

# Legal basis

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Each stop and search encounter must have a basis in law. The officer carrying out the stop and search must only do so using one of the powers provided for in legislation and it must be the right power in the particular circumstances.

The most widely used powers require the officer to have reasonable grounds for suspicion. Other powers do not, but only apply where a number of preconditions exist and should be used with particular care.

In its 2015 report, [\*\*Stop and Search Powers 2: Are the police using them effectively and fairly?\*\*](#), Her Majesty's Inspectorate of Constabulary and Fire & Rescue Services (HMICFRS) expressed concern about the use of powers akin to stop and search under [\*\*section 163 of the Road Traffic Act 1988\*\*](#) and the [\*\*Police Reform Act 2002\*\*](#). The limits of these powers are also set out in this section.

## Human rights check – I

- Public authorities, including the police, must act in accordance with the law.
- Laws must be accessible: a person must have an adequate indication of what the legal rules are.
- Laws must be foreseeable: the rules must be precise enough to enable the person to foresee the consequences of their behaviour.
- Where the law allows discretion, it should be:
  - for a legitimate aim
  - clear in scope and in the manner of its exercise
  - accompanied by legal safeguards

Principles extracted from European Court of Human Rights case law.

# Powers requiring reasonable grounds for suspicion

The 'reasonable grounds for suspicion' test is key to fair decision making in stop and search and its application is examined in greater detail under that theme.

The most commonly used powers requiring reasonable grounds for suspicion are those under section 1 of the Police and Criminal Evidence Act 1984 (PACE) and section 23 of the Misuse of Drugs Act 1971 (MDA). The Psychoactive Substances Act 2016 also introduces new powers to stop and search persons and vehicles where there are reasonable grounds to suspect that the person has committed, or is likely to commit, an offence under the Act or that the vehicle contains evidence of an offence.

## Section 1 of the Police and Criminal Evidence Act 1984

Section 1(2)(a) of PACE provides police officers with the power to stop and search any person, any vehicle, or anything which is in or on a vehicle, for stolen or prohibited articles, points and blades, or fireworks. Prohibited articles include offensive weapons and articles with which a person is going equipped to steal or cause criminal damage. Section 1(2)(b) gives the accompanying power to detain individuals and vehicles for the purpose of conducting a search.

Section 1(3) specifies that the power only applies where the officer has reasonable grounds to suspect that the relevant article will be found.

## Section 23 of the Misuse of Drugs Act 1971

Section 23(2) of the MDA provides that a constable may search a person suspected of being in possession of a controlled drug and detain them for the purpose of the search. They may also search any vehicle or vessel in which they suspect the drug may be found, and can require the person in control of the vehicle or vessel to stop it for that purpose.

This provision specifies that the person must be suspected of being in possession of the drug, not merely to have used it or been present during its use by others. With respect to a vehicle, the provision similarly requires the officer to suspect that the drug may be found in it.

## The smell of cannabis as sole ground for a search

In terms of why this is important, 7% of 8,574 searches assessed by HMICFRS in its [\*\*2017 legitimacy inspection\*\*](#) were based solely on the smell of cannabis. They found that there was a difference in find rates for black people (29%) compared to white people (37%), leading to a conclusion that weaker grounds might be used to search black people. Concerns have also been expressed that drugs searches, particularly those for cannabis, could criminalise young people and have a negative impact on the communities affected<sup>1</sup>.

**Section 23(2) of the MDA** and **PACE Code A** make no reference to whether the smell of cannabis alone provides reasonable grounds, and there are no stated cases on this issue. As a consequence, it is difficult for the College to provide further clarity, except to say that it is the responsibility of individual officers to ensure that searches based only on the smell of cannabis can be justified and are carried out in accordance with PACE Code A.

