

Justice Committee

Criminal Justice (Scotland) Bill

Written submission from the Association of Scottish Police Superintendents

1 Introduction

We welcome the opportunity to comment on the general principles of the Bill as presented.

2 Police powers and rights of suspects (Part 1 of the Bill)

The police powers as drafted give rise to uncertainty in a number of areas.

3 Arrest (Section 1)

The powers differ from the current Common Law powers of arrest when considering the “grounds” for a constable to consider when deciding whether or not to make an arrest. They fail to explicitly cover an important element where an arrest is executed in the interests of the offender or in the interest of public safety. The powers of arrest are not wholly consistent with the general **duties**¹ of a constable defined in the Police and Fire Reform (Scotland) Act 2012, in that they lack an explicit power to arrest to prevent a crime.

Police Powers of Arrest in England and Wales enable arrest, without warrant, anyone who is about² to commit an offence. Is this an implied power in Scotland or is it the intention to curtail any power to arrest for a person about to commit a crime? While the Criminal Procedure Scotland Act 1995³ provides that an attempt to commit a crime is punishable as a crime, new powers of arrest should be clear that an arrest can be made to prevent an attempt to commit a crime.

4 Arrested person to be taken to police station (Section 4)

It may be worth considering a clause that provides for the immediate de-arrest of an arrested person where the grounds of arrest no longer apply. This can be done at any time and should not require a person to first be taken to a police station as required under Section 4, just because they have been arrested. There is also a public interest and justice need to consider enabling an arrested person to be lawfully taken by arresting officers immediately upon arrest to where a living person is concealed (kidnap) or a dead body is located or to recover property or other evidence that might be lost. It should be clear that this should be done in very rare circumstances which must be justified.

¹ <http://www.legislation.gov.uk/asp/2012/8/section/20>

² <http://www.legislation.gov.uk/ukpga/1984/60/section/24>

³ <http://www.legislation.gov.uk/ukpga/1995/46/section/294>

5 Authorisation for keeping in custody (Section 7)

The practicalities of this, particularly in some of the more remote areas should be noted. It may be appropriate to consider providing that it is not necessary for the authorising constable to be physically present to reduce the scope for any legal challenge arising as to the competency of any authorisation where the authorising officer was not physically present to apply the test in Section 10. It may worth considering including similar wording as in Section 19 (3) regarding “a constable not to be subject to any claim whatsoever” by reason of authorising keeping a person in custody. It is important to ensure that the role of the officers applying the test for Section 7 is adequately understood and respected by arresting officers and Senior Investigating Officers. It is important that the Authorising Officers responsibilities and authority is adequately covered in law and supporting guidance or Code of Practice provided. The role of arresting and investigating officers may also need to be addressed in supporting guidance or Code of Practice.

6 Review after 6 hours (Section 9)

The practicalities of this, particularly in relation to setting the reviewing rank at Inspector, should be considered. It may be appropriate to consider providing that it is not necessary for the reviewing Inspector to be physically present to reduce the scope for any potential legal challenge arising as to the competency of any authorisation where the authorising officer was not physically present to apply the test in Section 10. The pressures on Police Scotland to achieve savings through “*management layering*” are significant. Reduction in supervision ratios may place the Inspecting ranks under significant pressure. It is important to ensure that new responsibilities under this Bill are given sufficient consideration by Police Scotland and that these responsibilities are not just “bolted on” to Inspectors performing Duty Inspector roles, where a potential conflict of interest may arise, in terms of ensuring an appropriate response to crime whilst safeguarding the rights of arrested persons.

7 Test for section 7 and 9 (Section 10)

The test relates to whether the keeping in custody following initial arrest can be authorised and whether at the review point of 6 hours continued keeping in custody can be authorised. The important point about that the reviewing Inspector has “*not been involved in the investigation*”, may need additional guidance or a Code of Practice to ensure that this is adequately understood. It should be clear if an Inspector performing a Duty Officer Role, responsible for leading and managing the police response to incidents, can be reasonably regarded as “*not involved in the investigation*” and can carry out the reviewing role to the satisfaction of Parliament.

