

EXERCISING POWERS OF ARREST UNDER SOCPA 2005 – wether discretion?¹

Summary

The framework for arresting suspects has changed dramatically since the 31st December 2005. This article focuses on the power of constables to make an arrest: it highlights the main changes that have been made to PACE and its Codes of Practice, and it discusses some of the practical difficulties that operational officers are likely to face. The changes are intended to make the power of arrest more 'straightforward' and so improve "police efficiency and effectiveness". The most significant change is the move away from the criterion of seriousness and to require constables to decide – applying an objective test – whether an arrest is necessary. All offences are 'arrestable', but much will depend on the circumstances of a given case. The discretion of constables to make an arrest is significantly curtailed.

From the moment the bell of "Big Ben" brought in January 1, 2006, police powers were substantially altered by the Serious Organised Crime and Police Act 2005 (SOCPA) – particularly in relation to arrest and those powers available to constables following an arrest.² Officers, who had the misfortune to be on duty from New Year's Eve until New Year's Day, found themselves applying two sets of powers in one shift! It is not apparent that this presented any difficulty to the officers concerned, but there is no doubt that the changes introduced by SOCPA will have considerable practical effect. Obviously such radical changes to the manner in which the basic tools of arresting suspects operate will have an impact on all policing, covert or otherwise.

The following points should be noted:

- The original version of section 24 of the Police and Criminal Evidence Act 1984 (PACE) has been replaced with a new s.24.³
- The phrase "arrestable offence" has disappeared from the language of PACE.⁴
- Section 25 PACE (general arrest conditions) ceased to have effect.⁵
- The definition of a "serious arrestable offence" as it appears in s.116 of PACE, is redundant.⁶
- Schedule 5 of PACE (serious arrestable offences) also ceased to have effect.⁷
- Given the above, the distinctions between an "arrestable offence", a "serious arrestable offence", and (colloquially) a "non-arrestable offence", have gone.⁸
- Note that s.26 of PACE has not been repealed. That section itself repealed statutory powers of arrest that existed before PACE came into force, but it also specifies statutory powers of arrest that are to be preserved.⁹ Understanding the relationship between s.26 of PACE, and the amendments set out in schd.7 of the 2005 Act is not easy, but in this respect, the government's *Explanatory Notes* shed some light [para.237]:

¹ Thanks are due to Professor David Ormerod for his helpful comments and suggestions. He is not to be taken as endorsing any of the views, or points, made herein.

² See *The Serious Organised Crime and Police Act 2005 (Powers of Arrest) (Consequential Amendments) Order 2005*, 2005 No. 3389.

³ See "*Serious Organised Crime and Police Act 2005, A Current Law Statute Guide*, Fortson, Sweet & Maxwell.

⁴ See Part 2 to Schedule 17.

⁵ Section 110(2) of the 2005 Act.

⁶ Para.43(12) to Part 3 of Schd.7 of the 2005 Act.

⁷ Para.43(13) to Part 3 of Schd.7.

⁸ Note that for the purposes of the offences of 'assisting an offender' (s.4, Criminal Law Act 1967), and 'concealing evidence' (s.5, CLA 1967) for "arrestable offence" read "relevant offence". A "relevant offence" means "(a) an offence for which the sentence is fixed by law, (b) an offence for which a person of 18 years or over (not previously convicted) may be sentenced to imprisonment for a term of five years (or might be so sentenced but for the restrictions imposed by section 33 of the Magistrates' Courts Act 1980): see s.4(1A) CLA 1967 (as amended: see SOCPA 2005,s.111, and Sched. 7, para. 40(1), (2) and (3)).

⁹ See schedule 2 of PACE.

