



Law Society
of Scotland

Stage 1 Briefing

Railway Policing (Scotland) Bill



May 2017

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society has considered the Railway Policing (Scotland) Bill. The Society has the following comments to put forward for consideration.

Background

The British Transport Police (BTP) is the police force for the railways, responsible under the Railways and Transport Safety Act 2003 for providing a policing service to Network Rail, rail and freight operators, their staff and their passengers throughout England, Wales and Scotland, with independent oversight provided by the British Transport Police Authority (created in 2004). The BTP is funded primarily by the rail industry.

The Smith Commission proposed that the functions of the BTP in Scotland be devolved¹. Section 45 of the Scotland Act 2016 provided the Scottish Parliament with legislative competence in relation to railway policing in Scotland. This was achieved through amending paragraph E2 of Schedule 5 Part II to the Scotland Act 1998 which reserved the provision and regulation of rail services and rail transport security by including an exception for the policing of the railways and railway property. This change allows the Scottish Parliament to legislate in relation to the policing of railways in Scotland.

Section 46 of the Scotland Act 2016 designates the British Transport Police Authority, the Chief Constable of the British Transport Police, the deputy Chief Constable of the British Transport Police and the assistant Chief Constables of the British Transport Police (collectively the "BTP Bodies") as cross-border public authorities for the purposes of the Scotland Act 1998 ("the 1998 Act")². The designation of BTP Bodies as cross-border public authorities resulted in functions in relation to those bodies being modified immediately so that future appointments to the BTP bodies will only be able to

¹ http://webarchive.nationalarchives.gov.uk/20151202171017/http://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf

² <http://www.legislation.gov.uk/ukpga/2016/11/notes/division/6/index.htm>

be made in consultation with the Scottish Ministers. Other functions in relation to the BTP Bodies will similarly only be able to be exercised following consultation with the Scottish Ministers unless their effect in Scotland would be wholly in relation to reserved matters.

The Explanatory Note to the Scotland Act 2016 stated:

“The designation of the BTP Bodies as cross-border public authorities is envisaged as a first step in the process of devolving greater powers to the Scottish Government. An order could, if required, be made under section 89 of the Scotland Act 1998 to confer further or wider functions on the Scottish Ministers in relation to the BTP Bodies or to make other modifications to constitutional arrangements. In the event that the Scottish Parliament exercises the new legislative competence conferred by section 45 to remove the Scottish aspects of functions of, or relating to, the BTP Bodies, section 90 of the Scotland Act 1998 could then be used to transfer the property and liabilities of the cross-border public authority which will enable the transfer to take place in an orderly manner.”³

General Comments

The Scottish Government has stated that the Railway Policing (Scotland) Bill⁴ will deliver the following: a) provide the Scottish Police Authority and Police Scotland with new powers in relation to the policing of railways and railway property; b) introduce a model of funding Police Scotland’s railway policing function by the rail industry; and c) remove powers in relation to such policing in Scotland from the British Transport Police (BTP) and the British Transport Authority (BTPA) as conferred by Part 3 of the Railways and Transport Safety Act 2003. The Bill enables the Scottish Police Authority to enter into railway policing agreements (RPAs) with railway operators to provide for policing in respect of the railways and railway property.

In addition to the Railway Policing (Scotland) Bill, the Scottish Government anticipates⁵ that the following further legislation may be required to facilitate the transfer of BTP functions to Police Scotland, namely: -

An Order in Council under Section 90 of the Scotland Act 1998: This provision allows for an Order in Council to be made subject to scrutiny in both the UK and Scottish Parliaments, for the transfer of property and liabilities of BTPA and BTP senior officers whose functions are to be no longer exercisable in or as regards Scotland by virtue of an Act of the Scottish Parliament.

³ <http://www.legislation.gov.uk/ukpga/2016/11/notes/division/6/index.htm>

⁴ [RAILWAY POLICING \(SCOTLAND\) BILL- Policy memorandum - as introduced to the Scottish Parliament on 8th December 2016](#) – see page 1 and Annex at page 17 and 18.

