

MEMORANDUM OF COMMENTS
BY
THE LAW SOCIETY OF SCOTLAND
ON
THE SCOTTISH EXECUTIVE CONSULTATION
SUPPORTING POLICE, PROTECTING COMMUNITIES
(APRIL 2005)

The Criminal Law Committee of the Law Society of Scotland ("the Committee") welcomes the opportunity of contributing to the Supporting Police, Protecting Communities consultation and has the following comments to offer on the proposals of relevance to the Committee:-

Section 2: Supporting the Scottish Police Service – the national delivery of services

The Committee notes that although the structure of the common police services may change, the operational role of the Scottish Drug Enforcement Agency ("SDEA") will continue. Given that the SDEA was only formally established in 2001, it is appropriate that it is given time to develop operationally so that a proper evaluation of its performance can be conducted.

The Committee welcomes the reference in paragraph 2.16 to the fact that the Director of the SDEA will be subject to the direction of the Lord Advocate in relation to the investigation of crime. The prosecution of crime, direction of the prosecution authorities and investigation of sudden and suspicious deaths in Scotland is the responsibility of the Lord Advocate and it is essential that his constitutional independence in discharging this role is recognised.

Paragraph 2.18 of the consultation paper suggests that in some circumstances it might be appropriate to allow secondment into the SDEA from other UK forces or possibly to permit direct recruitment of police officers

into the SDEA. If these proposals are accepted, then training programmes should be developed to ensure that those operating in this capacity in Scotland will have sufficient knowledge of Scots criminal law and procedure.

The Committee welcomes the commitment in paragraph 2.31 to deliver forensic science services on a national basis. The ability to transfer work between forensic science centres should improve efficiency and reduce the potential for backlogs arising.

Chapter 3: Knife Crime

Double the Penalty for Possession of a Knife (or other articles with a blade or point).

The Committee notes that the maximum penalty for possession of an offensive weapon in terms of section 47 of the Criminal Law (Consolidation) (Scotland) Act 1995 ("the 1995 Act") is 4 years imprisonment on indictment. The maximum penalty for possession of a knife or pointed instrument in public under section 49 of the 1995 Act is 2 years. The Committee appreciates that in seeking to extend the maximum sentence for carrying knives (or other articles with a blade or point) to 4 years, the Executive hopes sentencing policy will have a deterrent effect on knife crime.

Confirmation would be welcomed as to how often

- (i) the current maximum sentence of 2 years imprisonment has been imposed for contraventions of section 49 of the 1995 Act; and
- (ii) such offences have been libelled as the only charge on an indictment.

Further research and statistical analysis would be beneficial to ensure that the policy objective can be achieved by this course of action.

Power of Arrest

The Committee considered the proposal to amend the arrest provisions contained in sections 47 and 50 of the 1995 Act so that the police may arrest a person where they have reasonable cause to believe that the person has committed or is committing an offence of carrying a knife or other article with a blade or point or an offensive weapon.

The Committee would question the need for such provision. Section 50(1) of the 1995 Act allows a constable to detain a person whom he or she reasonably believes is in possession of a knife or pointed instrument. The purpose of the detention is to allow the constable to conduct a search of that person. If the search reveals the possession of such a weapon, then the constable can arrest the person without warrant in terms of section 50 (5) of the 1995 Act. Similar provisions already apply in relation to offensive weapons in terms of section 48 of the 1995 Act.

In addition to the powers contained in the 1995 Act, the constable also has the power of detention and questioning under section 14 of the Criminal Procedure (Scotland) Act 1995. This section allows a constable to detain a person whom he or she has reasonable grounds for suspecting has committed a crime punishable by imprisonment. As the offences with which the consultation document is concerned are punishable by imprisonment, section 14 could be used in these circumstances.

The combination of the statutory powers which are already available should allow a constable to take appropriate action in the circumstances envisaged in the consultation document. The Committee would therefore question why the extension of the power of arrest in the manner proposed is thought to be necessary.

Increasing the Minimum Purchase Age

The Committee supports the proposal to increase the minimum purchase age for knives and other bladed and pointed instruments to 18. It would also have

the benefit of ensuring consistency with similar provisions in relation to the sale of alcohol and fireworks.

General Comments

The Committee has considerable sympathy with the policy objectives which the Scottish Executive is seeking to achieve through these reforms but agrees that these measures alone will not achieve the culture change needed to reduce knife crime. The Committee appreciates that the proposals will be part of a wider programme to address the knife culture. The Committee recommends that the link between knife crime and domestic violence should be further explored and researched. This will assist in a policy formulation which addresses all the relevant issues.

Football Banning Orders

The Committee deplores sectarianism and supports the efforts of the Scottish Executive to combat this problem. Education, cultural shifts and multi-agency working are key to progress in this area. The Committee welcomes the publication of the progress report to the Summit on Sectarianism from February 2005 and the subsequent announcement from the Executive that it will launch a national action plan against sectarianism in the autumn.