PACE Code A states that reasonable grounds for suspicion must relate to the likelihood that the object in question will be found. It also says that, in the absence of specific intelligence or information, reasonable grounds may exist on the basis of someone's behaviour, and that searches are more likely to be effective and legitimate when their grounds are based on multiple objective factors. This would suggest it is not good practice for an officer to base his or her grounds for search on a single factor, such as the smell of cannabis alone or an indication from a drugs dog. College research, carried out in two forces, has also concluded that behavioural factors should play a more prominent role than the smell of cannabis in officers' decisions to search for cannabis<sup>2</sup>.

## **Guidance for practitioners conducting and supervising searches**

To help an officer decide if their grounds for a cannabis search are reasonable, they should ask themselves the following questions.

- **Attribution** – Can the smell of cannabis be attributed to a specific person?
  - If there is a group of people together – either in an area or vehicle – can I attribute the smell and/or suspicion to particular members of the group?
  - Could the smell have come from somewhere or someone else, such as a previous occupant of the area or vehicle?
- **Likelihood** – How likely is it that I will find the cannabis I can smell on this specific person?
- **Genuine suspicion** – Taking everything into account, do I have a genuine suspicion that I will find cannabis on this person and is there an objective basis for that suspicion based on facts,

information and/or intelligence?

- **Reasonable person** – How would my grounds sound to a reasonable person? Would they reach the same conclusion as me, as required by PACE Code A?

#### Behavioural factors

What else might indicate that the person is, or is not, currently in possession of cannabis – for example, their behaviour? Research has shown<sup>3</sup> that a criminal justice outcome was more likely when officers recorded at least one of the following behavioural factors in their grounds for a search.

- Being seen to hide, swallow or discard something.
- Being seen or found to be intoxicated.
- Admitting to being in possession of drugs or recently using or being in contact with drugs.
- Being seen in possession or close to suspected drugs.
- Smoking, holding or being close to a suspected joint.

#### Contextual factors

The same research identified that a criminal justice outcome was less likely when officers recorded one of the following contextual factors in their grounds.

- Being under 18 years old.
- Being seen in a group or with an associate.
- Being seen late at night.
- Being in a secluded place.
- Matching a physical description of a suspect or being identified during a geographic search of a local area.
- Attempting to avoid police contact.
- Being seen in possession or close to drugs paraphernalia.

#### Questions to ask yourself when deciding whether search is the best course of action

Officers should also decide whether searching for cannabis is the best course of action based on an assessment of the particular encounter, applying the National Decision Model and their training.

They may consider a number of specific questions when making this decision, as follows.

- How should the needs of the caller affect my actions if I am responding to a call for service? A stop and search should not be conducted purely because the officer perceives that a member of the public would expect them to do so. However, the circumstances and background to the incident need to be taken into account.
- Do I need to take action due to any additional safeguarding issues (for example, mental health, children and young people, vulnerability)?
- Should I carry out a **field impairment test** before I consider carrying out a search if I have stopped a vehicle and suspect the driver poses a risk to public safety because they are unfit to drive?

Once an officer has decided to carry out a search for cannabis, he or she must ensure that all the grounds for the search are explained and recorded, so that the search can be fully justified. Supervisors should also consider the above when monitoring and supervising the use of stop and search powers.

#### Case law

In R (Smith) v DPP [2002] EWHC 113 (Admin), the officer:

- saw a rearseat passenger in a vehicle fidgeting and moving his arm behind his back
- stopped the vehicle under section 163 of the Road Traffic Act 1988
- smelled what he believed to be cannabis when he opened the door of the vehicle
- saw some Rizla cigarette papers on the dashboard

The Administrative Court found that the search was lawful. It noted that it was the passenger's behaviour in the back of the vehicle that led to the officer's reasonable suspicion and that this was reinforced by the smell on approaching the vehicle.

#### Guidance for senior leaders

It is important for leaders to make clear to staff the force position on conducting searches based solely on the smell of cannabis and to monitor the extent to which this guidance is adhered to. It is unlikely that possession of cannabis will feature as part of a force control strategy or be a priority, but it is accepted that drug use and supply are prevalent in some organised crime groups (OCGs).

How leaders direct their staff in the use of this power to deal with cannabis possession can have a significant impact on public confidence and legitimacy.

