

## Non-statutory stop and search in Scotland

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The majority of stop searches undertaken in Scotland are non-statutory, that is, premised on verbal consent. This briefing examines the use of non-statutory stop and search by Strathclyde police force between 2005 and 2010. The briefing addresses questions in relation to informed consent, legal rights, searching young people and the aims of the tactic.

The analysis is based on police stop and search records (which predate the Police Scotland merger in April 2013), research interviews, and policy literature. The research was undertaken as part of an ESRC/Scottish Government funded doctoral project on stop and search in Scotland. The commentaries in the briefing are based on the more detailed SCCJR report *Stop and search in Scotland: An evaluation* (Murray, 2014).

### Introduction

The power to stop and search is one of the most contentious powers available to police officers, which has been widely commented upon and researched in many jurisdictions.

At the time of writing, Scotland is the only jurisdiction in the UK to permit the use of non-statutory stop and search, in addition to statutory stop and search powers. In England, Wales, and Northern Ireland all stop searches must be carried out under legal authority.

The use of non-statutory stop and search in Scotland has gained increasing attention following the merger of the eight forces into Police Scotland in April 2013. However, at the time of writing, stop and search data are not routinely published, making it impossible to examine the use of this tactic.

Against a lack of current data, this briefing looks at the use of non-statutory stop and search by Strathclyde police between 2005 and 2010. The analysis highlights a range of concerns, specifically that non-statutory stop and search is

uncodified, unregulated, falls disproportionately on young people and is unlikely to result in detection. The briefing does not argue against the proportionate use of statutory search powers based on reasonable suspicion.

### Strathclyde Police Force, 2005-2010

Strathclyde was selected for three reasons. First, the number of searches carried out by Strathclyde police in this period (over 2.3 million) suggests that the data patterns are likely to be robust. The proportion of non-statutory stop searches also remained consistent across the period (**Figure 1**), despite a significant increase in overall search levels. Second, the overall use of stop and search in Scotland is dominated by the Strathclyde region, which accounted for around 84% of recorded searches in 2010. Third, the proportion of non-statutory searches recorded by Strathclyde police is similar to the proportion recorded in the first nine months of the single force, which suggests that the analysis is relevant to Police Scotland stop and search practice.

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### 1. What is a non-statutory stop and search?

Also known as a 'consensual' or 'voluntary' stop and search

A non-statutory stop and search is premised on **verbal consent**, rather than legislation. In brief, a person must agree to be searched. **Box 1** shows the Police Scotland working definition of non-statutory stop and search.

**Box 1.** "A consensual search is appropriate where there is insufficient suspicion for a legislative search. This is a tactic used by the police during routine engagement with members of the public and should be conducted in a positive, amiable and professional manner. Where an officer wishes to conduct a consensual search on **a person who is not acting suspiciously, nor is there any intelligence to suggest that the person is in possession of anything illegal**, then this search is consensual and the officer must ask the subject if they can search them". (Stop and Search toolkit, 2013; 8, my emphasis)

#### Q.1 Agreeing to be searched: what does consent involve?

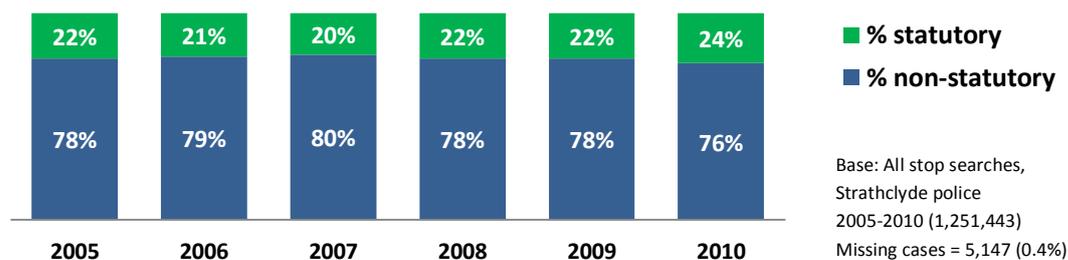
Non-statutory stop and search is based on verbal consent. This means that the person must freely agree to be searched. At minimum, consent involves:

- Knowing all the relevant facts
- Having the capacity or maturity to give consent
- Giving consent freely, without duress

However, in the context of non-statutory stop and search:

- Officers don't have to tell people they can say no, nor the reason for the search
- People's capacity for consent or maturity is not taken into account
- It seems doubtful that a request to be searched by uniformed police officers will be understood as voluntary.