“Part 1 of Schedule 7 repeals specific powers of arrest which are now unnecessary following the introduction of a general power of arrest. Part 2 of Schedule 7 provides a gloss for the same purpose on enactments where the power of arrest could not be separated out. A very limited number of specific powers of arrest have been retained in their existing form. These primarily relate to powers of arrest in connection with transport offences. This approach may be contrasted with section 26 of PACE which contained a general repeal of powers of arrest existing before that Act came into force. Some of the specific repeals in Schedule 7 may overlap with the effect of section 26 of PACE. Part 3 of Schedule 7 contains amendments consequential on the repeal of the definitions and concepts of an arrestable offence and a serious arrestable offence. *In general police powers which [are] available in cases involving serious arrestable offences and arrestable offences will now be available in cases involving indictable only or triable either way offences.* Part 4 of Schedule 7 contains purely consequential amendments.” [emphasis added]

It follows that all offences are arrestable. It is sometimes said (alluding to the terms of old s.25 PACE) that all offences were arrestable pre-SOCPA, but this is an over simplification. Section 25 PACE provided a “general power of arrest” in limited, prescribed, circumstances.¹⁰

The exercise of a power of arrest under the new s.24 PACE is subject to (a) the conditions set out in revised s.24 PACE (constables), or s.24A PACE (other persons), and (b) the revised PACE Codes of Practice – particularly Code G (31st December 2005). As before, constables have greater powers than citizens to make an arrest, but both groups must now have reasonable grounds for believing that it is *necessary* to make an arrest for any of the reasons set out in s.24(5) [constables], or s.24A(4) [other persons].

The position of constables

Under new s.24 PACE, a constable must (i) have reasonable grounds for suspecting that an offence has been committed, (ii) have reasonable grounds to suspect that D is guilty of it,¹¹ and (iii) have reasonable grounds for believing that it is necessary to arrest the person in question for any of the reasons mentioned in s.24(5). It is this last requirement that marks a radical departure from the previous framework, and which is likely to present officers with the greatest difficulty. Not only must officers understand what it is that is now required of them, but they also face practical difficulties deciding whether, and when, to arrest. The statutory reasons for making an arrest are:

- “(a) to enable the name of the person in question to be ascertained (in the case where the constable does not know, and cannot readily ascertain, the person's name, or has reasonable grounds for doubting whether a name given by the person as his name is his real name);
- (b) correspondingly as regards the person's address;
- (c) to prevent the person in question-
 - (i) causing physical injury to himself or any other person;
 - (ii) suffering physical injury;
 - (iii) causing loss of or damage to property;
 - (iv) committing an offence against public decency (subject to subsection (6)); or
 - (v) causing an unlawful obstruction of the highway;
- (d) to protect a child or other vulnerable person from the person in question;

¹⁰ Repealed; s.110(2) SOCPA.

¹¹ In *Fox, Campbell and Hartley*, Judgment, ECtHR, 26 June 1990, the Court stated, “The ‘reasonableness’ of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5§1(c) (art.5-1-c). The Court agrees with the Commission and the Government that having a ‘reasonable suspicion’ presupposes the existence of facts or information, which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as ‘reasonable’ will however depend upon all the circumstances”.

- (e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;
- (f) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question.”

The changes introduced by SOCPA follow the outcome of the *Report of The Joint Home Office/Cabinet Office Review of the Police and Criminal Evidence Act 1984* (2002), and have regard to responses received by the Government following publication of its Consultation Paper “*Policing: Modernising Police Powers to Meet Community Needs*”.¹² The anticipated benefits of the changes to the powers of arrest were summarised by the authors of the team who prepared the *Serious Organised Crime and Police Bill Summary Regulatory Impact Assessment*.¹³

“*Arrest*: Should result in improved police efficiency and effectiveness in terms of the police investigative process and raise the level of successful outcomes to investigations. Enables police to determine on a case by case basis whether or not a person needs to be taken into custody – potential savings on police time and related accommodation issues.”

Was changed needed?

For its part, the Review Team found “a high level of satisfaction with the framework of arrest powers, but there are concerns that it is too complicated. Some on the police side wanted to couple simplification with broader and stronger powers” [para.22]. The Review Team’s preferred option was to “create a definitive list of arrestable offences and to codify the powers of arrest”.¹⁴ It will be appreciated that this is not the step that Parliament has taken.

