflect the 2021 Census findings'**

16. StopWatch welcomes the proposal to update the ethnic categories found in Annex B to reflect the 2021 Census findings. This step would facilitate greater monitoring and

evaluation of the exercise of stop and search powers against individuals from specific ethnic and racial backgrounds.

**[i] 'Changing the start date of the Serious Violence Reduction Order (SVRO) pilot from 17th of January 2023 to 19 April 2023'**

17. StopWatch has been concerned about the effectiveness and proportionate use of Serious Violence Reduction Orders (SVROs) to address knife and offensive weapons-related crime since the reintroduction of the Police, Crime Sentencing and Courts Bill 2021 (as it was then known) into parliament.<sup>12</sup> Under these new powers, officers are able to repeatedly stop and search those subject to the orders and circumvent existing legal safeguards, such as the 'reasonable suspicion' test for searches under the Police and Criminal Evidence Act 1984 and PACE Code A.
18. Previous efforts to give police the power to indiscriminately stop and search people, such as under s44 of the Terrorism Act, have been ruled unlawful by the European Court of Human Rights for breaching privacy rights afforded under Article 8 of the European Convention of the Human Rights.<sup>13</sup> Moreover, from a purely empirical standpoint, a large body of evidence suggests that stop and search powers and further punitive measures have, at best, a marginal effect on crime.<sup>14</sup>
19. In light of this backdrop, we do hope that the three-month delay to the start date of the SVRO pilot to 19 April 2023 gave the relevant authorities the time to develop a more robust framework for evaluating various factors pertaining to the SVRO regime, including any potential equity and disproportionality issues arising therein. It is imperative that such a pilot does not operate as a mere buffer zone between the introduction of SVROs and its wider rollout without any consideration of the attendant harms and impacts associated with the enforcement of such powers.
20. We remain of the view that the pilot in its current form will likely fail to achieve the purported aim of establishing agreed standards to inform the wider rollout of SVROs and would only serve to greenlight a policy that has the potential to compound existing ethnic and racial disparities in the use of stop and search powers.

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### References

- <sup>1</sup> *R (Brown) v Secretary of State for Work and Pensions* (2008) EWHC 3158 [90-96].
- <sup>2</sup> Home Office (2022). 'Police Powers and Procedures: Stop and Search and Arrests, England and Wales, Year Ending 31 March 2022'. <https://www.gov.uk/government/statistics/police-powers-and-procedures-stop-and-search-and-arrests-england-and-wales-year-ending-31-march-2022/police-powers-and-procedures-stop-and-search-and-arrests-england-and-wales-year-ending-31-march-2022> According to these statistics, there were 27.2 stop and searches for every 1,000 Black people, compared with 5.6 for every 1,000 White people in England and Wales. There were 9.4 stop and searches for every 1,000 people with Mixed ethnicity, and 8.9 for every 1,000 Asian people. the Black Caribbean, 'Black Other' and 'Asian Other' ethnic groups had the highest rates of stop and search out of all 19 individual ethnic groups recorded.
- <sup>3</sup> National Union of Journalists (2022). 'NUJ signs joint letter to Home Secretary after police arrests of journalists' <https://www.nuj.org.uk/resource/nuj-signs-joint-letter-to-the-home-secretary-over-police-arrests-of-journalists.html>
- <sup>4</sup> *R (Sheakh) v Lambeth LBC* (2022) EWCA Civ 457 [16]; *R (Hollow) v Surrey County Council* (2019) EWHC 618 [80].
- <sup>5</sup> Criticisms of the 'tick-box mentality' arising from 'due regard' obligations have previously been raised in relation to the Equality Act 2010, s.149 (the 'Public Sector Equality Duty'). See: *Haque v Hackney London Borough Council* (2017) EWCA Civ 4 [86].
- <sup>6</sup> Equality and Human Rights Commission (2012). 'Race disproportionality in stops and searches under Section 60 of the Criminal Justice and Public Order Act 1994'. <https://www.equalityhumanrights.com/sites/default/files/briefing-paper-5-race-disproportionality-in-stops-and-searches-under-s60-of-criminal-justice-and-public-order-act-1994.pdf>
- <sup>7</sup> Liberty and StopWatch (2017). 'Driving While Black: Liberty and StopWatch's Briefing on the Discriminatory Effect of Stop and Search Powers on our Roads'. [201712\\_Driving\\_While\\_Black.pdf](https://ams3.cdn.digitaloceanspaces.com/201712_Driving_While_Black.pdf) ([ams3.cdn.digitaloceanspaces.com](https://ams3.cdn.digitaloceanspaces.com))
- <sup>8</sup> *Ibid*, p.2.
- <sup>9</sup> *Ibid*, p.3.
- <sup>10</sup> The Children's Commissioner for England (2023). 'Strip Search of Children in England and Wales – Analysis by the Children's Commissioner for England', p.10. <https://assets.childrenscommissioner.gov.uk/wpuploads/2023/03/cc-strip-search-of-children-in-england-and-wales.pdf>
- <sup>11</sup> *Ibid*, p.10.
- <sup>12</sup> StopWatch (2021). 'Serious Violence Reduction Orders: An Open Letter to the Home Secretary'. [SVRO open letter](https://ams3.cdn.digitaloceanspaces.com/SVRO_open_letter) ([ams3.cdn.digitaloceanspaces.com](https://ams3.cdn.digitaloceanspaces.com))
- <sup>13</sup> *Gillan and Quinton v United Kingdom* App no. 4158/05 (ECtHR, 12 January 2010).
- <sup>14</sup> Delsol, R. (2015). 'Effectiveness' in R. Delsol and M. Shiner (eds) *Stop and Search: The Anatomy of a Police Power*, Basingstoke: Palgrave Macmillan; Ward, L., Nicholas, S., and Willoughby, M (2011). 'An Assessment of the Tackling Knives and Serious Youth Violence Action Programme (TKAP) – Phase II', London: Home Office; <https://www.gov.uk/government/publications/an-assessment-of-thetackling-knives-andserious-youth-violence-action-programme-tkap-phase-ii>;
- McCandless, R., Feist, A., Allan, J. and Morgan, N. (2016). 'Do Initiatives Involving Substantial Increases in Stop and Search Reduce Crime? Assessing the Impact of Operation BLUNT 2', London: Home Office [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/508661/stop-search-operation-blunt-2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/508661/stop-search-operation-blunt-2.pdf).