**Figure 1** shows that the majority of stop searches carried out by Strathclyde police between 2005 and 2010 were non-statutory. The proportion of non-statutory searches has remained high following the Police Scotland merger. A statement issued by Police Scotland in January 2014 said that **more than 70%** of the 519,213 stop searches recorded between April and December 2013 were non-statutory.



**Figure 1. Proportion of non-statutory and statutory stop searches, 2005-2010**

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### **Q. 2 A lack of legal authority: does it matter?**

The power to stop and search should not be treated lightly, nor as a 'bread and butter' policing tool. Police powers of search are backed by coercive force and should be conferred by a democratically elected parliament. This is one of the key ways in which the police are held to account in advanced democratic societies and a keystone of policing by consent.

## **2. The geography of non-statutory stop and search**

The proportion of non-statutory stop searches recorded by Strathclyde police between 2005 and 2010 varied significantly across the region, from 60% in Argyll and Bute, to 89% in South Lanarkshire. **Table 1** shows the percentage of non-statutory searches in each council area in the six year period.

**Table 1. Proportion of non-statutory stop searches by council area**

Council Area	% non-statutory	All stop searches
South Lanarkshire	89%	145,543
East Ayrshire	85%	73,757
North Lanarkshire	79%	152,968
North Ayrshire	77%	65,740
East Dunbartonshire	77%	30,362
South Ayrshire	77%	43,674
East Renfrewshire	77%	14,742
Glasgow City	76%	541,743
West Dunbartonshire	76%	43,567
Inverclyde	74%	36,068
Renfrewshire	71%	70,425
Argyll and Bute	60%	22,638
<b>Total</b>	<b>78%</b>	<b>1,241,227</b>

Base: All stop searches, Strathclyde police 2005-2010 (1,251,443)  
Missing cases = 10,216 (0.8%)

### **Q. 3 Why does geographic variation matter?**

Non-statutory searches lack key legal safeguards that are provided when a person is searched using statutory powers. When a person is searched on a non-statutory basis:

- *The search is not based on reasonable suspicion*
- *The officer does not have to explain the reason for the search, nor tell the person that they have the right to refuse the search*

**Geographic differences in the use of non-statutory stop and search mean that people have unequal access to legal rights and safeguards in different parts of Scotland.**

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**3. Age and non-statutory stop and search**

The use of non-statutory stop and search in Strathclyde varied significantly by age between 2005 and 2010. **Table 2** shows that children aged between 11 and 15 years old were more likely to be searched on a non-statutory basis (and therefore less likely to be provided with legal safeguards) than any other age-group.

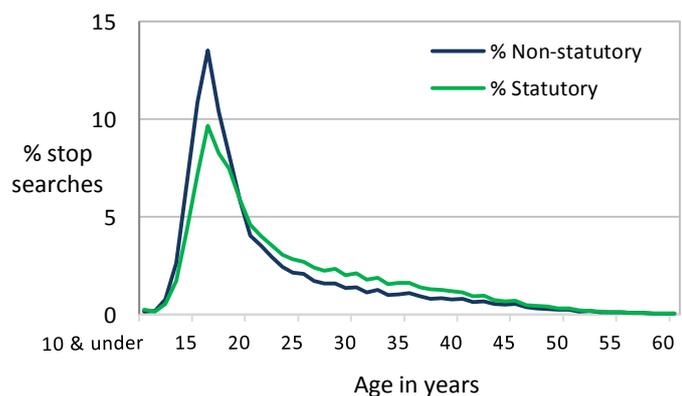
**Table 2. Proportion of non-statutory stop searches by age-group**