The consultation document considers the introduction of football banning orders to help tackle the problem. The Committee can see some merit in the introduction of these orders following conviction, as part of a tailored-approach to sentencing and by way of addressing the cause of offending behaviour.

The consultation document suggests that such orders should also be available by way of summary application in civil procedure to combat football related violence and disorder. Given the potential restriction on liberty which such orders could impose, the court would, in considering applications, require to be satisfied that such action would be necessary and proportionate

to the conduct in question. In cases of violence, where the order is necessary to prevent further acts of violence, the assessment of proportionality may be easily made and the infringement on liberty justified. However, would such an order still be proportionate in circumstances where the threat may not infringe on others so directly? On this basis, the Committee has some concerns about the extension of the civil orders to the full range of conduct outlined in the consultation paper.

The Committee agrees with the proposed duration of the banning orders, the maximum penalty for breach of such orders and the proposed extent of the games to which the orders should apply. Consideration should also be given to making provision to allow parties to make an application for alteration or revocation of civil orders on cause shown.

It is appropriate that the police should have a role in the administration of banning orders. However, there should also be close liaison with the football authorities and clubs.

Section 5: Marches and Parades

In relation to paragraph 5.14, the Committee would welcome clarification as to whether the proposed Code of Conduct for processions would be voluntary or statutory in nature and to whom recourse would lie if agreement could not be reached between the parties concerned.

Section 6: Mandatory drug testing and assessment

The Committee has considered the proposals within this section and, in general terms, supports the ethos behind them. Proposals to direct accused persons to treatment facilities at an early stage are to be welcomed. The Committee has however some concerns about the mandatory nature of the proposals.

(a) The co-operation of the accused person

In practical terms, the success of such rehabilitation programmes will depend on the co-operation of the accused person. Changes in lifestyle can only be effected by the individual concerned. This is acknowledged in the consultation document. Whilst testing and assessment can be conducted on a mandatory basis, participation in treatment can only be with the consent of the individual assessed. The mandatory nature of the testing and assessment process may do little to foster such consent, particularly if the programmes are running alongside prosecution. Those individuals involved may be reluctant to co-operate with the police and authorities. There may be a greater willingness to commit to such programmes if they were used as an alternative to prosecution in appropriate cases.

(b) The role of the senior police officer

The Committee notes that the proposals in this chapter give police officers and senior police officers significant powers. The consultation suggests that police officer should have the power to require persons arrested for certain offences to undergo drugs tests. A senior police officer will have the authority to authorise drug testing and referral in cases where a person has been arrested for a non-trigger offence if he or she has reasonable grounds for believing that the misuse of a class A controlled drug has caused or contributed to the offence. Furthermore, a senior police officer will also be entitled to require those who test positive for a class A drug to attend an assessment of their drug misuse.

Whilst senior police officers have existing sampling powers in terms of the Criminal Procedure (Scotland) Act 1995, these powers have traditionally stopped short of allowing the procuring of evidence by methods which case law has defined as invasive. Extreme invasions of bodily privacy, which involve entering the suspect's body, still require the authority of a sheriff's warrant which has to be obtained by the procurator fiscal.

The Committee is concerned that the procedure for drug testing may represent a departure from this principle and would seek clarification that such action would be compliant with the European Convention on Human Rights.

Is it envisaged that release from police custody would be conditional upon completion of the drug test and assessment? If so, how will this affect a suspect's rights in terms of Article 5 of the ECHR?

Paragraph 6.10 states that the test would not be used for evidential purposes on those who are suspected of having taken drugs but who have not committed any other offence. Is it intended that the information obtained from the test would in any circumstances be used for evidential purposes and if so, will suspects be made aware of this before the sample is taken?

(c) Evaluation of non-statutory arrest referral schemes.

The Committee notes that a national evaluation of non-statutory arrest referral schemes will be commenced shortly and that the findings will be available in spring 2006. There may be some merit in awaiting the outcome of that research before extending the scheme as proposed.

(d) Resources

If statutory drug testing and mandatory arrest referral schemes are to be adopted, then sufficient resources must be put in place and treatment services made available at an early stage. The resource implications for the relevant support services cannot be underestimated, particularly if they are to accommodate the potential number of referrals under the proposed scheme.

Section 7: Police power to take fingerprints at a place other than a police station

The Committee supports the proposals contained in this section.

Section 8: Date and place of birth

The Committee supports the proposals contained in this section.

Section 10: Incentives for providing information or evidence for use against others

Reduction of sentences for accused pleading guilty and providing information and evidence for use against others.

The consultation document envisages a situation in which the accused person will enter into a written and binding agreement with the prosecution to provide information relevant to the investigation, testify against any associates and plead guilty to the charges libelled against him or her. In return, the prosecutor will provide information about the level of co-operation to the court for the purposes of sentencing.