The Consultation Paper went further in its criticisms of the pre-SOCPA position, stating that

“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. As indicated by the Association of Chief Police Officers in responding to the Joint Review of PACE, there is a ‘myriad of different qualifiers’ to effect arrest” [para.2.2].¹⁵

Andrew Roberts describes that claim as “unconvincing” because previous powers of arrest were “clearly demarcated”.¹⁶ In other words, the powers of arrest were demarcated by the explicit identification of specified offences as “arrestable”, or demarcated by definition (i.e. an offence carrying a maximum term of imprisonment of five years or more). The problem - whether an officer had a power of arrest in respect of a particular offence that occupied the lower end of seriousness - arose in cases rarely that were rarely encountered by officers. It is doubtful that this was a significant problem: had it been so, one wonders why the PACE Review Team’s preferred option was for Parliament to enact a definitive list of arrestable offences. The problem typically encountered by officers was not whether a power of arrested existed, but whether it was appropriate to make an arrest. Arrests have significant resource implications both as to time and cost. Deciding whether to arrest involves an application of legal rules, the existence of discretion (an appreciation of the limits of that discretion), and policy. In practice, the new framework does not ease the burden on officers: indeed, for the reasons given below, the burden is increased.

¹² Home Office, August 2004.

¹³ November 2004; available on the internet.

¹⁴ The Review recommended creating a definitive list of powers to arrest, “complemented by information on how they can and should be applied. This should link to enhanced training. More radical ideas about expanding the scope to arrest require further consultation”, page 21.

¹⁵ *The Final Regulatory Impact Assessment Rationalisation of Arrest Powers And Execution of Search Warrants*, states that “(i) The objective: provide clarity on the present myriad of arrest powers under the Police and Criminal Evidence Act (PACE) 1984 and other specific legislation. The aim is to provide clear statement for police, Criminal Justice System and the public on arrest powers” [para. 2(i)].

¹⁶ *Modernising Police Powers*, Criminal Justice Review, 2003-2004, 16th Annual Report, Centre for Criminal Justice Studies, University of Leeds, p.34.

Arresting Appropriately and the exercise of discretion to arrest

New s.24(5)(a)-(f) PACE includes two grounds, namely (e) and (f), that are so broadly drawn that they are capable of justifying arrest in almost any circumstance. Code G states that s.24(5)(e) PACE may include cases:

- “(i) Where there are reasonable grounds to believe that the person:
- has made false statements;
 - has made statements which cannot be readily verified;
 - has presented false evidence;
 - may steal or destroy evidence;
 - may make contact with co-suspects or conspirators;
 - may intimidate or threaten or make contact with witnesses;
 - where it is necessary to obtain evidence by questioning; or
- (ii) when considering arrest in connection with an indictable offence, there is a need to:
- enter and search any premises occupied or controlled by a person
 - search the person
 - prevent contact with others
 - take fingerprints, footwear impressions, samples or photographs of the suspect
- (iii) ensuring compliance with statutory drug testing requirements.”

There is force in the point made by Andrew Roberts that:¹⁷

“If...the police cannot be relied upon to apply the existing powers arrest appropriately, one might reasonably question whether a power of arrest which relies on police officer's judgment of necessity would be likely to improve matters or whether it will be even more likely to lead to abuse and inappropriate use.”

In fact, the issue facing most busy constables is not one of competence, but *uncertainty* whether a decision to arrest might be objectively viewed as unlawful on the grounds that a purported exercise of power was not “necessary”, or that it constituted a disproportionate response (in ECHR terms). Although it seems likely that the courts will afford constables significant flexibility in the exercise of their power to arrest under new s.24 PACE, Code G makes it plain that if the provisions of the Act and the Code are not observed, “both the arrest and the conduct of any subsequent investigation may be open to question” [G.1.4]. It must be stressed that it does not follow that evidence obtained as a result of an improper arrest will necessarily be inadmissible at trial, but such a result is possible.