Age-group	% non-Statutory	All stop searches
10 years & under	67%	2,301
<b>11 - 15</b>	<b>84%</b>	<b>241,004</b>
16 -20	80%	501,345
21-25	74%	170,593
26-30	71%	104,426
31-35	70%	76,709
36-40	70%	57,620
41-50	72%	59,757
51-60	76%	14,179
60 and over	77%	4,172
<b>Total</b>	<b>78%</b>	<b>1,232,106</b>

Base: All stop searches, Strathclyde police 2005-2010 (1,251,443)  
Missing cases = 19,337 (1.5%)

Whilst young people were disproportionately the subject of both statutory and non-statutory searches, **Figure 2** shows that non-statutory searches were especially targeted at the young.

**Figure 2. Proportion of statutory and non-statutory stop searches, by age (%)**



Base: All stop searches, Strathclyde police 2005-2010 (1,251,443)  
Statutory = 272,879, non-statutory = 959,227  
Missing cases = 19,337 (1.5%)

**Q.4 Can young children consent to be searched?**

The proportion of non-statutory searches carried on very young children was lower than other age-groups. **Table 2** showed that 67% of searches carried out on children aged 10 years and under were non-statutory.

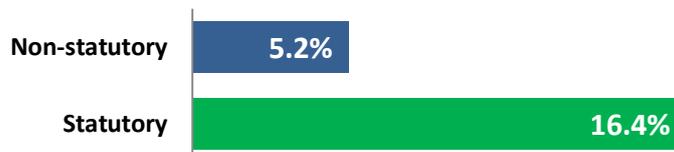
Breaking the age data down further, Strathclyde police recorded **893 searches on children aged 7 and younger** between 2005 and 2010, of which 45% were non-statutory. To be clear, non-statutory stop searches undertaken on children this young *cannot* be based on informed consent.

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### 4. The aim of non-statutory stop and search

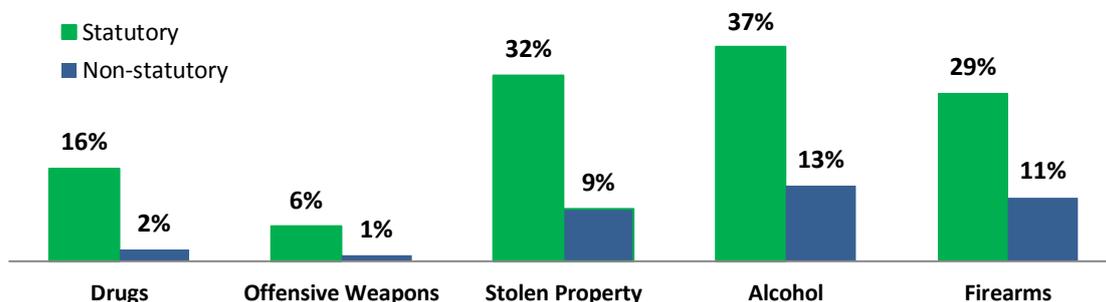
Given that non-statutory stop searches are undertaken *without* reasonable suspicion (Box 1), the aim of the tactic seems unclear. This lack of clarity is evident in detection rates for non-statutory searches, which were significantly lower than those for statutory searches. Figure 3 summarizes the overall difference in detection rates between statutory and non-statutory stop searches.

**Figure 3. Proportion of statutory and non-statutory stop searches resulting in detection (%)**



Base: All stop searches, Strathclyde police 2005-2010 (1,251,443) Statutory = 274,569, non-statutory = 963,833  
Missing cases = 13,041 (1.0%)

Breaking the data down, Figure 4 shows that the proportion of non-statutory searches which resulted in detection was lower in each stop and search category.



**Figure 4. Proportion of statutory and non-statutory stop searches resulting in detection, by search category (%)**

Base: All stop searches, Strathclyde police 2005-2010 (1,251,443) drugs = 449,162, offensive weapons = 417,862, stolen property = 29,610, alcohol = 334,807, firearms = 2,254, others/missing cases = 17,748 (1.4%)

#### **Q. 5 Why are detection rates for non-statutory stop and search so low?**

Non-statutory searches seem less likely to result in detection for two key reasons. First, a **lack of reasonable suspicion**, which lowers the probability of detection.

