

## Justice Committee

### Criminal Justice (Scotland) Bill

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

1. Part 1 of the Criminal Justice (Scotland) Bill (the 'Bill') as introduced deals with arrest by police without warrant. In particular Section 1(2) introduces a general police power to arrest a person without a warrant in respect of an offence not punishable by imprisonment. Subsection 2 states that such an arrest can only take place in certain circumstances, namely only if the constable is satisfied that it would not be in the interests of justice to delay the arrest in order to seek a warrant. Subsection 3 attempts to define circumstances where the interests of justice would not be served by delay in arrest.

2. These commentators would suggest that the terms of Section 1(3) as currently drafted are framed in such a way as to be unclear in two respects. Firstly Section 1(3) requires a constable to have a reasonable belief as to a negative assertion; i.e. that if the person is not arrested without delay that the person will act as described in subsection 3(a) to (c). It is understood that the rationale for this is perhaps to require the constable concerned to make an assessment of risk but given that this judgement will require to be made when the constable is on active duty as the circumstances unfold, it is suggested that the test should be made as clear as possible.

3. It is suggested that the test could be better worded if it allowed a constable to arrest without a warrant if the interests of justice demanded an immediate arrest. Parts (a) to (c) could then outline factors that could be taken into account when making this assessment.

4. As currently drafted Section 1(3) is silent as to whether parts (a) to (c) are to be read as a cumulative list or if these form alternatives. This is important in the context of arrest without warrant as it is unlikely that a constable could have a reasonable belief that all three potential actions on the part of the person would take place and therefore this subsection would be little used in practice. However if the three parts (a) to (c) are read as alternatives their individual application is likely to be much more frequent. If the latter interpretation is to be adopted then it must be understood that constables could interpret these subsections widely thereby allowing for the arrest of persons for what could be regarded as minor offences.

5. Whilst the subsection and its parts would be open to judicial interpretation these commentators are of the view that if Section 1(3)(a) to (c) are left as currently drafted there is the very real possibility that persons could be arrested without a warrant for minor offences without any real justification. Doubtless operational guidance would be issued by Police Scotland on this issue but these commentators would prefer to see additional wording within the subsection to qualify the scope of the circumstances where such an arrest can take place to include:

*An overarching condition that there must also be a reasonable belief on the part of the constable as to the existence of a risk to public safety arising from the actions of the individual at the time of the intended arrest.*

6. It is suggested that this wording would ensure that any arrest with the mandatory consequence of being taken to a police station was a proportionate and justified response to any offence which would present a risk to public safety rather than one which was no more than a minor contravention of a statute.

7. Chapter 4 of the Bill as introduced sets out the rights of the suspect in custody or who attends voluntarily and in particular Section 24 sets out the right of such a person to have a solicitor present during interview and in Section 36 the right to a consultation with a solicitor at any time whilst being held in custody. These sections appear to represent a development of the rights enshrined in Section 15A of the Criminal Procedure (Scotland) Act 1995 introduced following the decision in *Cadder v HMA* [2010] UKSC 43.

8. These commentators welcome the simplification of the right of access to a solicitor by a person in custody to allow a private consultation to take place at any time during the period of custody and not just prior to or during questioning. In addition the Bill introduces a right to have a solicitor present during interview which did not previously exist in statute although anecdotally it is known that in certain situations (e.g. serious sexual offences) some police officers are content to allow solicitors to be present at interview whilst continuing to operate in terms of Section 15A.

9. What is of concern to these commentators is the lack of financial provision for the exercise of this new right on the part of a person in custody within the Financial Memorandum attached to the Bill. SLAB have since the inception of access to legal advice post *Cadder* kept full statistical information regarding requests for advice and how these are dealt with. Whilst accepting that we are moving further towards the English system in which there is 70% attendance by solicitors and acknowledging that the right to a consultation at any time will certainly increase the number of requests for consultation itself, there seems to be little reference to the cost implication of a solicitor being present during an interview. Whilst currently a grant of ABWOR can be made and will be paid if personal attendance can be justified in order to consult, under the provisions of the Bill the solicitor might be requested to be in attendance for the duration of the interview leading to an increase in ABWOR expenditure.

10. These commentators suggest that insufficient consideration has been given to potential additional costs here in terms of the Legal Aid budget. Experience tells us that if people are given a right they will use it and it must therefore be likely that there will be at least a reasonable number of persons in custody who assert their right to have a solicitor present at interview. In these circumstances it is only proper that solicitors called upon in these situations are properly remunerated.