Whilst the Committee can appreciate the utilitarian benefits of this approach, it has a number of concerns about how such provisions would operate in practice. The agreement will be between the accused person and the prosecutor and will not involve the judge in the process. The level of sentence discount will however be a matter for the sentencing judge¹. What will happen if the accused is not satisfied with the extent of the discount? If the reduction in sentence is within the discretion of the sentencing judge, the Court of Criminal Appeal may be reluctant to interfere with that decision.

Who will determine whether the accused person has fulfilled his or her part of the bargain and provided all relevant information or testified to the best of his or her ability? What if the accused person complies with the letter of the agreement but testifies in a manner which renders the evidence incredible or unreliable? What if the jury simply prefers other evidence in the case? How will qualitative assessments of the accused's participation be made and who will determine these matters?

These issues would, in the Committee's view, have to be resolved prior to introduction of such arrangements. They highlight the debate on formalised plea bargaining. If the Executive is considering adopting such an approach in Scotland, there may be some merit in referring this topic to the Sentencing Commission for further consideration and consultation.

Provision of confidential information to the judge

The Committee has no objection to a provision which would allow the prosecutor in Scotland to inform the trial judge in confidence of unrelated co-operation which an accused person has provided in the past and for the judge to be able to take that into account in sentencing where relevant.

Enhancing the existing powers of the prosecution in relation to immunity from prosecution.

The consultation document quite correctly identifies that under the common law, prosecutors can offer immunity from prosecution or discontinue proceedings in return for co-operation. However, this practice currently operates within a framework of criminal procedure which seeks to ensure that the fairness and integrity of proceedings is preserved.

Article 6 of the ECHR (the right to a fair trial) is fundamental to Scots' criminal procedure. The practices and procedures which have been developed seek to preserve the privilege against self-incrimination and ensure that the decision of the prosecutor is binding and can be relied upon. Where there is concern about the propriety of proceedings, a plea in bar of trial can be taken. If a plea in bar is sustained, it effectively stops further procedure on the libel.

The Committee believes that the following pleas are relevant to the consideration of the proposals in paragraph 10.13 of the consultation document.

(a) Socii criminis

Where a witness is called by the prosecutor as a socius criminis, he or she cannot be charged for the offence in reference to which he or she depones. The measure of the indemnity is the libel in support of which he or she gives evidence. Once a socius criminis is tendered as a witness that precludes the Crown from prosecuting that person in respect of matters covered by the libel². When called in this capacity, the witness is obliged to answer all pertinent questions even although these may show that person's guilt.

(b) Personal Bar – renunciation of the right to prosecute

Although the immunity of the socius is not based on personal bar against the Crown, there are other situations in which the Crown is personally barred from insisting on a prosecution. Such a bar will operate where the diet has been deserted simpliciter on the motion of the Crown or where there has been conduct on the part of the Crown which would make it unfair to allow them to proceed. In a number of cases³, the Crown has been personally barred from continuing or re-raising proceedings where they have previously intimated to the accused or his or her agent that proceedings would be dropped.

(c) Oppression

Although the decision whether and when to prosecute is within the discretion of the Lord Advocate and is not subject to control by the court, the court does retain an inherent power to prevent a case proceeding to trial where to do otherwise would be oppressive and unfair to the accused.

The criterion to be used in deciding whether proceedings are incompetent on the ground of oppression is whether there has been prejudice so grave as to be incapable of being removed by an appropriate direction to the jury or by other appropriate action on the part of the trial judge, so as to give the accused a fair trial.

There is authority⁴ that a person who has been precognosed on oath in relation to an offence cannot be subsequently prosecuted for that offence. It has also been held⁵ to be oppressive for the Crown to prosecute a person who has been interviewed by them as part of the procedure for deciding

whether to deal with the case by a warning, at least if the person has been cautioned and charged with the offence. If the Crown have obtained information about the accused's defence in the course of such an interview, it is difficult to see how the accused could receive a fair trial.

The availability of these pleas preserve the integrity of the justice system so that reliability can be placed on the decision of the prosecutor and no unfair advantage can be taken of the co-operation of an accused person.

The Committee would question how the proposals contained in paragraph 10.13 of the consultation paper could be aligned with these pleas in bar of trial. Once the prosecutor has granted immunity, should he or she be entitled to revoke that immunity? If so, who will determine the qualitative issues about whether an accused person has failed to comply to the necessary degree with the agreement to justify such revocation? If the prosecution have obtained information about the defence during such co-operation, how can the accused receive a fair trial in terms of Article 6 of the ECHR? What about the rule against self-incrimination? These issues would require to be resolved before implementation of such procedure and assurance given that any procedure would be compliant with the ECHR.

