

**REPORT OF PROCEEDINGS OF
LEGISLATIVE COUNCIL**

**Douglas, Tuesday, 24th March 1998
at 10.30 a.m.**

Present:

The President (the Hon Sir Charles Kerruish OBE LLD (hc) CP), the Lord Bishop (the Rt Rev Noël Debroy Jones), the Attorney-General (Mr W J H Corlett), Hon C M Christian, Messrs J R Kniveton and E G Lowey, Hon E J Mann, Messrs J N Radcliffe and G H Waft, with Mr T A Bawden, Clerk of the Council.

The Lord Bishop took the prayers.

Police Powers And Procedures Bill - First Reading Approved

The President: Now, hon. members, turning to our agenda paper, we have one item for consideration this morning and it is the Police Powers and Procedures Bill 1998 which is for first reading. I call upon the learned Attorney-General.

The Attorney-General: Thank you, Mr President. The Police Powers and Procedures Bill is for the most part based on the Police and Criminal Evidence Act 1984 and the Criminal Justice and Public Order Act 1994, both being statutes of the Parliament of the United Kingdom.

As its title implies, the Bill is concerned with the powers of the police and the procedures the police must adopt when dealing with persons who are suspected of having become involved in criminal activities. As such it is of considerable importance not only to the members of the police force but to all who are involved in the administration of the criminal law and there has been extensive consultation with the relevant professional bodies.

Criminal law must, above all, be certain. One of the objects of the Bill is to make the law more certain and clear in the context of the powers of the police when dealing with, for example, powers of stop and search and powers of entry. The Bill also seeks to confer various safeguards on those who are the objects of those powers.

Mr President, with that brief introduction to this important Bill I would move that the Police Powers and Procedures Bill 1998 be now read a first time.

Mrs Christian: I beg to second and reserve my remarks.

Mr Lowey: Mr President, I have got to be absolutely honest on this one. I find this particular Bill almost as difficult to come to terms with as, if I may say so, the Abortion Bill. I had to wrestle with my conscience on the Abortion Bill and I came down on a certain view, but this particular one, the title of the Bill, Police Powers, and the police exercise and wield on our behalf a lot of power and this Bill actually extends that power. It may define it, but it actually extends the power. It does take away certain basic rights, or what I presumed were basic rights of individuals, the right to silence et cetera, and this Bill tilts the balance even further in the hands of authority.

Now, I do not wish to criticise the Manx police force in any way, shape or form. I believe as legislators we have got to be very careful, when we are making the rules for the police to

operate under, that we get the balance right. I am far from happy that this Bill actually gets that balance right.

As I have said, I have major problems, and the mover of the Bill says that this actually introduces the 1984 and 1994 Act of the United Kingdom, and that means that the Isle of Man has been operating for the last 20 years under statutes that are even older than that, but in bringing this forward and incorporating all the modern technology that it does do, with recordings and all the rest, I still have this unhappy, uneasy feeling that we are tilting the balance against individuals.

Now, I can quite understand how a policeman must feel frustrated when he gets what I would call a known criminal, who he firmly believes has been guilty of an offence, into the police station, and through what I would call legal niceties that man or person is able to hold up, delay the progress of that investigation. But, hon. members, I do not believe for one second that this particular piece of legislation will deter and hinder and interrupt that particular scenario. What it will do, I am afraid, will actually impinge upon what I would call the person who goes into the police station for the first time: not a pleasant experience. It is not meant to be a pleasant experience, but it is not a pleasant experience and I can understand a policeman who would perhaps be at the end of a shift, that wants to go home, that has been under pressure for his full shift. The temptation is to use these new extended powers, and I know who it will actually impinge upon. It will not be upon the hardened criminal, it will be against what I would call the less sophisticated criminal, alleged, and I have looked in here for the balances and I do not see too many balances on behalf of the individual. Perhaps the learned Attorney can assuage my fears. I have looked through the Bill. I cannot see them.

I have listened to the debate. I understand where it is coming in from, why it is required by the police as they see it, but I do believe, as legislators setting the parameters for the police, that we have got to be extremely careful in this balance. I think the scales of justice are scales and I think we have to be very careful that we do not come down too far on one side as opposed to the rights of individuals on the other. I believe this particular Bill, regrettably, does just that. At this moment in time I regret very much that I will not be able to support it.

Mr Waft: Mr President, I wondered if the Attorney might look up the situation with regard to clause 58, which we will be coming to at the clauses stage, but the intimate searches of a juvenile. At what age are you deemed to be a juvenile? And the concern that I have is that a police officer may undertake that search and it does not make any reference to training of intimate body searches carried out by the police officer when he has to do this sort of body search to a younger person. At what age would that body search be likely to take place? I am thinking in terms of perhaps it could end up with a perforated bowel and peritonitis. I would just like some clarification on that one.

