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FACULTY OF ADVOCATES

RESPONSE

by

THE FACULTY OF ADVOCATES

to

SCOTTISH EXECUTIVE

on

SUPPORTING POLICE, PROTECTING COMMUNITIES: PROPOSALS FOR LEGISLATION

The Faculty of Advocates welcomes the opportunity to respond to the Consultation Paper. A number of matters are outwith our particular field and we have made no response to these questions. We are grateful for the opportunity to comment upon matters which are of particular interest and concern.

Questions 1 to 11 are concerned with the organisational structure of the Police Service in Scotland. We do not consider that we have sufficient expertise in this field to comment on the effectiveness of these proposals.

12. We recognise the need to address the problem caused by carrying knives or similar instruments. The existing penalties have not deterred offenders. We accordingly agree that an increase in penalties is justified.
13. A power to arrest without warrant is a significant one and should not be conferred by parliament unless it is clearly justified. The Police already have certain powers of arrest under sections 47 (3) and 48 (3) of the Criminal Law (Consolidation) (Scotland) Act 1995 and, under section 48 (1), power to detain and search a person, in relation to whom there are reasonable grounds for suspecting that he possesses an offensive weapon. There is no material in the consultation paper that identifies the need to expand the power of arrest contained in section 47 (3). We consider the police officers who have reasonable grounds to suspect someone is carrying an offensive weapon should in the first instance detain that person for the purposes of search. The

power of arrest should be reserved until the police have established the suspect is in possession of an offensive weapon and are in a position to arrest and charge the suspect with an offence. The police already have power to arrest a suspect who does not co-operate. In the absence of any clear and specific justification for this we oppose this proposal.

14. We agree with this proposal to increase the minimum age at which knives may be purchased.

Questions 15 to 20 are concerned with Football Banning Orders. These proposals seem to us to be sensible and proportionate. The Faculty has no additional specific comment to make in relation to them apart from question 20 (see below).

20. We consider the clubs should be responsible for enforcing banning orders subject to the police having overall supervision of the enforcement of banning orders.

Questions 21 to 29 are concerned with Marches and Parades. These proposals seem to us to be sensible and proportionate. The Faculty has no additional specific comment to make in relation to them.

30. It is an important principle of Scots Law that a person arrested should be charged with an offence without delay. We do not consider that it should be a function of the Police Service to *require* individuals to undergo drug tests with a view to tackling the problem of drug abuse. We are concerned that such a use of the Police Service may compromise its role in the investigation and reporting of criminal activity. We think that a more appropriate way forward would be specifically to provide that drug testing may be made a condition of bail and in the event of a positive drug test a bail condition may be made requiring the accused person to attend for and possibly even participate in assessment. We think that such an approach is likely to be more effective particularly as a person accused of an offence may have an incentive to participate in treatment.
31. We wonder whether the authors of the consultation paper truly mean “arrest” here or whether they mean “detention”. Generally, persons suspected of having committed criminal offences are detained and following upon that are arrested and charged at the same time. We do not consider that it is appropriate or necessary to add to the powers of the Police provided under section 14 of the Criminal Procedure (Scotland) Act 1995. We think that any requirement to be drug tested and thereafter assessed should on any view not take place unless and until a suspect is arrested and charged.
32. No. We do not consider that it should be made a function of the Police Service to require persons to attend an assessment of their drug use. Such a requirement is more properly a matter for the courts as a condition of bail.
33. While there is often a drug abuse background to those who commit theft we consider it inappropriate to require all persons charged with theft to be required to undergo drug testing. We think that it would be helpful to identify

more precisely the type of offence referred to here – for example theft by housebreaking or theft from shops - so that drug testing and assessment can be properly targeted. The requirement should only be made where the police have reasonable grounds to believe the offence has been committed in order to feed a drug habit.