Officers now risk being criticised for arresting either too often, or not often enough. During debates in the House of Lords, when the 2005 Act was then a Bill, Lord Dholakia was fearful that the answer was the former.¹⁸ The government’s position was that it must maintain the existing ability of police officers to arrest and to intervene when an offence is about to be committed, and it sought to rationalise the powers of arrest “to ensure that the police have access to effective and proportionate powers to tackle crime when it occurs”, and that revised the Codes of Practice would focus on the reasons that constitute necessity [Baroness Scotland, *Hansard*, 5th April 2005, col.639; see now Code G of the PACE Codes of Practice].

¹⁷ *Modernising Police Powers*, Criminal Justice Review, 2003-2004, 16th Annual Report, Centre for Criminal Justice Studies, University of Leeds, p.34.

¹⁸ “Those conditions are drafted very broadly; it will be very easy for an officer to justify an arrest under one or both of them. Since officers must often make rapid decisions about whether to arrest, it will be natural, particularly for the relatively inexperienced, to err on the side of caution. That will lead to further overcrowding of custody suites and an increased use of police time and resources in dealing with people arrested for minor offences. In addition, we are concerned that there is considerable scope for abuse of those subsections, and that they may be applied arbitrarily or in a discriminatory fashion against certain sections of the community. Article 5 of the convention does not permit arbitrary procedures for arrest” [*Hansard*, 5th April 2005, col.637-638].

Understandably, there is concern that the new provisions will make it more likely that officers who arrest for minor offences will face accusations that they are ‘picking’ on particular social groups, or individuals.¹⁹ The same accusation might be made in connection with arrests made during test purchase operations.²⁰ To avoid such accusations, officers prefer the comfort of clear legal principles. Clarity enables officers to know whether or not they will be acting within the law should they exercise a particular power. An arrestee will also want to be reassured that the arresting officer acted within his/her powers. Constables are unlikely to find much comfort in the words of the Minister for Crime Reduction, Policing and Community Safety (Ms Blears) who said:²¹

“...we are saying that the constable must think carefully, exercising his or her professional discretion, training and skills to reach a decision in the particular circumstances. They will not simply have the automatic power of arrest and be able to arrest someone without thinking about it; they will have to go through the necessity test because it will be looked at in court and perhaps by the Independent Police Complaints Commission, which will have judicial oversight. *Having to go through that process places quite a rigorous burden on the constable, given that he or she does not have to go through it at the moment.*” [emphasis added]²²

As part of that process, a constable will need to keep in mind Code G.3.3, which requires him to inform the person arrested of the fact of arrest as well as the grounds for arrest.²³ Code G, Note 3, imposes a further requirement that an arresting officer must inform the suspect of the “suspected offence’s nature...when and where it was committed” and “of the reason or reasons why arrest is considered necessary. Vague or technical language should be avoided” (and note s.28 PACE²⁴). Arguably, “Note 3” goes no further than existing case law: see *Abbassy and another v. Commissioner of Police of The Metropolis and Others* (1990) 90 Cr.App.R. 250, and *Taylor v. Chief Constable of Thames Valley Police* [2004] 3 All E.R. 503, CA (Civ. Div.)²⁵; and the Code is intended to meet the requirements of Art.5.2 of the ECHR.²⁶

An arresting officer is not obliged to spell out in detail the grounds for arrest, and most suspects will be assumed to possess average intellect to be able to adequately contextualise the officer’s language to understand why he/she has been arrested.²⁷ For example, where a person is found in possession of

¹⁹ Some commentators have been highly critical of the new arrest provisions. For a particularly strongly worded criticism see “*A Law the Stasi would have loved*”, The Observer, Henry Porter, November 6, 2005. In milder tones, the Law Society stated: “We oppose the removal of the seriousness criterion...since it amounts to an important proxy for proportionality...Under the proposals in the paper, the police would have a power of arrest however minor the suspected offence. We do not believe that this represents an appropriate balance between the liberty of the citizen and the needs of the police, and is contrary to the principles embodied in the PACE powers concerning arrestable offences as originally proposed by the Royal Commission on Criminal Procedure.” [*Policing: Modernising Police Powers to Meet Community Needs, Responses*, Home Office]

²⁰ There is little cause for concern in this situation because experience has shown that ‘street dealers’ are often not low-level dealers, and it will often be easy to demonstrate that it was necessary to arrest under s.24(5)(e) PACE.