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

11. There are implications in Section 57 of the Bill for the future of dock identification where no identification parade or similar procedure has taken place as a source of evidence which does not appear to have been considered. In *Holland v H.M. Advocate* 2005 1 SC (PC) 3 Lord Rodger of Earlsferry at para 57 agreed with the Lord Justice Clerk that “except perhaps in an extreme case, there is no basis, either in domestic law or in the Convention, for regarding such [dock identification] evidence as inadmissible *per se*. The safeguards to which the Lord Justice-Clerk draws attention — the requirement for corroboration, the opportunity for counsel to contrast the failure to identify at the parade with the identification in the dock and to comment accordingly — are, of course, important. Their mere existence cannot be used, however, to justify the abstract proposition that in all cases in Scots law an accused who has been convicted on the basis of dock identification has necessarily had a fair trial.”

12. If the requirement of corroboration is removed it is at least theoretically possible that a case could be brought on the basis of a complaint from one witness that he was assaulted by an accused “who he could identify if he saw him again”. There would be no strict requirement to hold an ID parade. The case could come to trial and the witness could point out the accused in court as the person who committed the offence. Without the safety net of corroboration there is no way of knowing whether the accused has been picked out because he is in the dock.

13. Cases since *Holland* have quoted the comments of Lord Rodger and referred to the protection offered by corroboration. If that is removed might we have to look at making ID parades mandatory where dock identification is to be relied upon. Otherwise the accused has to rely on his defence team undermining the credibility or reliability of the eye witness and on the directions of the judge to the jury on the perils of eye witness identification. The LA’s guidelines on the subject are quite clear but they do not seem to be observed very closely, presumably for reasons of resourcing.

14. Section 63(1) has the effect of withdrawing from the accused the opportunity to make a judicial declaration when appearing before the sheriff to be committed for further examination or to be liberated in due course of law. Subsection 2 repeals the provisions on judicial examination. While it is acknowledged that persons appearing before the sheriff on petition rarely choose to emit a declaration, and while the use of judicial examination is saved mainly for murder cases, there seems to be no pressing reason to remove them.

15. The Explanatory notes and Policy Memorandum that accompany the Bill are silent as the reasons for the inclusion of Section 63 in the Bill other than to suggest that the abolition of judicial examination and the removal of the opportunity to make a declaration would become surplus to requirements if the proposals to grant the police extended powers to question a person officially accused of committing an offence contained in Sections 27-29 are passed, especially as the accused may also still make a voluntary statement to the police at any time (*Policy Memorandum* 92).

16. However, an accused person may in some circumstances prefer to make a declaration, duly tape recorded and lodged as part of proceedings, in the security of the court in the presence of an impartial judge. Furthermore, there may still be circumstances in which it would be expedient for the prosecutor to judicially examine an accused person and so unless the government can make out a more convincing case for abolition of these procedures; these commentators recommend that they remain available.

17. Section 69(2) amends Section 77(1) of the Criminal Procedure (Scotland) Act 1995 and has the effect of removing from Section 77 the requirement that the accused, if he is able to do so, sign a written copy of the plea of guilty to an indictment or any part of it and that such plea be countersigned by the judge. This amendment seems to have emerged as one of the recommendations made by Sheriff Principal Bowen in his *Independent Review of Sheriff and Jury Procedure* (See 9.4).

18. Apart from the assertion that the removal of the need to sign a plea of guilty will generate savings by allowing persons, presumably those accused remanded in custody pending trial to plead guilty remotely, (Financial Memorandum 243) it is nowhere explained in either the Explanatory Note or the Policy Memorandum which accompany the Bill why this step is considered to be necessary or advisable, or how it will benefit the smooth operation of proceedings or for that matter how great the savings might be. It is assumed that savings could be made in the cost of transporting accused from prison to court for a first diet to tender a guilty plea when it is clear that the matter could not be disposed of without first obtaining background reports, thus requiring the accused to appear in court on a further occasion. However, as has already been stated, no estimates are provided as to the possible savings.

19. Section 70(2) of the Bill inserts a new section, namely section 90ZA(1), into the Criminal Procedure (Scotland) Act 1995, which has the effect of increasing the number of jurors required to return a verdict of guilty (in both solemn and summary procedure) from 8 to 10. This means that a majority of two thirds will now be required to secure a conviction as opposed to the simple majority currently required.

20. The Bill also provides for situations where the total size of the jury falls below 15 members (see section 70(2) and the insertion of 90ZA(2)(a)-(c)). Where juror numbers decrease for whatever reason, the majority of at least two thirds will always be required. Thus if the total jury size decreases to 13 members for example, at least 9 jurors would have to be in favour of a verdict of guilty in order to secure a conviction.

21. One would expect to see clear reasons why the Government is specifically proposing to increase the number of jurors to 10, yet the Policy Memorandum simply states that the objective for choosing a two-thirds majority is to introduce an additional safeguard into the Scottish criminal justice system (*Policy Memorandum 171*). What is not even remotely clear is why a two-thirds majority as opposed to a larger majority has been deemed appropriate in providing such a fundamentally important 'additional safeguard' in the face of corroboration being abolished.