Also the position with regard to the cost - mention has been made of the sergeants, the extra sergeants that will be necessary, but has there been any account taken of the fact that an advocate needs to be on hand, as it were, to carry out the responsibilities that will have to be available to the client when he applies for legal aid at that time. What cost would that involve? Thank you, Mr President.

The President: Does any other hon. member wish to speak? The hon. member Mrs Christian.

Mrs Christian: Mr President, I reserved my remarks, but I think that I would just like to say that whilst I sympathise with the views expressed by the hon. member Mr Lowey in having difficulty in determining which way he will swing on this issue, I think that, in particular with regard to his comment about the right to silence, the right to silence is not being withdrawn. It is being surrounded by conditions which allow an interpretation to be made as a result of persons not speaking. But I would suggest that in the case of the public at large they have viewed this with some concern for as long as it has existed. One always feels that if a person is innocent, then they will be prepared to protest their innocence and I wonder why they will not do so and suspect that if they do not do so they may have some involvement in a criminal offence and I think it is up to them to prove their innocence, so I do not have any difficulty personally with that particular provision.

I do agree that whilst powers are being perhaps extended here, the police, I think, in today's society where we often see headlines in relation to the way police behave, do have a very onerous responsibility to behave with integrity and professionally and perhaps the majority are undermined by the very few who stray from that particular path, but nevertheless I think that the provisions of this Bill do go some way to redressing the balance, which has perhaps swung a little too far the other way in the view of many people.

Mr Lowey: Could I just come back on that one, Mr President? Really Mrs Christian has epitomised what I call my concern really. She said if somebody has got no involvement, then they should want to prove their innocence. I always was under the impression that somebody had to prove your guilt, you did not have to prove your innocence at all, and I think that is a fundamental premise, I would have thought, in our legal system, that I do not have to prove my innocence, it is for the prosecution or those prosecuting me to prove my guilt, and therefore I do not see why I should have to. There is a thing going through the legal system where the onus is always on the prosecution to prove, not for the accused to prove their innocence, and this Bill somehow seems to be changing that ethic and that ethos.

I can understand the irritation, having been at Home Affairs. I find myself in the position where I know the police and I have worked very closely with them and I admire the work and I understand the frustrations and I want to help to prosecute where wrongdoing is happening. I have no time for that, but I think as legislators we have got to be very careful, when we are dealing with this, that we do not put the scales the wrong way. This Bill seems to me to be getting the scales out of balance.

The President: Does any other hon. member wish to speak? If not I will call upon the learned Attorney-General to reply.

The Attorney-General: Thank you, Mr President. In so far as the Bill confers rights and powers upon the police in their endeavours to bring criminals to justice I would suggest that the Bill should be welcomed. However, I do entirely accept the concerns expressed by the learned member Mr Lowey.

I believe that the Bill does strike the correct balance between the rights of the police on the one hand and the rights of the public on the other. Generally speaking, where there is a right conferred upon the police there is invariably a corresponding duty upon the law-abiding members of society to co-operate with the police, but of course all members of society, whether law-abiding or not, also have rights, for example a right that they will not suffer

unlawful detention for an excessive period of time, and a right that they should have reasonable access to a friend or legal adviser when held in custody. As I say, my perception of the Bill is that it does strive and is successful in achieving the correct balance between the rights of the police and the investigating authorities on the one hand and the rights of the accused person on the other.

Now, Mr Lowey has indicated that he is concerned that the Bill now tilts the scale of justice in favour of the police. I think it is important to note, if I may, that a lot of the existing powers and procedures conferred upon the police and exercised by them, and indeed a lot of the procedures of the criminal courts, particularly with reference to the right of silence, go right back to the days of the 19th century when the accused person was in a far more precarious position than he is now. One reads very often of the severity not only of the sentences that were imposed by judges in the middle of the 19th century but also the very burdensome position in which an accused person found himself. It was for that reason in the 19th century that an accused person could not be compelled to say anything, if he did not wish to. He could not be compelled to say anything. Now, of course, as society has developed and as technology has developed, we know that when police are conducting investigations into serious crime, and indeed ordinary crime, and a person is detained at a police station, the interview is conducted with the benefit of tape-recording and with the benefit of a caution and invariably an accused person is entitled to have the benefit of a friend or an advocate present. It is with that background that I think we must look at the Bill.

The Lord Chief Justice in England, Lord Chief Justice Taylor, commented on the criticism of the Bill in England when it was being debated, with reference to the right of silence and what he said there was this: 'Despite frequent loose assertions to the contrary (the new provisions) do not abolish the right of silence. A suspect or accused person is still entitled under these provisions to remain silent. Silence does not constitute a criminal offence or contempt of court. If a defendant maintains his silence from first to last and does not rely on any particular fact by way of defence but simply puts the prosecution to proof, then the provisions would not bite at all.' Now, I think that that really does put the problem in a nutshell. The Lord Chief Justice is confirming - and these comments are equally applicable in the Isle of Man - that, throughout, the burden of proof remains on the prosecution. It is not under any circumstances the duty of the defendant to prove his innocence and if the defendant decides or if he is advised to remain silent throughout, that is his right and it may well be that that is a perfectly good bit of advice or a good tactic for the defendant to adopt. On the other hand the Lord Chief Justice is saying that if a defendant has a particular defence which is readily available to him, then it is open to him, it is not his duty to, but it is open to him to put that defence forward.