²¹ *Hansard*, Standing Committee, January 18, 2005, col.238.

²² Code G.2.6 lends support to that view: “applying the necessity criteria requires the constable to examine and justify the reason or reasons why a person needs to be taken to a police station for the custody officer to decide whether the person should be placed in police detention.”

²³ This must be done at the moment of arrest, or as soon as practicable thereafter.

²⁴ Section 28(3) PACE 1984 states that “no arrest is lawful unless the person arrested is informed of the ground for the arrest at the time of, or as soon as is practicable after, the arrest”.

²⁵ See also *Fox, Campbell and Hartley v. U.K.*, 13 E.H.R.R. 157.

²⁶ “Paragraph 2 of Article 5 (art. 5-2) contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5 (art. 5): by virtue of paragraph 2 (art. 5-2) any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4 (art. 5-4) (see the *van der Leer* judgment of 21 February 1990, Series A no. 170, p. 13, § 28). Whilst this information must be conveyed “promptly” (in French: “*dans le plus court délai*”), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.”; *Fox, Campbell and Hartley v. U.K.*, 13 E.H.R.R. 157, para.40 of the judgment.

²⁷ Note that the grounds for arrest must nevertheless be given regardless of whether the ground for the arrest is obvious: s.28(4) PACE 1984.

heroin, an officer who says “you’re under arrest for unlawful possession” has probably said enough to inform the arrested person of the nature of the offence, even though the officer did not add “for the unlawful possession of a controlled drug”. However, the new arrest provisions now require a constable to inform the arrestee of the reason, or reasons, why arrest is considered necessary. This is a major shift, but an inevitable one, given that the criterion of seriousness has been removed. Previously there usually was no need for an officer to spell out *the purpose* for which a person had been arrested.²⁸ Now, if new s.24(5)(e) and (f) PACE are available in a given case, an officer will be required to say something along these lines: “I am arresting you for robbery, to allow me to promptly and to effectively investigate the offence, and to prevent a prosecution being hindered because I believe that you will disappear unless I take you into custody”. It may not be practicable to utter such a mouthful of words at the moment of arrest, but an officer may give his reasons at a later stage: s.28(3) PACE.

Justifying arrest for a minor offence to further a wider investigation

Suppose a constable [‘P’] carried out covert surveillance following a tip-off that D is unlawfully supplying cannabis. The surveillance failed to reveal any evidence of drug dealing by D. One evening, P stopped and searched D who was seen to be loitering in the street and who seemed to be acting under the influence of a controlled drug. D was found to be in possession of a very small amount of cannabis resin, consistent with personal use. P considered whether he could arrest D under s.24(5)(e) PACE for the offence of simple possession of a controlled drug²⁹, but he decided that it was not “necessary” for him to do so. P knew D’s identity, and D volunteered a roadside admission that the substance was cannabis for his own use. It was not “necessary” to arrest D for the “proper and effective investigation” of an offence of simple possession. Would it have been open to P to have arrested D as part of the wider investigation into alleged drug trafficking by D?

One of the government’s criticisms of the pre-existing rules was that powers of arrest were based “on the concept of seriousness of the offence and not on the complexity of the investigation”:³⁰

“2.5...We should be building on the accrued benefits of PACE and moving towards a straightforward, universal framework which focuses on the nature of an offence in relation to the circumstances of the investigation.”

In seeking to address concerns that the absence of a criterion of seriousness might result in too many persons being arrested for minor crimes, Baroness Scotland of Asthal (Home Department) said :³¹

“We are not suggesting that the seriousness of the offence is not a consideration when a constable decides to make an arrest. But it is not the sole consideration. Rather it is just one of a number of necessary factors which should be taken into account. However, these powers must be proportionate to the offence....”