The degree to which an Inspector is regarded as “*not involved*” in the investigation may be a point of dispute in legal proceedings unless this is explicitly understood. The reference to “*necessary and proportionate*” at 10, (1), (b) and (2), (a), (b) and (c) does not adequately meet the policy objectives outlined in paragraph 45 where it provides the police must, when considering custody, take into account:

- 1) Fairness
- 2) the interests of justice
- 3) the necessity to protect the public
- 4) the prevention of crime

The degree to which police working practices may need to change should not be underestimated. The importance in legal proceedings of decisions both “*authorising*” and “*reviewing*” should be understood. The likely inclusion as witnesses in any legal proceedings of such officers and the examination of their decision making should be clarified.

8 12 hour limit: general rule (Section 11)

The degree to which police working practices may need to change should not be underestimated. By specifying that “*the person may continue to be held in police custody only if a constable charges the person with an offence*” constrains police action. Currently a person who is detained under Section 14 of the Criminal Procedure (Scotland) Act, status changes when they are placed under arrest. There is no requirement to charge them at that point, although that may happen. If a person is being detained for appearance at court from police custody there is a period of time during which police are able to prepare the charges and then formally charge the arrested person. The wording in Section 11 (2) may result in additional costs (financial through overtime or opportunity by handing the case over to others to deal with) to Police Scotland by removing the flexibility currently available about specifying exactly when a person is charged. Alternative wording to be considered that still ensures the arrested person understands why they are being kept in police custody might be: “*The person may be continued to be held in police custody only if the constable informs the person that they are going to be charged with an offence.*” This can negate the requirement for the full details of all the charges to be ready by the completion of the 12 hour period, in those cases where a person is to be held in police custody prior to appearing at court and this would still be fair to the accused.

9 12 hour limit: previous period (Section 12)

The challenge to monitor and implement the 12 hour limit – previous period should not be underestimated. It will require a technology fix to support this. The implementation of this legislation could be done on a paper basis but the some of the complexities will need a technical solution. The design of the technical solution is dependent upon the final version of the Bill and managing the dependency with the technical solution providers will be an important point to get right to avoid additional costs around technology. Failure to get this right may lead to the loss of criminal cases at court and justice not being done.

Given the additional rights and safeguards in the Bill there is serious doubt in the practicality of completing all the activity that is required within a 12 hour limit. It is perhaps expecting too much to manage the increasing complexity of progressing a criminal investigation relying on external third parties for Forensic Analysis and other enquiries, safeguarding an arrested persons wellbeing and ensuring an arrested persons rights are met all within the context of a 12 hour time limit and 28 days Investigative Liberation. Getting the balance right in an interview where the suspect

is regarded as vulnerable may require additional breaks (see paragraph 119 of the Policy Memorandum). A 24 hour period is more reasonable and is likely to be more feasible and achievable than a 12 hour period. Additional ECHR safeguards could be built in by review from a Superintendent, not connected to the investigation, in those cases where 12 hours is assessed as being insufficient.

10 Medical treatment (Section 13)

The implementation of this legislation could be done on a paper basis but the some of the complexities will need a technical solution (tracking exact times). The design of the technical solution is dependent upon the final version of the Bill and managing the dependency with the technical solution providers will be an important point to get right to avoid additional costs around technology. Failure to get this right (breach of time limits) may lead to the loss of criminal cases at court and justice not being done.

11 Investigative Liberation (Section 14)

The Policy Memorandum (paragraph 58) indicates that these powers “*are most likely to be of use in the investigation of serious crimes which often involve complex and technical examinations of telephones, computers etc.*” This is a new power for Scotland but there is a similar power that has been available for some time in England and Wales. The study “*Police use of pre-charge bail*”⁴ carried out by the former National Policing Improvement Agency (NPIA) published in 2012 identified four aspects of the pre-charge bail or in the Bill’s terms Investigative Liberation, perceived to be driving the use of this power, and were potentially sources of unnecessary use:

- 1) Unplanned arrests
- 2) Insufficient quality in initial investigations
- 3) Demands on limited custody space
- 4) Differing perceptions on levels of evidence required for charging leading to delays in the process.