## The Psychoactive Substances Act 2016

The Psychoactive Substances Act 2016 (PSA) came into force on 25 May 2016. A psychoactive substance is defined as any substance that is capable of producing a psychoactive effect in a person who consumes it and is not an exempted substance under Schedule 1 to the Act.

Offences under the Act (PSA offences) are:

- producing (section 4)
- supplying or offering to supply (section 5)
- possession with intent to supply (section 7)
- importing or exporting (section 8)
- possession in a custodial institution (section 9)

Simple possession is **not** an offence unless it occurs inside a custodial institution.

Section 36 of the PSA creates a power to stop and detain a person for the purpose of search where a police officer has **reasonable grounds to suspect** that the person has committed, or is likely to commit, a PSA offence. As simple possession is not a PSA offence, there is no power to search for simple possession.

Sections 37 and 38 create similar powers in respect of vehicles, vessels and aircraft. An officer may require a vehicle stopped under section 37 to be taken elsewhere as directed if it is impracticable to search it where it was initially stopped.

Under section 43, officers searching a person under sections 36–38 may seize and retain any item found in the course of the search:

- to determine if a PSA offence has been committed or
- where the officer reasonably believes the item to be:
  - evidence that a PSA offence has been committed
  - a psychoactive substance (whether or not it is evidence of an offence)

Section 43 only applies where psychoactive substances are found during a search under sections 36–39 (or the officer is otherwise lawfully on premises) and not under any other stop and search power.

Under section 49, items seized under section 43 can only be retained for as long as necessary in all the circumstances and in particular for:

- use as evidence at trial for a PSA offence
- forensic examination
- investigation in connection with a PSA offence

A psychoactive substance that is not evidence of an offence (ie, a quantity consistent with simple possession) can, therefore, be seized if found during a search under sections 36–38, but not retained.

Section 50, however, allows an officer to **dispose** of a psychoactive substance where:

- the officer reasonably believes the item is a psychoactive substance that, if it had not been seized, was likely to be consumed by an individual for its psychoactive effects
- the item is not evidence of a PSA offence (simple possession)
- the officer has no reason to believe the substance was being used for an exempted activity under **Schedule 2** of the Act by a person entitled to do so
- the search was carried out in a place to which the officer had lawful access without a warrant

In such circumstances, section 50 allows the officer to dispose of the item immediately as they see fit, subject to local force policy on seizure, retention and disposal of a PSA. Any substances disposed of should be properly recorded and disposed of safely. In particular, they should not be disposed of down drains or other water courses.

Seized substances should be treated as if they are a controlled drug and packaged in accordance with local force policy.

Psychoactive substances may come in a form similar to controlled drugs and be difficult to identify. If an officer suspects simple possession of a controlled drug, but the person to be searched suggests that it is a psychoactive substance, the officer may still carry out a search under section 23 of the MDA where they have reasonable grounds to suspect that the person is in possession of

a controlled drug. Section 23 of the MDA has its own power to seize items found.

For further information see:

- College of Policing, [\*\*Psychoactive Substances Act 2016 – Briefing Note: May 2016\*\*](#)
- Home Office Circular [\*\*004/2016\*\*](#), Psychoactive Substances Act 2016
- Home Office, [\*\*Overview of the Psychoactive Substances Act 2016 and supporting documents\*\*](#)

## Other stop and search powers

Other powers that require an officer to form a reasonable suspicion and that apply in specified circumstances include:

- [\*\*section 47 of the Firearms Act 1968\*\*](#)
- [\*\*section 7 of the Sporting Events \(Control of Alcohol etc.\) Act 1985\*\*](#)
- [\*\*section 4 of the Crossbows Act 1987\*\*](#)
- [\*\*section 2 of the Poaching Prevention Act 1862\*\*](#)
- [\*\*section 12 of the Deer Act 1991\*\*](#)
- [\*\*section 11 of the Protection of Badgers Act 1992\*\*](#)
- [\*\*section 19 of the Wildlife and Countryside Act 1981\*\*](#)
- [\*\*section 139B of the Criminal Justice Act 1988\*\*](#)

A fuller list of powers can be found in [\*\*Annex A\*\*](#) of Code A. It is not a definitive list.