The above suggests that the decision of a constable must be based on circumstances relevant to the investigation or prosecution of the offence in question, but a statement made by Ms Hazel Blears in the House of Commons might be understood to mean that in some circumstances an officer would be entitled to arrest a person for an offence (were it necessary to do so) in order to take forward a wider investigation:³²

“I am delighted to confirm that seriousness will remain one of the factors to be used in deciding whether it is necessary to exercise the power. It is an important factor and it will remain a central consideration, because we do not want to deny the basis on which Police and Criminal Evidence Act 1984 provisions have developed. However, a number of other matters will also be taken into account, and that will strengthen the test...seriousness remains one of

²⁸ Save for the old general arrest conditions under the now repealed s.25 PACE 1984.

²⁹ Section 5(2) MDA 1971.

³⁰ Consultation Paper: *Modernising Police Powers to Meet Community Needs*, H.O., 2004, para.2.5.

³¹ *Hansard*, col.758, 6th April 2005.

³² *Hansard*, col.244, 18th January 2005.

the factors. We also want to consider the effect on the victim and the way in which we can ensure that the powers are used both to investigate crime and to secure convictions...subsection (5)(e) makes a key addition. There are currently no necessity provisions for the general power of arrest, but paragraph (e) will allow the prompt and effective investigation of the offence or the conduct of the person in question. *That relates to whether one is looking at a serious offence and whether, in a complex investigation, one needs to make an arrest in order to take the matter forward....*

....We are asking constables to take a more holistic view of the circumstances that face them.... We are asking the constable to take a view on the nature of the offence, the conduct of the person in question and the seriousness of the situation, including whether there is physical injury or loss or damage to property, or whether can he get an [col.246] address. A range of issues are involved, and the constable has to be satisfied that it is right to exercise the power in those circumstances.”

[emphasis added]

Note the words “a more holistic view”. This probably means no more than that an officer may roll up his/her reasons for making an arrest. On this basis, one reason for making an arrest might be s.24(5)(e), but it need not be the only one.³³ But are the words of Ms Blears to be interpreted as meaning that a constable may also arrest a person for a minor offence in order to further a wider, and more complex, investigation? The answer to this question is obviously important because other powers may be available to police once an arrest is made.³⁴ Under the pre-existing framework, the demarcation and identification of offences as ‘arrestable’, ‘serious arrestable’, and ‘non-arrestable’, was relevant to the exercise of other powers (e.g. to search a person, or to seize a person’s property). “Serious arrestable offences” gave constables particularly intrusive powers, and restricted rights afforded to suspects under PACE - subject to appropriate authorisation: e.g. road checks [s.4, PACE], warrants for further detention [s.43, PACE], delaying the right to have someone informed when arrested [s.56, PACE], and delaying access to legal advice [s.58, PACE].

It is not the government’s intention that under the new framework, *any* arrest should trigger powers such as those mentioned, but the government argues that the exercise of a power “is either justified or not in the individual case”.³⁵ The government therefore proposed that the person must be arrested for an offence that is at least “indictable” before powers contingent on arrest, are triggered.³⁶ This is the effect of Part 3 to Schd.7 of the 2005 Act, which amends all existing enactments, by substituting the words “indictable offence” for “serious arrestable offence”, and (at times) substituting “indictable” for “arrestable”. These changes have also been criticised.³⁷ Thus, s.18 PACE (entry and search after arrest), and s.32 PACE (search upon arrest) are exercisable if the offence in question is “indictable”. The simple possession of cannabis³⁸ is an indictable offence, but an officer rarely needs to search premises under s.18 PACE merely to investigate that offence.

³³ Presumably, by the time the officer decides to arrest, the precise statutory reasons for doing so ought to have crystallised in his mind. This is because the law requires that the arrested person is told both the offence for which he is being arrested, and the arrest condition used to justify the arrest: *Nicholas v. Parsonage* [1987] R.T.R. 199, DC and see *Mullady v. DPP* [1997] C.O.D. 422, DC.