Some of the reasons for this included Force policies and processes driving individual officer’s decision to arrest, risk aversion, performance pressures, resource pressures where response officer numbers are depleted through increased number of specialist investigative units. Police Scotland has a robust performance management regime and its impact on the implementation of Investigative Liberation will need close monitoring.

The NPIA research paper identified the types of reasons why pre-charge bail would be appropriate, it included not only the time consuming technology investigations but also, DNA, fingerprints, wellbeing of suspect (illness, injury, drug or alcohol intoxication) and that similar factors applied to victims and witnesses all of which could necessitate release while investigation took place. If all of these factors are to be considered in terms of fairness to the suspect it is likely that Investigative Liberation may be required on fairness grounds for more than just “*serious crimes*”, as presumably fairness is required for all suspects’ not just suspects for serious crime. On fairness grounds it may well be that Investigative Liberation becomes

⁴ http://www.college.police.uk/en/docs/The_police_use_of_pre-charge_bail.pdf

used more frequently than envisaged in the Policy Memorandum, given the prevalence of drug and alcohol in crimes investigated by police in Scotland. Further guidance and/or a Code of Practice may be required for this new development to learn the lessons of Investigative Liberation in other jurisdictions and to ensure the policy objective is achieved. That it is used where it is necessary and proportionate with regard to fairness to any suspect rather than “*mostly in the use of serious crimes which often involve complex and technical examinations of telephones, computers etc.*” (Policy Memorandum, paragraph 58).

12 Investigative Liberation - Release on conditions (Section 14)

The implementation of Investigative Liberation could be done on a paper basis. However, managing the process, ensuring resources are available, there is sufficient cell capacity, that conditions are automatically updated to the Criminal History System in time etc. will need a technology solution. Ensuring there is sufficient numbers of Inspectors and that they have the capacity to meet this new requirement given the requirements for “management layering” to achieve savings, is something the Justice Committee may wish to receive assurance on from Police Scotland. Setting of conditions will need to conform to ECHR tests of proportionality, necessity and lawfulness. Conditions will need to take into account the PM objectives of “*needs of the enquiry*”, “*public safety*” while “*balancing the fundamental rights of a person suspected of having committed the crime*”. The officer setting the conditions will need to have sufficient information from the investigating officer to satisfy themselves as to the lines of enquiry required, why they cannot be completed at the time, how long they will take and if there is a reasonable prospect of them being completed within the 28 days.

The NPIA report highlighted it generally took 4 weeks for forensic examination (DNA, blood fingerprints, digital etc.). What is the current average time for the results of Forensic analysis of all types to be provided to Police Scotland? Is there a Service Level Agreement between the Scottish Police Authority and Police Scotland that specifies a limit of within 28 days? In terms of public safety the officer setting the conditions will need access to sufficient information to assess the risk of harm to the victim and witnesses, the general public and the suspect – either from risk of self-harm or indeed by persons seeking to harm the suspect. A “tick box” approach is unlikely to meet the policy objective; proper consideration of the facts will be required.

13 Investigative Liberation – 28 Day limit (Section 14)

It is likely that this time period will be insufficient, particularly if the Police Scotland performance management approach drives an increasing number of submissions for forensic examination in an increasing number of cases. The Bill is silent on the detail around the detail of the operation of Investigative Liberation (IL). Is it competent to specify a condition that the person released on IL must attend a specified police station at a specified time and date – once the further enquiries have been completed? It would appear to be competent for a Constable to then arrest the suspect for the purpose of questioning the suspect on matters arising from the result of the further enquires in relation to the matter in which he was arrested – exercising the power under Section 1 in accordance with Section 2. Depending on how much

time is left on the 12 hour “*custody clock*” – this may not be sufficient time to ensure the suspects rights are fully safeguarded and still complete any necessary interview. 12 Hours may not be sufficient and the balance of fairness may be more heavily weighted in the suspects favour. A period of 24 hours may represent a more fair balance between the suspect and victims.