So to take perhaps a very simple example, if a defendant is found standing next to a broken window and he has all the hallmarks of a guilty person, if he decides to remain silent when he is challenged about who broke the window, instead of saying 'It wasn't me: it was John Smith', then the defendant, you may feel, is going to receive everything that comes to him. It is so easy for him to explain that it was not him and it was somebody else. If he elects to maintain his silence, then it may well be that a court would be very suspicious if he fails to give that explanation or at a very late stage in the trial he suddenly comes up with that explanation.

I would suggest that really the innocent person who is brought in to the police station for questioning has nothing to lose at all in coming clean and giving his explanation as to what had happened. As I say, though, that, as it were, natural reaction to what somebody should say in police custody does not take away his right to silence, either at the station or in court.

I entirely accept the concerns Mr Lowey has expressed about the less sophisticated individual, and we all know of cases that have been reported, particularly in the national press in England, where some very grave miscarriages of justice have occurred. I believe that one of the benefits of this Bill is to ensure that persons who are in custody are afforded their rights and that those rights are enshrined in statute, because so often now, at the police station, the police are trying to carry out the best practice and procedure which they perceive is being carried out in England, but there is no statutory basis for it. This can not be good for the defendant and it can not be good for the police. It is, in my submission, very important that rights are made clear and certain. With those rights come the corresponding duties, as I have mentioned before.

I hope therefore, Mr President, that I may have satisfied Mr Lowey in so far as his doubts on the general tenor of the Bill is concerned.

If I may try to refer to the point raised by the hon. member Mr Waft, I think he refers to clause 57 of the Bill, which deals with intimate searches, and so far as intimate searches are concerned, if an officer of at least the rank of chief inspector has reasonable grounds for believing that an arrested person may have concealed on him anything which he could use to cause physical injury to himself or others or may have a controlled drug concealed on him and was in possession of that drug with the appropriate criminal intent before his arrest, then an intimate search of that person may be authorised.

Now, clearly, I entirely agree that there must be safeguards, particularly for persons who are subjected to an intimate search. Generally speaking, an intimate search must be carried out by a registered medical practitioner, but if there are reasonable grounds to believe that there is an immediate danger that physical injury may be caused to the arrested person or others if a search is not undertaken, a police officer of the same sex, or a registered nurse, may carry out the search. The Bill does say that such reasonable force as is necessary may be used to conduct the examination and a constable may be required to exert such force to enable the examination to be carried out.

Now, the search must be carried out either at a hospital, a registered medical practitioner's surgery or a medical room at a police station which is designated for such purpose by the Department of Home Affairs. It is only where there is an emergency, such that immediate danger may be caused to the arrested person, that the search may be carried out in another part of the station.

Now, a juvenile may not be subject to an intimate search unless a person responsible for the welfare of the juvenile is present and if there is any difficulty in obtaining the presence of such a person an application may be made to the High Bailiff for authority to carry out an intimate search of a juvenile in the absence of that person.

So I would suggest that the Bill clearly recognises the importance which is attached to intimate searches and the invasion of personal liberty and indeed physical integrity which is

involved in such a search, but the Bill also imposes considerable safeguards in having those searches carried out.

Now, in so far as the cost implications are concerned, those implications, I think, were addressed in the debate in another place. I believe I am right in saying that the cost, which was estimated for the legal aid scheme, was in the region of £90,000. I could be wrong about that: I think that was the correct figure.

Clearly it is a most important aspect of this Bill that there is a panel of advocates who are able and willing to provide advice to people who are arrested and are brought to a police station for questioning. That is a crucial linchpin of this Bill, and I believe that the Law Society is co-operating in a very full manner with a view to putting forward a panel of experienced advocates. It is, I think, important that the advocates are experienced in criminal law. It is no good just having a panel of every advocate who is available. They must be experienced and they must be able to advise meaningfully at all times of the day.

So I hope that those remarks will do something to persuade the hon. member Mr Lowey that the Bill is a worthwhile piece of legislation and most important for the administration of the criminal law, and also that the hon. Mr Waft is satisfied as to those points.

The President: Hon. members, I will now put the resolution that the Police Powers and Procedures Bill 1988 be now read a first time. Will those in favour please say aye; against, no. The ayes have it. The ayes have it.

Now, hon. members, that concludes our public business for this day and Council will now sit in private to deal with those matters set out on the agenda paper.

The Council sat in private.