22. If we look at the current system where a jury could legitimately decrease from 15 to 12 members due to juror illness or other extenuating circumstances for example, the jury could still return a verdict of guilty so long as 8 of the jurors were in favour of such a verdict. If we compare this situation above to the proposed two-thirds majority (apparently offering such an 'additional' safeguard), the percentage of jurors required in order to secure a conviction is exactly the same. That percentage being 66%. (A majority of 8 to 4 in the first situation and 10 to 5 in the second). While it is acknowledged by these commentators that juries of 12 members are not commonplace in Scotland they are not rarities either.

23. It appears that the Scottish Government in its *Consultation on Additional safeguards Following the Removal of the Requirement of Corroboration* (the '*Consultation*') only ever sought views on whether the majority required to return a conviction should be increased to either 9 or 10 jurors because this would provide a "less dramatic change to the current system". Despite only being given the choice between 9 or 10 jurors, a significant number of respondents to the *Consultation* thought the majority should be higher than 9 or 10 in order to provide an additional safeguard. (<http://www.scotland.gov.uk/publications/2013/06/7066>).

24. These commentators are of the view that in the absence of any other safeguards proposed by the Bill, the two-thirds majority does not provide any real additional safeguard against potential miscarriages of justice. These commentators would suggest that in order to provide an additional safeguard a larger majority of at least three-quarters is required. In other words, 12 out of 15 jurors. Furthermore, this would have the effect of bringing the majority verdict required in Scottish in proportion with other Commonwealth adversarial systems. There is no compelling reason and certainly there are none offered by the Explanatory Notes or Policy Memorandum as to why the majority being proposed by the Bill should be much lower than other criminal justice systems.

25. In consulting on the possibility of a majority verdict being introduced, it was disappointing that no further consideration was given by the Government in potentially reducing the jury to 12 members and requiring a majority of 10, which is commonplace in many other common law countries. Despite the obvious financial savings in having fewer jurors to cite and pay expenses to, it seems entirely plausible and perfectly timed to consider such a change.

26. If corroboration is abolished by this Bill then juries will be asked to decide a person's guilt or innocence based on the strength of that evidence and conceivably on the basis of single witness testimony and uncorroborated evidence. These commentators are of the view that a higher proportion of jury members being satisfied beyond a reasonable doubt of an accused guilt would go some way to providing a safeguard for accused and victims of crime in jury trials.

#### Court procedures (Part 3 plus section 86 of the Bill)

27. The wider proposals for reform of Sheriff and Jury procedure contained in Part 3 of the Bill emphasise the importance to case management of the first diet by bringing procedure into line with that followed in High Court cases since 2004. If a case can be made for the economic benefits of enabling the accused to attend

proceedings by way of live TV link, then it may make some sense to hold those first diets that it is known will result in a plea of not guilty by way of TV link from a remote location.

28. Some of the responses to the Bowen consultation expressed concern that the technology currently used to enable the accused to participate though live television link is not sufficiently robust to be used as a matter of course. (*Reforming Scots Criminal Law and Practice, Reform of Sheriff and Jury Procedure: Analysis of Consultation Responses* 8.8) If the equipment breaks down or television links are lost at crucial points it may increase the number of appeals or instances in which proceedings require to be adjourned. Even if the court room technology could always be relied upon, there is an important point of principle to be considered.

29. It was noted in the *Analysis of the Consultation Responses* 8.7 that to dispense with the accused's attendance at proceedings at which he was to plead guilty was to detract from the *gravitas* of the situation and this commentator sees some force in this comment. To plead guilty to a case on indictment is a serious matter. To have the plea recorded on the accused's behalf while he watches proceedings via a TV link removes an important aspect of the accused's participation in proceedings. It detracts from the recognition of his personal responsibility for his situation.

30. At present the accused must sign his plea and if he has second thoughts he may refuse to sign, normally signaling the withdrawal of his representation and resulting in a delay in proceedings. However if that prevents the accused from subsequently making spurious allegations that he was persuaded to plead guilty, in order to secure a discount in sentence for example, so be it. Even if the accused is asked to confirm his plea of guilty via the television link and an audio recording is made of proceedings, there would still be greater scope for the accused to claim that in confirming the plea, he misunderstood the words of the judge or could not hear them sufficiently well to give him grounds to appeal. At present, the signing of the plea is a clear signifier of the accused's acceptance of his situation and the courts will not normally permit a plea made on legal advice and signed by the accused to be withdrawn at a later date. See for example *Crossan v H.M. Advocate* 1996 SSSC 279.

31. In conclusion, these commentators are of the view that a compelling case for removing the need to sign a plea of guilty has not been made out. There is insufficient evidence that it would save time and money or to what extent, protects the accused's representatives from allegations of defective representation and protects the accused in that he ultimately has the choice to sign, or not if he has doubts at the last moment. It is suggested that Section 69 be removed from the Bill.