## Powers requiring the existence of preconditions

Stop and search powers that do not require an officer to have specific reasonable grounds for suspicion ('no suspicion' search powers) give rise to potential for abuse and their use is strictly regulated.

[\*\*Section 60 of the Criminal Justice and Public Order Act 1994\*\*](#) (CJPOA) provides for a power to stop and search in anticipation of, or after, serious violence. It is currently the most far-reaching search power, as it allows 'no suspicion' searches in a defined area, so prior authorisation based on an objectively held reasonable belief is a prerequisite.

Three separate powers to search premises also include a power to search any person found there without prior specific grounds relating to the individual, but the search of the premises itself requires a number of pre-conditions to be met. One of the powers is under Schedule 5 of the Terrorism Act 2000, and thus not addressed here.

## Section 60 of the Criminal Justice and Public Order Act 1994

### What are section 60 powers?

Section 60 powers allow a constable in uniform to stop and search any pedestrian - or anything carried by them - or any vehicle, its driver and passengers, for offensive weapons or dangerous instruments. The constable can make any search they think fit, whether or not they have any grounds to suspect that the person or vehicle is carrying the above items.

Such wide powers must be used only where necessary and in a proportionate manner. In line with legislation and PACE Code A, their use must be authorised, and their geographical scope and duration must be limited.

Use of section 60 powers may only be authorised by an officer of at least inspector rank. If the authorising officer is an inspector, they must ensure that an officer of at least superintendent rank is informed about the authorisation as soon as practicable.

In order to grant an authorisation, the authorising officer must **reasonably believe** that one or more of the permitted grounds applies and that it is **expedient** to use section 60 powers to achieve a legitimate aim.

Permitted grounds are one or more of the following:

- incidents involving serious violence **may** take place in the police area
- persons are carrying dangerous instruments or offensive weapons without good reason in the police area
- an incident involving serious violence has taken place in the police area and a dangerous instrument or offensive weapon used in the incident is being carried by a person in the locality

Legitimate aims are any of the following:

- prevent serious violence
- find dangerous instruments or weapons after an incident involving serious violence
- apprehend persons carrying weapons

Code A [\*\*guidance note 11\*\*](#) states that the authorising officer must base their reasonable belief on objective factors. Examples given include a history of violence or antagonism between particular groups, previous violent incidents at particular events, and a significant increase in knife-point robberies in a particular area. This emphasises the importance of intelligence-led authorisations.

It is the responsibility of the authorising officer to ensure that the purpose is clearly articulated and communicated to officers. This should include briefing officers on the intelligence that underpins the authorisation.

The scope of the authorisation (duration and geographical area) must also be limited by what is necessary to achieve the legitimate aim.

- Duration: minimum period considered necessary up to a maximum of 24 hours.
- Geographical area: no wider than necessary and with clear boundaries identified by named streets.

Code A ([\*\*paragraph 2.13\*\*](#)) says that the authorisation must specify grounds, locality and duration. It must be in writing, unless serious violence has already taken place and it is not practicable to give it in writing. If given orally, it must be recorded in writing as soon as practicable.

An officer of at least superintendent rank can extend the duration of an authorisation by a further 24 hours when it is expedient to do so, having considered any offences connected to the authorisation that have been committed, or are reasonably suspected to have been committed.

Where it is operationally feasible, forces are encouraged to communicate to the public that a section 60 authorisation is in place, to help deter offending and to enhance community trust and confidence.