Second, in research interviews, officers said that *they were unlikely to carry out a non-statutory search if they thought that the search might result in detection*, due to the **risk of legal challenge (Box 2)**.

Evidence gained in a non-statutory search could be rejected by the procurator fiscal or challenged in court. For example, it could be argued that an officer was fishing for evidence, or that informed consent was not properly obtained. This observation did not however apply to non-statutory stop searches for alcohol, which were unlikely to result in criminal proceedings, and therefore unlikely to be challenged.

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**Box 2.** *“If at all I think I’m going to find something I’ll go down the legislative route purely because I know the grief I will get in the box as a witness for finding something under a voluntary search... If I get a positive drugs search, I know that the first question the defence lawyer is going to ask me, or one of the main questions my lawyer is going to ask me, is ‘What was your reasonable cause for searching my client? Why did you search him? Were you on a fishing trip?’ (Police Constable, research interview)*

If evidence *is* found in a non-statutory search, Police Scotland working guidelines recommend that officers should then undertake a statutory search (**Box 3**). This approach renders the evidence admissible and provides protection for the officer. This also means that the ‘legal’ process begins *after* the evidence has been found, which raises concerns both in relation to consent and due process.

**Box 3. From non-statutory to statutory stop and search:  
Police Scotland working example**

*‘Officers are called to a report of a group of males loitering outside a common close. There are no reports of criminality, however the reporter was concerned regarding noise. Officers attend and ascertain that they are all local males who are just hanging around having a chat, albeit none stay at this precise location. The males are all spoken to and their details are noted and checked via CHS (Criminal History System). The males are known to police on CHS, however nothing that would lead officers towards a legislative search either from CHS convictions or markers or from what they have ascertained engaging with the group. As part of that local interaction, all males are asked for their consent to be searched, which all agree to. All males were searched and one is found to possess a small piece of cannabis resin within his pocket. That specific male should be cautioned and informed that a full search will be conducted under section 23 of the Misuse Drugs Act 1971’* (Stop and search toolkit, 2013: 9)

### **Q.6 What is the purpose of non-statutory stop and search?**

If the aim of stop and search is to detect unlawful items, it seems ineffective and inefficient to search someone ‘*who is not acting suspiciously*’ (**Box 1**), particularly if any evidence that is found could be subject to legal challenge. These observations raise questions as to the purpose of the tactic.

Possible explanations for the use of non-statutory stop and search include:

- a. A means of meeting **targets** or increasing the number of searches if stop and search is set as a **Key Performance Indicator (KPI)**.
- b. A means of searching young people for **underage possession of alcohol**.
- c. A means of **detering** people from offending.

Each explanation is considered next.

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### a. Meeting targets

Targets for stop and search were set by Strathclyde police as part of the Force Control Strategy for several years prior to dissolution of the force (**Box 4**). Targets for 2009/10 and 2012/13 are shown in **Table 3**. Whilst Police Scotland state that targets are no longer set, stop and search is set as a KPI in the single force to encourage proactive policing. Non-statutory stop and search provides an easier way of meeting targets or increasing search numbers because reasonable suspicion is not required.

