

The changing nature of policing powers

Gareth Crossman looks at the implications for civil liberties.

On the first day of January 2006, there was a quiet but significant shift in the nature of policing. All criminal offences became arrestable. The new power, created by the *Serious Organised Crime and Police Act 2005* (SOCAPA), means that police officers can place people under arrest for the most minor offences. Up to now most of these offences, generally covering those not punishable by a custodial sentence, were 'non-arrestable'.

The change did not generate a great amount of media interest. Only the *Daily Telegraph* considered it front page material. Compared with other changes in SOCAPA, such as the banning of demonstrations in Parliament Square, or in the context of police anti-terrorism powers, such as 90 day pre-charge detention, it has not been considered particularly newsworthy. In pure 'news' terms this lack of interest is perhaps understandable. Extending powers of arrest to cover low level offending is not headline

rules and 'judges' rules'. Pre-PACE detention was intended to result in confession and, with no detention time limits in place it was not unusual for suspects to be held for days until they became co-operative. Considering how different the post PACE policing world is, it is not surprising that overall detection rates are lower these days, generally operating in the high twenty percentages.

Similar pressures exist on forces to reduce crime. Central allocation of resources is directly linked to the meeting of crime reduction targets. Underperforming Chief Constables could also face Government censure under *The Police Reform Act 2002* which created powers for the Home Secretary to call for a Chief Police Officer's suspension (earlier plans to allow the Home Secretary a direct power to sack having been abandoned). Similarly, current proposal to reduce the number of Police Authorities from the current 43 to as few as 12 are likely to place pressures on individual

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grabbing stuff. It is however symptomatic of a wider move towards discretion-based policing evident in recent years. While the use of discretion has always been an obvious and necessary part of day-to-day police work, legislation in recent years has seen the government move away from setting clear parameters to police powers. The consequences of this can be to undermine the social contract that exists between the public and police. We give up a degree of freedom in return for the promise of protection. At the heart of this is an acceptance that powers to restrict our freedom will be used only when proportionate and necessary.

The police are under a considerable pressure to meet targets. In particular individual forces are to reduce crime and increase detection rates. As Home Secretary, David Blunkett set a gold standard of 40 per cent as the detection rate all forces should aim for. However, this figure was based on the 1980 detection rate. Crucially, this predated the passing of the *Police and Criminal Evidence Act 1984* (PACE), the legislative cornerstone protecting against abuse and mistreatment of suspects in police custody. The Police have been governed by PACE for over 20 years and it is sometimes easy to forget the treatment suffered by detainees under the previous common law

authorities not considered to be 'performing'.

If the police are under pressure to meet targets, the Prime Minister and Home Secretary have insisted they should have all the tools they want to help them do so. In their joint introduction to the Labour Party Document of April 2005, *Tackling Crime, Forwards not Back* they say "We asked the police what powers they wanted and made sure they got them". Given this sort of blank cheque invitation senior police officers might do well to consider the classic American short story *The Monkey's Paw* which warns "Be careful what you wish for, you may receive it".

The types of powers given to the police in recent years have become increasingly discretion based. This can place an excessive burden on individual officers. The justification for making all offences arrestable under SOCAPA was simplicity "[The] basis of arrest remains diverse – it is not always straightforward or clear to police officers or members of the public when and if the power of arrest exists for offences at the lower end of seriousness" (Home Office, 2004). However, making all offences arrestable places a far more onerous, if somewhat impractical, duty upon an officer. Before an arrest is made he or she will have to decide whether it is 'necessary' to arrest. In human rights terms this means that every time a police officer

has to make a decision on arrest they will effectively be required to make a determination as to whether it would be proportionate to arrest under Article 5 (the right to liberty) and Article 8 (the right to privacy) of the *Human Rights Act*. The reality is that is highly unlikely.

Experience shows that when the police are given powers they will exercise them broadly. Sections 43 and 44 of the *Terrorism Act 2000* give the police powers to stop and search persons and vehicles without the need for 'reasonable suspicion' normally required. While the legislation specifies that detention and search must be for terrorist purposes the reality has proved different. The fact that the entire metropolitan area of London has been on a rolling authority for several years is indicative of the general application of the legislation intended by the government and this has been carried through to use at street level. Section 44 powers have been used against anti-war protestors, anti-arms fair protestors, and recently to detain Walter Wolfgang, the 82 year old who was thrown out of the Labour party conference. In London, Section 44 searches have been used regularly against young Asian males on a scale which would make it nonsense to suggest that they are solely terrorism related.

A central plank of the Government's criminal justice programme has been to combat anti-social behaviour. One of the principle concerns about anti-social behaviour policy is a consistent blurring of the boundary of criminality. The *Anti Social Behaviour Act 2003* (ASBA) created powers of curfew so that 16 year olds out after 9pm could be returned home by the police even if they were doing nothing wrong. It also created dispersal zones that would allow the police to move people on if gathered in a designated dispersal area where there has been a problem with anti-social behaviour. Again no one has to be doing anything wrong but failing to comply with a removal instruction is a criminal offence. Announcing his 'respect' agenda in January, the Prime Minister indicated his desire to increase the use of summary policing powers, some of which are to be found in the *Police and Justice Bill* before Parliament.

At the heart of these legislative moves towards ever greater police discretion is a concern that the Government is absolving itself of responsibility to lay down clear indicators of what powers the police can legitimately use. Of course the police should have special powers to deal with terrorist threats. If there was intelligence that a terrorist attack was being planned, no-one could reasonably argue that the police should not be able to stop and search people without suspicion. If people are engaging in criminal antisocial behaviour then naturally the police should be entitled, as they have always have been entitled, to use reasonable powers to arrest and detain. Even the use of powers to detain in order to prevent offending, such as to prevent a breach of the peace, can be justifiable. Problems arise when

police discretion is increased to such an extent that there is no actual need for a nexus with criminality or wrongdoing.

The Government is sending out a difficult message to the police. There is a need to improve performance, reduce crime and increase detection. In order to do this the police can have significant powers and discretion. Meanwhile, they should make sure that they don't misuse their powers. If there is pressure to get results then it can only be expected that the police will use them. It is hardly reasonable to expect a young inexperienced police officer given wide powers of stop, search, arrest and detention not to use the powers they have to their limits.

In July 2004, while giving evidence to the Parliamentary Home Affairs Select Committee, the Metropolitan Police Authority said of Section 44 of the *Terrorism Act 2000*, "Section 44 powers do not appear to have proved an effective weapon against terrorism and may be used for other purposes, despite the explicit limitation expressed in the Act...It has increased the level of distrust of our police. It has created deeper racial and ethnic tensions against the police. It has trampled on the basic human rights of too many Londoners. It has cut off valuable sources of community information and intelligence. It has exacerbated community divisions and weakened social cohesion". The MPA should be commended for its comments. Yet ideally these concerns should have been expressed before, rather than after, the Act was passed.

The main onus should be on the Government to ensure that legislation sets down a clear demarcation as to what behaviour is and is not permissible, what the police can and cannot do. Home Office and Crown Prosecution Service guidance will always be necessary but it cannot replace legislative certainty. The police hold a unique position in society. Generally they have rightly enjoyed trust and respect. In a time of increased concern over national security and public safety there is a particular danger that disproportionately increasing police powers could undermine that trust.

Gareth Crossman is Director of Policy at the human rights organisation, Liberty.

References

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