³⁴ See “*The Powers of Arrest Provisions*”, Centrex Digest, September 2005.

³⁵ Para.2.18, Consultation Paper: *Modernising Police Powers to Meet Community Needs*, H.O., 2004.

³⁶ The 2005 Act does not define what “indictable” means, but the Interpretation Act 1978 defines an “indictable offence” as an offence triable only on indictment, or triable “either way”. The government accepts that the effect of these amendments is to, “...bring a wider range of offences within the orbit of the trigger powers currently only available at the ‘serious’ end of the offence range. But as indicated, there are significant safeguards and protections in place before these powers can be exercised. They would remain in place to provide an important safeguard against disproportionate use” [Para.2.18; *Policing: Modernising Police Powers to Meet Community Needs*, H.O, August 2004].

³⁷ As part of its response to the HO Consultation Paper, *Liberty* stated “...an officer would need to undertake a detailed rights analysis under the HRA before exercising such powers on a case-by-case basis. It is unclear how this approach will protect the rights of the public to be free from arbitrary and disproportionate interference with their rights; it is also unclear how moving from a structured framework to a case-by-case system will prove more efficient or will free up police resources (in fact, the contrary is surely true).” [*Policing: Modernising Police Powers to Meet Community Needs, Responses*, Home Office].

³⁸ Under s.5(2), Misuse of Drugs Act 1971.

It is submitted that there will be circumstances in which a constable is permitted to arrest a person under the new s.24 PACE on suspicion of committing a minor offence, albeit as part of a wider investigation, but there are significant limits on his/her power to do so. Put shortly, the power of arrest is exercisable only to investigate the circumstances of the offence/conduct for which the person was arrested. The results of that investigation might be relevant to a wider inquiry, but (it is submitted) the revised framework is not intended to permit arrests in order to “fish” for information, and this is so for the following reasons. First, new s.24(5)(e) PACE relates to “*the* offence”, or “of the conduct of the person in question”. The latter expression is probably intended to cater for cases where no offence was actually committed, or where D was not responsible for a crime committed.³⁹ Secondly, s.24(5)(f) also refers to “the offence”. Thirdly, powers available to officers following the making of an arrest, are exercisable in respect of an “indictable” offence.⁴⁰ Fourthly, police powers ought not to intrude into the lives of citizens to an extent greater than is necessary. The so-called “holistic approach” appears to be confined to the circumstances of the offence for which D is liable to be arrested. If this analysis is correct, it follows that, in the above example, P would *not* be entitled to arrest D for the simple possession of cannabis in order to further an investigation into drug dealing.

Discretion to arrest? To what extent is there still a discretion?

Code G, para.2.4, states that the power of arrest is “only exercisable if the constable has reasonable grounds for believing that it is necessary to arrest the person”, and that:

“it remains an operational decision *at the discretion* of the arresting officer” (emphasis added) as to “- what action he or she may take at the point of contact with the individual; - the necessity criterion or criteria (if any) which applies to the individual; and - whether to arrest, report for summons, grant street bail, issue a fixed penalty notice or take any other action that is open to the officer”.

Code G, 2.7, refers to the “*operational discretion* of individual officers”⁴¹, but in this instance the discretion relates to the circumstances that satisfy the criteria set out in new s.24(5) PACE.

It is questionable whether the references in Code G to “discretion” are appropriate because what is required of an officer is judgment. An officer must weigh-up whether the statutory criteria for making an arrest, under s.24 PACE, are met. An officer might decide that it is not practicable to arrest D (e.g. because a more serious incident occurs that requires his immediate attention), and therefore D is not arrested notwithstanding that the officer could justify an arrest under s.24. In that sense, the officer retains an executive discretion to arrest, but it is discretion curtailed by the provisions of SOCPA.⁴²