⁵ [RAILWAY POLICING \(SCOTLAND\) BILL- Policy memorandum - as introduced to the Scottish Parliament on 8th December 2016](#) – see Annex at pages 17 and 18

An Order under section 104 of the Scotland Act 1998: This Order would make such further consequential and supplementary provision of a cross-border nature which is necessary or expedient in consequence of the Act of the Scottish Parliament. In particular we note that this could include cross-border enforcement and mutual aid and collaboration between Police Scotland and the BTP (if needed).

Regulations made under section 48 of the Police and Fire Reform (Scotland) Act 2012 (“the 2012 Act”) and/or Ministerial determinations under the Regulations: it is proposed that such regulations will, if necessary, make adjustments to existing regulations and determinations on the governance and administration of Police Scotland to reflect, for example, the distinct terms and conditions of service of members of the BTP.

In respect of the above as noted in the Justice Committee’s Stage 1 Report on the bill (SP paper 132) paragraph 302, appropriate consultation should be carried out on all draft instruments prior to the final orders and regulations being laid before Parliament.

Specific Comments on the Bill

We have the following comments on provisions concerning the resolution of disputes relating to RPAs.

Section 1 of the Bill makes provision for policing of railways and railway property by inserting a new Chapter 12A (consisting of sections 85A to 85M) into the 2012 Act. This establishes a legislative framework for RPAs to be made between railway operators and the Scottish Police Authority.

Inserting new section 85E (Preliminary powers of the Scottish Ministers to resolve disputes) into the 2012 Act:

New section 85E(2) of the 2012 Act allows the Scottish Ministers to make a preliminary determination that a party must make a payment in respect of any costs incurred by the Scottish Ministers, the other party or another person in connection with steps to resolve the dispute. This seems to be prior to parties being given an opportunity to make representation in respect of the issues in dispute.

Inserting new section 85F (Disputes about terms to be included in an Railway Policing Agreement) and 85G (Disputes about variation, interpretation or operation of the Railway Policing Agreement) into the 2012 Act:

These provisions allow for the Scottish Ministers to determine the dispute themselves, or “appoint a suitable person to determine the dispute”. The Bill is silent on the criteria for the “suitable person” and the circumstances and/or types of disputes when that person may be appointed.

In terms of the process to be followed for the determination of any disputes, the Bill only requires that the parties are given an opportunity to make representations. The Scottish Ministers or the “appointed person” “may otherwise decide the determination of the dispute”. The lack of clarity

around process could engage human rights issues around Article 1 of the First Protocol (right to property) along with potential public law challenges.

We draw attention to the Justice Committee's Stage 1 Report on the bill paragraphs 108 -109 and the recommendation at paragraph 111 The Committee highlights the Law Society's concerns relating to the criteria for a suitable person to resolve disputes and on a perceived lack of clarity as to their power to determine the procedure for resolving disputes, which it saw as potentially engaging human rights issues and believes the Scottish Government must fully respond to these concerns.

Inserting new section 85H (Appeals) into the 2012 Act: We note that the Bill allows any party to a dispute referred to the Scottish Ministers to appeal a determination to the Court of Session. The Bill is silent on the process to be followed for any appeal.

Cross Border Enforcement and Co-operation

We note that section 2 of the Bill provides constables of Police Scotland with powers to enter railway property without warrant. At present, there are 5 railway passenger services that operate across the border between Scotland and England (e.g. East Coast, West Coast, TransPennine Express, Cross Country and the Caledonian Sleeper). We believe that the police in each UK jurisdiction must work collaboratively given the differences in the law of each of the UK jurisdictions. On implementation these operational aspects will require careful consideration in the context of any further legislation or operational frameworks⁶ which facilitate the transfer of BTP functions to Police Scotland, this will include consideration of the impact of any new measures enacted by virtue of the Policing and Crime Act 2017.