14 Conditions ceasing to apply (Section 15)

The potential for new work for police in relation to managing conditions is noted. The need for a technology solution is noted to keep records up to date.

15 Modification or removal of conditions (Section 16)

The potential for new work for police in relation to managing conditions is noted. The need for a technology solution is noted to keep records up to date. The requirement on Inspectors to “*keep under review*” investigative liberation will create new work for the Inspecting ranks and consideration should be given to whether the review of investigative liberation conditions is placed at the right level or if it should be placed at a Custody Sergeant level.

16 Review of conditions (Section 17)

The potential for new work for police in relation to managing conditions is noted. Additional reports to COPFS for any review of Investigative liberation conditions being heard by the Sheriff. The need for a technology solution is noted to keep records up to date.

17 Information to be given before interview (Section 23)

Some clarity over what is meant by “*voluntary attendance*” and what rights any person who attends voluntarily at a police station has would be helpful. This might include the requirement in law to inform any such person they are

- Not under arrest
- Free to leave at any time
- Not obliged to answer any questions

Clarifying what is meant by “*police custody*” would also be helpful. Does this mean a person who is under arrest or otherwise detained under other statutory power for the police to detain a person (Misuse of Drugs Act etc.)? Some clarity over whether there is a requirement to make a record that Section 23 has been complied with may be helpful.

18 Right to have solicitor present (Section 24)

Occasions – very rare - may arise where it is necessary to remove a solicitor from an interview. There is no reference to this in the Bill.

19 Consent to interview without solicitor (Section 25)

Is the use of the words “*mental disorder*” sufficient and is there a need to consider “*incapable*”, in terms of the in the Adults with Incapacity (Scotland Act 2000, Section 1, (6) which includes physical disability.

20 Questioning following arrest (Section 26)

Clarification would be welcome on the police powers to question a person under arrest for an offence and having charged (officially accused) that person in relation the offence for which they were arrested, now seeking to question them in relation to other crimes and offences not relating to the offence they were initially arrested for or arising from the same set of circumstances as the offence. This may arise whereby they are initially arrested for an assault and are subsequently charged. Checking of police recorded crimes may reveal that they are suspected of other recorded crimes and police may need to question them regarding those crimes. Would police have to arrest the person in relation to those other crimes and would the entire process have to start again – with fresh authorisations, reviews and custody clock? Subsection (3) may need to include another item at (f) - the person’s occupation. Some occupations are very relevant – particularly in relation to public protection where placing a requirement to give their occupation may be important. This might be relevant when dealing with someone who may be in a position of trust and may avoid revealing their occupation because it may have an immediate impact. Is there a need to consider making it an offence not to disclose occupation?

21 Authorisation for questioning (section 27)

This new provision will require new work for police and COPFS in preparing the case for seeking court authorisation. There will be an opportunity cost. Such authorisation could have been provided by a police Superintendent within tight time limits and guidelines and saved COPFS and Courts time and money.

22 Arrest to facilitate questioning (Section 29)

This new provision for a warrant to arrest for further questioning under Section 27 will require new work for police and COPFS in preparing the case for seeking court authorisation. There will be an opportunity cost. It is likely that a warrant will be required in most cases to facilitate questioning. Such authorisation could have been provided by a police Superintendent within tight time limits and guidelines and saved COPFS and Courts time and money.

23 Right to have intimation sent to other person (section 30)

Subsection (5) is an important judgement to be made regarding delaying intimation and additional guidance/Code of Practice may be necessary.