## **The Best Use of Stop and Search Scheme (BUSSS)**

In 2014, the Home Office introduced the [\*\*Best Use of Stop and Search Scheme\*\*](#) (BUSSS). The police forces that chose to take part in BUSSS were expected to adopt a series of voluntary conditions that restricted the use of section 60 powers, which went beyond the legal requirements

but were not legally binding. The conditions in BUSSS related to section 60 included:

- raising the minimum rank of the authorising officer, from inspector to assistant chief constable or commander
- allowing the authorising officer to give an authorisation only when necessary to do so, rather than when expedient
- strengthening the grounds needed to give an authorisation, from reasonably believing that serious violence may take place to reasonably believing it **will** take place
- reducing the maximum duration of an authorisation to 15 hours, which could be extended by up to nine hours (to 24 hours)
- reducing the maximum duration by which authorisation could be extended beyond the initial 24-hour maximum, from a further 24 hours to 15 hours.

The above conditions were relaxed by the Home Office in seven forces as part of a 12-month pilot. The aim was to make it easier for these forces to respond to knife crime. The Home Office extended the pilot after six months to all forces. In 2021, it was announced in the Beating Crime Plan that the voluntary restrictions on the use of section 60 powers contained in BUSSS were no longer Home Office policy. This decision was ratified in 2022, permanently relaxing the conditions relating to section 60.

## Officer use of section 60 powers

When a **section 60** authorisation is in force, officers using stop and search powers should know:

- that it is in force
- the grounds for which it was issued
- the geographic limits of where it applies
- the start and end times of the current authorisation

They should be able to explain all of these details to any member of the public who is stopped.

**Section 60** does not justify the blanket use of stop and search powers. Officers should consider the circumstances that have generated the authorisation and limit their searches to those persons likely to be involved. The power does allow officers to search anyone within the locality, but they should use judgement when exercising it and be guided by the purpose of the authorisation. Code A, **paragraph 2.14A** specifies that officers must not stop and detain people for the purpose of search:

- for reasons unconnected to the purpose of the authorisation
- on the grounds of any of the protected characteristics of the Equality Act 2010

#### **Removal of face coverings**

Where a section 60 or section 60AA authorisation is in force, officers have a power to require the removal of disguises. This is not a search power, but may take place at the same time as or become relevant during a stop and search under section 60.

If either authorisation is in force and an officer reasonably believes that an item is being worn as a disguise (a person is wearing it wholly or partly for the purpose of concealing identity), they can seize the item.

The key factor is the purpose for which the item is being worn. Head or face coverings may be worn for religious reasons, so it is not enough that the covering does in fact conceal identity. There must be reason to believe that it is being worn at least partly for the purpose of disguise.

There is no power to stop and search for disguises, but if one is being carried, or is discovered during a search for something else, it can be seized where the officer reasonably believes it is intended to be used to conceal anyone's identity.

## **Powers to search persons when searching premises**

The following powers to search premises include an associated power to search any person found on the premises during the search.

### **Section 139B Criminal Justice Act 1988**

Where a constable has reasonable grounds to suspect that a bladed or pointed article or offensive weapon is on school premises, they may search the premises and any person on them for any such article or weapon.

### **Section 23(3) Misuse of Drugs Act 1971**

Where there are reasonable grounds to suspect that controlled drugs or certain documents are in the possession of a person on a particular premises, a warrant may be issued under this section to search the premises. Any person on the premises may be searched as long as this is specified in the warrant.

Code A ([paragraph 2.29](#)) says:

*Prior grounds specific to the individual being searched are not required, but the decision to search them should still be based on objective factors relevant to the reason for searching the premises, not personal prejudice.*

## Powers akin to stop and search

HMICFRS recommendation 6 ([Stop and search powers 2: are the police using them effectively and fairly?](#)):

*The College of Policing should make sure that the relevant authorised professional practice include instruction and guidance about how officers should use the [Road Traffic Act 1988](#) power to stop motor vehicles and the [Police Reform Act 2002](#) powers to search for and seize alcohol and tobacco from young people in a way that is effective and fair.*

## Vehicle stops under section 163 of the Road Traffic Act 1988

[Section 163](#) of the RTA states that a person driving a mechanically propelled vehicle on a road must stop if required to do so by a constable. Not to do so is an offence. There are no procedural requirements for the stop and there is no associated search power.