At present, a BTP constable can when in Scotland, execute an arrest warrant, warrant of commitment and a warrant to arrest a witness from England, Wales or Northern Ireland,⁷ and when in England or Wales, execute a warrant for committal, a warrant to imprison (or to apprehend and imprison) and a warrant to arrest a witness from Scotland⁸.

The Policing and Crime Act 2017: We note that the Policing and Crime Act 2017 proposes an amendment to the Criminal Justice and Public Order Act 1994 ("the 1994 Act"), Part 4 on Cross Border enforcement. The Society previously commented on cross border powers of arrest in the context of the Legislative Consent Memorandum on the Policing and Crime Bill⁹.

The Justice Committee's Note by the Clerk on the Legislative Consent Memorandum explains¹⁰ that the concern with the existing framework is that there are no powers of arrest available in urgent investigations where an individual is alleged to have committed a serious offence in one UK jurisdiction, where no arrest warrant has been issued and the suspect has turned up unexpectedly in another UK jurisdiction. Even if there are strong arguments for arresting and holding the suspect, at present, the local police lack clear power to do so.

Section 116 of the Act fills this gap in cross-border arrest powers. This clause inserts new sections into the 1994 Act. If enacted, the provisions will allow people suspected of serious offences in Scotland to be arrested in other parts of the UK by police from those jurisdictions, by giving a constable of a police force in a particular part of the United Kingdom power to arrest a person in that part who is reasonably suspected of having committed a specified offence in another part. The Secretary of State has power by regulations to specify the offences. The powers of arrest are available only in urgent cases and for the purpose of enabling the person to be re-arrested either under section 136 (where a warrant is obtained) or under section 137 of the 1994 Act. New section 137C inserted into the 1994 Act by section 116 also specifies limits on the period for which persons arrested under the new powers may be detained and makes other supplementary provision.

According to the UK Government's factsheet on the cross-border provisions: -

“Given that the criminal law differs in each of the three jurisdictions it is necessary to develop a bespoke, but analogous, list of offences for each jurisdiction. To allow for the appropriate consultation with, and consent of, the devolved administrations, and consultation with police forces in the three jurisdictions, the Bill provides for a list of offences to be specified in secondary legislation. This approach would also afford the flexibility to update the list in the light of experience and to reflect the creation of relevant new offences.”¹¹

As previously stated, whilst we recognise and support the introduction of provisions to allow more comprehensive cross-border powers of arrest, we believe that there must also be consideration to the common procedural rules for all cases within the UK. Clearly, the accused can only be subjected to one set of criminal procedure rules and, in this regard, there should be clarity around which set applies. Where an accused is being questioned about a Scots Law Crime, under Scottish Criminal Procedural Rules, the accused must have access to the Scottish rules which affords him or her protection. For example, we believe that where an accused is apprehended in England and is questioned about a Scots Law crime, he or she must have the right to have the advice of a solicitor qualified in Scotland at the police interview.

⁶ For example, the Society refers to the [Joint Statement by Her Majesty's Attorney General and the Lord Advocate in respect of the Handling of Terrorist cases where the jurisdiction to prosecute is shared by prosecuting authorities within the UK](#)

⁷Section 136 of the Criminal Justice and Public Order Act 1994

⁸Section 136 of the Criminal Justice and Public Order Act 1994

⁹ <http://www.lawsco.org.uk/media/891721/policing-and-crime-bill-lcm-draft-response.pdf>

¹⁰ [http://www.parliament.scot/S5_JusticeCommittee/Meeting%20Papers/J-S5-16-2-7_Paper by the clerk - Policing and Crime LCM.pdf](http://www.parliament.scot/S5_JusticeCommittee/Meeting%20Papers/J-S5-16-2-7_Paper%20by%20the%20clerk%20-%20Policing%20and%20Crime%20LCM.pdf)

¹¹ [https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537277/Factsheet_14b - Cross-border powers.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/537277/Factsheet_14b_-_Cross-border_powers.pdf)



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