There is no doubt that the pre-existing framework gave constables a greater degree of executive discretion than is now available to them. The diminishment of discretion becomes apparent if one sketches the history of the summary power of arrest for constables from 1967. Section 2(4) of the Criminal Law Act 1967 provided that “Where a constable, with reasonable cause, suspects that an arrestable offence has been committed, he may arrest without warrant anyone whom he, with reasonable cause, suspects to be guilty of the offence”. That provision - by the use of the word “may” - gave a constable discretion to arrest a person if he had reasonable cause to do so, but the officer was not bound to make an arrest. If there was reasonable cause to arrest, an officer’s motive or purpose for exercising his discretion to arrest was subject to the principles stated in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation*: see, for example, *Holgate-Mohammed v. Duke* (1984) 79 Cr.App.R. 120, HL (and see the commentary to that case in [1984] Crim.L.R. 419).

³⁹ For example, where there were reasonable grounds to suspect that D had committed an offence but subsequent enquiries revealed that no offence had been committed, or that D could be eliminated from the investigation.

⁴⁰ See para.43 to Part 3 of schedule 7 of SOCPA 2005.

⁴¹ Emphasis added.

⁴² See *Shaaban bin Hussein v Chong Fook Kam* [1970] AC 942, and *Al-Fayed v Commissioner of Police for the Metropolis (No.3)* [2004] EWCA Civ 1579, for a discussion regarding a constable’s executive discretion to make an arrest pre SOCPA.

In *Holgate*, a police constable, exercising his powers of arrest pursuant to section 2(4) of the CLA 1967, arrested H on suspicion of having committed a burglary. H was interrogated at the police station and she maintained her innocence. She was released a few hours later and never charged. The officer had arrested H in the belief that she was more likely to respond truthfully to questions put to her while under arrest at the police station, than if, without arresting her, she was questioned at her own home from which she could order him to depart at any moment. Their Lordships observed that an officer was given -

“... an executive discretion whether to arrest...or not. Since this is an executive discretion expressly conferred by statute upon a public officer, the constable making the arrest, the lawfulness of the way in which he has exercised it in a particular case cannot be questioned in any court of law except upon those principles laid down by Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223” [per Lord Diplock].

Holgate was decided pre-PACE, at a time when the actions of police officers investigating offences were less heavily regulated, but even s.24 of PACE 1984, as originally drafted, conferred upon an officer an executive discretion to arrest: see *Fayed v Metropolitan Police Commissioner* [2004].

The question that arises is whether new s.24 of PACE has altered the position. New s.24 continues to confer upon a constable discretion to arrest, but what *has* changed is that an officer’s motive or purpose for doing so is now relevant to the question whether the arrest was lawful. Suppose an officer has reasonable grounds to suspect that an offence has been committed, and that he reasonably suspects D to be guilty of it [s.24(2)]. In addition, the officer has reasonable grounds for believing (and he does believe) that it is necessary to arrest the person to allow the prompt investigation of the offence [s.24(5)(e)]. It is submitted that even at that point the officer is not *obliged* to arrest D. He still has discretion *not* to do so. He might not do so if a major incident occurs that requires the officer’s urgent attention, and the police decide to deal with D in some other (albeit less satisfactory) way. However, if the decision is taken to arrest D, because the officer believes that it is necessary to do so (based on s.24(5)(e)), it is open to the court to enquire into the officer’s reasoning. The issue here is not about discretion – it is about whether the power of arrest was available to the officer at all.

Does this mean that “executive discretion” concerning a constable’s power of summary arrest is a thing of the past? The answer, it is submitted, is ‘no’ – there is merely less room for the exercise of discretion. In the Privy Council case of *Hussein v. Chong Fook Kam* [1970] A.C. 492, Lord Devlin (giving the judgment of the Board, p.498) said,

“To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police inquiries are examples of those factors with which all judges who have had to grant or refuse bail are familiar.”

If we take away the references to “executive discretion”, the factors mentioned by Lord Devlin, will often be relevant today: see Code G of PACE.

Time will tell whether the new arrest provisions make the position of constables, and citizens, more “straightforward”.

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