34. No. Such a power would seriously undermine the presumption of innocence. Until a person has been convicted and a Court is satisfied of such circumstances it would be inappropriate for the police to exercise such a power.
35. Yes.
36. We are unable to answer this question. It is inappropriate for police to be looking upon persons charged with offences as “Clients”.
37. Yes – provided that the power is only available where the person is reasonably suspected of having committed a criminal offence and the police officer has reasonable grounds for believing that the identity given by a person is false, or is not known and cannot satisfactorily be ascertained. It is also essential that proper safeguards are in place to ensure that fingerprints taken in this way are not retained nor added to the national database.
38. No. We do not agree that officers should be able to conduct on-the-spot checks in specified circumstances. We see no justification whatsoever for this radical change from current practice.
39. Yes. We can see no reason not to require a person to give their date and place of birth, provided that those who are genuinely ignorant of such details are adequately protected.
40. We think that proposed measures at paragraph 9.11 are likely to raise the profile of the role of the Procurator Fiscal in investigating criminal complaints made against the police. We welcome the provision of more information to the public.
41. We are satisfied that the powers and duties outlined at paragraph 9.15 should permit the new body to play an effective role in ensuring that Scotland has a modern and transparent police complaints system.
42. We are unable to suggest any further powers at this stage.
43. At present the Court will take into account any assistance given by an Accused who has pleaded guilty and given evidence against a Co-Accused. It is often a delicate and difficult decision for the Prosecutor to decide whether to call an Accused who has pleaded guilty or to drop charges against an Accused with a view to calling him to give evidence against Co-Accused. (See *Campbell & Steele v HMA* 1998 SLT 923; 2004 SLT 397) We think that any innovation upon the long established arrangements in this area should be the subject of careful consideration by the Scottish Law Commission and not simply an

addendum to other proposals. Our impression is that the proposals contained in the consultation paper have not been properly considered and are a merely a response to developments in England and other foreign jurisdictions. We take issue with the proposition that there is currently no effective system of sentence reductions in return for cooperation by an accused. On the contrary it is competent for a court to take into account cooperation by an accused person (either in relation to the offence with which it is immediately concerned or in relation to any other inquiry) when imposing sentence. We also take issue with the proposition that the ability to discontinue proceedings in return for the use of the evidence of an accused is not often used. On the contrary, there is a long tradition (stretching back to Burke and Hare; see *Hare v Wilson* (1829) *Syme* 373) of prosecutors in Scotland using such methods to obtain a conviction. Prosecutors regularly accept reduced pleas in return for cooperation (usually evidence against a former co-accused or person to be indicted subsequently). Of course, such a course of action cannot responsibly be taken unless there is a material advantage to be gained in the public interest and any such decision is one properly for the Lord Advocate. Any former accused in relation to whom a reduced plea is accepted can be (and usually is) sentenced at the end of the trial of the person in relation to whom the evidence is given. The criminal justice system in Scotland has many distinctive features. We think that it would be unwise to legislate in this area without (i) accurately describing the current arrangements in Scotland (ii) identifying the precise way in which those arrangements are thought to be ineffective (iii) considering the measures that may remedy any perceived defects and (iv) considering how any such changes would effect the administration of justice as a whole. The consultation paper does none of these things. We should add that we find it difficult to envisage “the exceptional circumstances” where it is thought that it would be appropriate to make arrangements of this kind without making them public. Certainly, any person against whom evidence is to be given would have to be made aware of any such arrangement otherwise he would not receive a fair trial.

44. Our response to question 43 hopefully makes clear our attitude to these proposals. We find it difficult to envisage circumstances where it would be appropriate or acceptable to reduce a sentence retrospectively. We would oppose any further inroad into the principle that the prosecutor has no interest in sentence. The trial and sentencing process requires to be public and transparent. Of course after sentence, the extent of a convict’s cooperation can be taken into account in considering whether to allow early release on parole. We do not see any justification for any alteration to the current arrangements in this area.
45. We have difficulty in understanding exactly what is proposed. At present it is competent for any relevant information (including in relation to cooperation with the authorities in relation to other matters) to be placed before a Judge. Although discretion can be exercised in relation to such information it is impossible to avoid the fact of such cooperation being made apparent to some extent. We do not understand what is meant by the sentence “There is no means of presenting information to a sentencing judge in cases where an accused is not prepared also to disclose the information to the defence”.

46. No. We think that the current arrangements are clear and well understood and we cannot see any merit in putting them on a statutory footing. We do not think that the prosecutor should be able to commence or recommence proceedings where the degree of cooperation has not been provided.