24 Right to have intimation sent: under 18s (Section 31)

Subsection (5) (a) for a person believed to be under 16 years of age it should specify parent, guardian or other appropriate person. For police to fail to inform a parent or

guardian of a person they believe is under 16 is likely to give rise to unnecessary complaint. There may also be occasions when it is inappropriate to inform the parent or guardian (they may be a suspect) and so a lawful alternative needs to be available. Evidence of compliance with this right will be necessary and will require a paper based and technology solution to record compliance. Restricting access is an important judgement and further guidance and/or a Code of Practice may be required.

25 Support for vulnerable persons (Section 33)

Is the use of the words “*mental disorder*” sufficient and is there a need to consider “*incapable*”, in terms of the in the Adults with Incapacity (Scotland Act 2000, Section 1, (6) which includes physical disability. As it is for the police to assess vulnerability (see Policy Memorandum paragraph 121) a review of the current level of training to identify vulnerable suspects may be necessary. Some consideration may be necessary as to which constable has the responsibility for assessing the vulnerability of a suspect. Is it the constable authorising or reviewing detention, the arresting officer or the investigating officer or Senior Investigating Officer in serious crime cases? How are any disagreements between constables as to the vulnerability of a suspect to be addressed in a manner that safeguards the Human Rights of the suspect?

26 Right to have intimation sent to solicitor (Section 35)

There may be investigative reasons to delay sending intimation to a solicitor, in very rare occasions, and explicit lawful provision should be made for this that goes beyond “*as soon as is reasonably practicable*.”

27 Right to consultation with solicitor (Section 36)

It would be helpful to clarify what is meant by “*at any time*”. Does this mean that the person can demand multiple consultations during their period in police custody? What sort of circumstances might apply that equate to “*necessary in the interests of justice*”? Who determines the method of consultation?

28 Use of reasonable force (Section 37)

Consider alternative wording similar to “*A constable may use the minimum reasonable force necessary....*”. This supports the requirement of police to act in compliance with the European Convention on Human Rights and apply the proportionate, legal and necessity test within a framework of policing by consent. Note police use of force is provided for in various other legislation such as the Criminal Procedure (Scotland) Act 1995⁵.

⁵ <http://www.legislation.gov.uk/ukpga/1995/46/data.pdf>

29 Common Law power of entry (Section 38)

An opportunity is missed here to modernise police powers of entry and search without a warrant that would save money, improve justice for victims, enhance opportunity to preserve and secure evidence and improve justice.

30 Common law power of search (Section 39)

An opportunity is missed here to modernise police powers of search. What use of minimum reasonable force applies here?

31 Power of search etc. on arrest (Section 40)

What use of minimum reasonable force applies here?

32 Breach of Liberation Conditions - Offence where condition breached (Section 43)

Is there a deliberate intention to curtail any preventative power of arrest (is likely to break⁶) in relation to liberation, as can be found in relation to Bail in Section 28 of the Criminal Police Procedure Act 1995. What are the implications for the Lord Advocate guidelines – will breach of a Liberation Condition be grounds for holding accused in police custody for court?

33 Abolition of pre-enactment powers of arrest (Section 50)

Is the common law power of arrest by a citizen unaffected and is there a need to refer to citizen powers of arrest?

34 Meaning of officially accused (Section 55)

Is there any implication here for the statutory warning of intended prosecution under the Road Traffic Offenders Act 1988⁷?

35 Corroboration, admissibility of statements and related reforms (Part 2 plus section 70 of the Bill)

I remain not wholly convinced of the case for the complete abolition of the requirement for corroboration.

36 Police Negotiating Board for Scotland (Part 6 (section 87) of the Bill)

I welcome this proposal.

⁶ www.legislation.gov.uk/ukpga/1995/46/section/28

⁷ <http://www.legislation.gov.uk/ukpga/1988/53/section/1>

38 Conclusion

The Bill as drafted raises a number of questions. It may be necessary and advisable to provide additional guidance and/or Codes of Practice to ensure the intention of Parliament is appropriately implemented.

Association of Scottish Police Superintendents
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