The officer can ask the driver for their licence and ask the driver and passengers questions – in effect, a stop and account. The officer may only search the vehicle or persons in it if one of the stop and search powers applies in the circumstances – for example, if there is intelligence giving reasonable grounds to suspect that drugs or a weapon are being carried in the vehicle. If no power applies, no search can take place.

The officer does not need to have any particular reason to stop the vehicle and there is no obligation to explain why the vehicle has been stopped. However, explaining why the officer decided to stop the vehicle – in line with a procedural justice approach – is likely to improve the quality of the encounter and how it is perceived by the person stopped<sup>4</sup>.

In addition, officers are subject to the public sector equality duty under [section 149](#) of the Equality Act 2010. In the exercise of their functions, the officer must have due regard to the need to eliminate unlawful discrimination, harassment and victimisation. They are therefore not permitted to stop a vehicle solely based on relevant [protected characteristics](#), including the race, age or religious dress of the driver or passengers.

## Police Reform Act 2002 powers to search for and seize alcohol and tobacco

Under [section 38](#) of the Police Reform Act 2002 (PRA), police community support officers (PCSOs) may be designated with the search powers set out in [schedule 4](#) of the Act.

Code A, [Annex C](#) specifies that when exercising any of the powers, a PCSO must have regard to any relevant provisions of the code, including conduct of searches and steps to be taken prior to a search.

Designated PCSOs have the power to seize alcohol in a public place from a person under 18 and to seize tobacco or cigarette papers from a person under 16 who is found smoking in a public place. They have a similar power to seize anything they reasonably believe to be alcohol, or a container for alcohol, from anyone they reasonably believe is or has been consuming, or intends to consume, alcohol in a designated public place, whether under a [Designated Public Place Order](#), or a [Public Spaces Protection Order](#).

[Paragraph 7A](#) of schedule 4 grants a power to search in such cases where:

- the PCSO has required the person to surrender the alcohol or tobacco
- the person has failed to comply with the request **and**
- the PCSO **reasonably believes** the person is in possession of the item

If all of these elements are present, the power to search is activated, but the PCSO must still obtain the person's consent in order to proceed to search. When proposing to search, the PCSO must inform the person that it is an offence for them to withhold consent without a reasonable excuse. If they do not consent, the PCSO cannot search the person but can require them to give their name and address. Failing to give their name and address allows a designated PCSO to detain them for up to 30 minutes until the arrival of a constable. The constable will have the option of arresting

them for the offence of withholding consent without a reasonable excuse and searching them post-arrest or of exercising a wider stop and search power if there are reasonable grounds to do so.

The legislation specifies some limitations to the extent of the search:

- the PCSO can search only to the extent **reasonably required** to find the object of the search
- they cannot require the removal of more than a jacket, outer coat and gloves (JOG) in public

If the PCSO finds controlled drugs in the course of the search, those drugs can be seized without the person's consent. Under paragraph 7E of schedule 4 of the Act, this includes psychoactive substances where the PCSO reasonably believes that it is unlawful for the person to have the substance in their possession – for example, where the quantity is such as to point to intent to supply. In these circumstances, the PCSO may also require the person to provide their name and address, failure to do so being an offence. The PCSO has specific duties under paragraph 7E(4) to explain to the person the retention and disposal provisions (sections 49-51 and 53) of the Psychoactive Substances Act 2016. The PCSO must also follow any instructions given by a police officer regarding the substance.

By definition, the powers to seize alcohol and tobacco from those under 18 and under 16 involve interaction with children and young people. PCSOs must give particular regard to the specific **information on engaging with children** when using these powers.

## Stop and account

Stop and account does not depend on a legal power. It can be used in any circumstance, as long as it does not breach the public sector equality duty by being based on protected characteristics.

This means, however, that there is no corresponding power to detain a person to talk to them or ask them to account for themselves. They cannot be arrested for not stopping to talk to the officer or answer their questions.

## Tags

Stop and search