**Table 3. Strathclyde Police Force: Stop and search Control Strategy targets**

Financial year	Target
2009/10	243,206
2012/13	459,438
% Increase in targets	89%

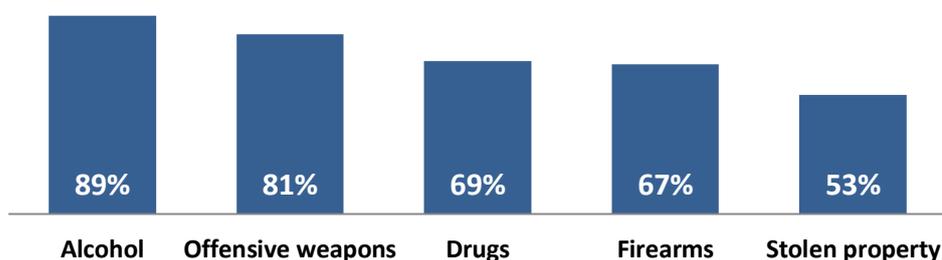
Source: Strathclyde Police Authority

**Box 4.** “At the start of the financial year a target is set for the subdivision. And then we’ll get kind of progress reports – we’re on target, we’re under target... In recent months it’s been targeted to single officers, but in general terms, it’s driven towards subdivisional targets. It’s 18 a month as our set target, and my opinion of a police officer who isn’t meeting 18 month stop searches then they’re not doing their job right. Because regardless of how many people there is, you don’t have to look very far to find a ned.”

(Police Constable, research interview)

### b. Searching for alcohol

Whilst officers in Scotland have legal powers of *confiscation* for underage possession of alcohol, they do not have powers of stop and search. Non-statutory stop searches can provide a way round this limitation. **Figure 5** shows that nearly 90% of alcohol searches between 2005 and 2010 were undertaken on a non-statutory basis.



**Figure 5. Proportion of non-statutory stop searches in each search category**

Base: All stop searches, Strathclyde police 2005-2010 (1,251,443) Alcohol = 337,149, offensive weapons = 420,743 drugs = 450,853, firearms = 2,275, stolen property = 29,948, missing cases/other = 10,475 (0.8%)

Whilst non-statutory stop and search can help to confiscate alcohol from young people, the use of this tactic on young people raises serious concerns about consent. As such, it may be preferable to legislate for search powers in relation to underage possession of alcohol, rather than rely on what can be seen as a legal loophole.

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### c. Deterrence

Perhaps the strongest explanation as to the scale of non-statutory stop and search in Scotland is the assumption that the tactic works as a deterrent. In brief, deterrence theory argues that people are likely to be deterred from offending if they perceive the probability of detection and punishment to be high. For example, it could be argued that high levels of stop and search can deter people from offending by communicating the risk of getting caught, as suggested in **Box 5**.

**Box 5.** *'Police searches are believed to be a key weapon in helping to bring down knife crime figures in the city. Police carried out more than 2600 on-the-spot searches in the city centre last month. It led to a dramatic reduction in serious violent crime. A record low of 0.5% of the searches carried out had a "positive result" with arrests being made - and weapons confiscated.'*

(Evening Times 6/1/14)

Non-statutory stop and search fits with deterrent aims because the tactic allows officers to carry out **a large numbers of searches without reasonable suspicion**. It also makes sense of the finding that officers were more likely to carry out non-statutory stop searches when they thought that they would **not** detect unlawful items (with the exception of alcohol).

#### **Q.7 Does stop and search work as a deterrent?**

Put simply, we don't know. It is exceptionally difficult to establish deterrent effects and to make a *robust* association between searches and offending trends.

But we do know that deterrent-based stop and search requires suspicionless, high volume searches. In practice, this means searching people on a non-statutory basis, without legal authority, irrespective of their involvement in crime. We also know that this type of search falls disproportionately on young people, often without informed consent or access to legal safeguards. Existing research also shows that high levels of stop and search can damage police-community relationships, and undermine trust and confidence in the police<sup>1</sup>.

Importantly, if stop and search *is* viewed as a deterrent the measure of success changes, from detection, to **detection and non-detection**. In other words, **either** outcome can be judged as effective.

Conversely, if stop and search is intended to be 'lawful, proportionate and intelligence-led', and aimed at detection (Police Scotland, 2014; 9), the on-going use of non-statutory stop and search doesn't appear to make sense.

<sup>1</sup> For a more detailed discussion, see the full SCCJR report [Stop and search in Scotland: An evaluation](#) (2014) Police Scotland (2013) *Stop Search Operational Toolkit*, Alcohol and Violence Reduction Directorate. Police Scotland (2014) [Keeping people safe through stop and search](#) paper to the Scottish Police Authority.