

Justice Committee

Criminal Justice (Scotland) Bill

Letter from the Scottish Government to the Convener

I thought it would be helpful to write to you following the evidence session for the Criminal Justice (Scotland) Bill on 7 January 2014 to expand on some points that were discussed with regard to police powers of arrest in the Bill.

New power of arrest and existing powers

In line with the recommendations of Lord Carloway's review, section 1 of the Bill will confer on the police the power to arrest a person without a warrant on suspicion that the person has committed, or is committing, a crime.

Currently the police have the power to arrest without warrant under the common law. In addition to their common-law power, the police also have powers to arrest conferred on them by various statutes. These powers are exercisable in relation to particular offences and are expressed in different ways in different Acts.

The Bill will simplify this landscape, making the law around arrest clearer for both police and citizens alike. Once the general power of arrest under section 1 of the Bill is in place, section 50 and schedule 1 will sweep away the present jumble of common-law and offence-specific statutory powers.

Section 1 of the Bill reflects what is reasonably understood to be the essence of the common-law power of arrest. With regard to non-imprisonable offences, section 1(3) lists examples of circumstances in which arresting someone for such an offence without waiting for a warrant can be considered to be in the interests of justice. The opening words clarify that it is not an exhaustive list and it ends with a catch-all reference to the risk of the person otherwise obstructing the course of justice unless arrested immediately.

Other than the abolition of the common law power of arrest, the Bill does not affect the existing powers of the police. This means that the police can continue to act to deal with cases arising from the need to protect people and property, for example when a person is threatening to commit suicide, or where a missing child is found and returned to her home address.

There was discussion during the evidence session about the powers available to the police to arrest a person in order to prevent a crime from being committed. Police constables have general duties under section 20 of the Police and Fire Reform (Scotland) Act 2012 in relation to preventing crime, maintaining order and protecting life and property. They can intervene in situations in fulfilment of those duties. Frequently the appropriate intervention will not be arresting a person, bearing in mind that arrest is the term used for taking a person into the police's custody. It would be a very serious erosion of civil liberties if the police were given a general power to take people into their custody merely on the strength of a suspicion that a person might be about to commit an offence.

Of course this does not mean that the police need to stand by and watch an offence being committed. As mentioned, they can intervene in ways other than arresting a person. Moreover, as I said in my evidence, attempting or conspiring to commit a particular offence can itself be an offence for which a person can be arrested. Arrest in that circumstance is entirely consistent with the normal character of arrest as the person is taken into police custody not to stop the person doing something (or at least not just for that reason) but in order that the person can be dealt with in accordance with the law for committing an offence through attempt or conspiracy.

Detention and arrest

In the Bill, 'arrest' is the only label used for the act by which the police take a suspect into their custody with or without a warrant. At present the police can also take a person into their custody without a warrant by 'detaining' the person under section 14 of the Criminal Procedure (Scotland) Act 1995. Under the Bill as introduced the distinction between being in police custody having been detained, rather than arrested, will disappear. Like the move to a single statutory arrest power, this too gives effect to a recommendation of the Carloway Review.

The Government shares Lord Carloway's view that it no longer serves any real purpose to use the distinct labels 'arrest' and 'detention' to describe the act of taking a person into custody on the strength of a suspicion that the person has committed a crime. Again, in the interests of simplicity and clarity, the Bill uses only one word to describe the act of taking a suspect into custody, i.e. arrest.

The committee has expressed concern that unless the label 'detention' is retained, the public and press will be unable to distinguish between the position of a person who is merely being questioned by the police and a person who is being held in custody to be brought before a court. The first point to be made in response to this concern is that all suspects are presumed innocent unless and until their guilt is proved to the satisfaction of a court of law. It is just as wrong to assume that a person who has been arrested is guilty as it is to assume the guilt of a person who has merely been detained.

The second point to be made is that, both in the present system and the system the Bill would create, it is the point of charge, not the shift from detention to arrest, which marks the important change in a suspect's position. There will therefore still be an official vocabulary available to the press and public capable of expressing the different stages which an investigation against a person may reach.

Officially accused

Finally, having mentioned the word 'charge' it might be helpful if I say something about the expression 'officially accused'. In colloquial usage, and in some legislation, the word 'charge' is often used to describe what the police do when they tell someone they are charging them with an offence. It is also sometimes used to describe what the procurator fiscal does in raising proceedings against a person by libelling a charge against the person on a complaint, petition or indictment. In some legislation the word is used loosely to mean either one of those things. In the

interests of clarity, the Bill uses the word 'charge' only in relation to the police charging a suspect.

In some places though, there is a need to refer in the Bill to any person who has been charged by the police and also to any person against whom proceedings have been raised. Conversely there are provisions in Part 1 of the Bill (including the whole of Chapter 2) which are to operate only in relation to a person who has neither been charged by the police nor been made the subject of a prosecution. This is necessary because certain things follow from the fact that an agency of the State has taken the formal step of saying it believes a particular person has committed a particular crime and that can be proved in court.

Rather than repeatedly writing out in section after section that it does, or does not, apply to any person who has been charged by the police or against whom proceedings have been initiated, it is more convenient to use a label to describe the status of those to whom the section applies. Since the relevant shift in a person's status occurs when someone in an official position (be it a constable or a prosecutor) levels a formal accusation against the person, the label the Bill uses is 'officially accused'.

I hope that this further explanation of key points will assist with your consideration of Part 1 of the Bill.

Kenny MacAskill
Cabinet Secretary for Justice
16 January 2014