Justice Committee
Police and Fire Reform (Scotland) Bill

Written submission from Professor J D Gallagher CB FRSE

This memorandum is submitted to the Justice Committee to assist their scrutiny of the police provisions of the Police and Fire Reform (Scotland) Bill.

Background

This evidence is based, in part, on long experience of working with the Scottish Police Service. In various roles I have worked with Scottish Forces since 1977. I was for four years Head of the Scottish Justice Department, and am also a non-executive member of the management team of Lothian and Borders Police.

Overall Approach

I have been one of those who have expressed concern about having only a single police force in Scotland. It is clear however that a majority in the Scottish Parliament support it, and so I regard that decision as in effect now taken. This memorandum therefore accepts that there is to be one force and concentrates on how the Bill might be improved.

The Governance of Scottish Policing

The governance of policing is unusually important, because of the nature of the powers which the police have and the discretion which they exercise when using them. The police wield the domestic coercive power of the State over citizens. This must be held to account (as it is in various ways), and be subject to democratic scrutiny and influence, but care must be taken that this coercive power cannot be directed for political purposes.

In Britain this has been secured in a number of ways. The police are answerable to the courts, and operate under the supervision and in some matters the direction of the public prosecution authorities. Police constables are officers of the law, and have powers and discretion legally vested in them; they hold an office, rather than an employment. Britain also has a tradition that policing is a local service, enforcing the law of the land, and not a national agency enforcing the will of government.

When policing developed in Britain in the nineteenth century, it was consciously and deliberately contrasted with the models of policing on mainland Europe – notably France. British policing was to be decentralised, a servant of the law and not a tool of central state power. Of course it is possible to exaggerate this difference, which is as much presentational as real – police forces discharge very similar functions in most countries, and their forms share many characteristics as a result. British central government has always taken an interest in policing, and that has increased markedly in recent decades.
Nevertheless Scottish policing does rest on a tripartite model, in which power and responsibility are distributed between central and local government and Chief Constables. The Bill will abolish that. Are we about to lose something valuable without realising it?

It is very easy to see the problems of the tripartite system. Power is distributed, and it is not therefore easy to see who is in charge. Change is difficult to push through: too many people can exercise a veto. There may be a perception that Chief Constables are allowed to do whatever they want, with little accountability. Police Boards – comprising members from up to a dozen local councils – have not always been strong supervisors of forces.

But these problems are precisely the signs that power is indeed effectively distributed. The relative weakness of police boards is a problem, but it is one that is capable of being rectified – and recent audit work has shown that measurable progress is being made in doing so. Abolishing the tripartite system may well give greater clarity and make it easier to push through change; and may subject a Chief Constable to greater control. The converse is a big risk - concentration of power. This memorandum therefore goes on to consider amendments which might be made to the Bill to mitigate this risk.

The role of local government

At the moment local authorities are all police authorities and policing is a local government function, in relation to which Scottish Ministers have certain statutory powers. The SCDEA is the only national policing body in Scotland. Local councils also have lead statutory responsibility in relation to community planning, in which police forces are required to participate. Under the Bill policing will no longer be a local government function, but councils will still lead community planning.

Clauses 45 - 48 of the Bill give councils some replacement powers. The Police Service must have a local commander for each council area; that officer must participate in community planning and must additionally submit a local policing plan to the council. If they do not like the plan the council have the power to ensure it is not published. These are obviously much weaker powers than councils have at present over policing, and it is very hard to see them as greater local accountability. A number of options exist to strengthen that relationship:

- There is no reason in principle why a single force could not be part of local government. Rather than a quango appointed by Ministers, the SPA could be a local government body, consistent of elected councilors, perhaps with appointed members added. There would need to be rules about how the councillors were chosen, perhaps by a form of indirect election. Police finance would remain within the local government finance system, with 50% grant as now, and Ministers could have powers of appointment etc similar to those they have now. If the objective of the Bill is indeed to cut costs by reducing the overhead of 8 forces, this approach could meet it as well as what is proposed.

- Financial responsibility is an important aspect of control over a body. Under the Bill this will be centralised with Scottish Ministers. I understand that it is
the policy of Ministers that local councils will be able to supplement local police budgets from their own resources, so as for example to ensure that additional officers are deployed in their area. They will not however be able to take the view that community planning objectives would be better met if, say, fewer police officers were deployed and more youth workers, and transfer resources accordingly. The Bill could alternatively be amended to give councils to power to transfer resources into or out of policing in their local area in accordance with the community plan, with consequent changes to the local policing plan. There is absolutely no technical reason why this would be impossible.

- At present, the duty to participate in community planning falls on Chief Constables. Under the Bill this will devolve to local commanders. This is in practice where it will be discharged for the most part, but it is anomalous that although the Chief Constable is under a duty to provide local policing, no community planning duty falls on him or her or the SPA. Other statutory bodies do have such legal obligations under the Local Government in Scotland Act 2003.

**Safeguarding Independence**

All bodies connected with the investigation, prosecution and conviction and sentencing of criminals require, and have by law, appropriate independence. Courts and judges are wholly independent of the executive. This is required to meet Convention Rights. Courts are now administered by a Board chaired by the Lord President. Judges cannot be dismissed by Ministers. Indeed the first successful ECHR challenge of the actions of Scottish Ministers concerned the illegality of appointing of sheriffs on a temporary basis. Prosecution decisions by the Lord Advocate must under the Scotland Act be taken “independently of any other person”.

The operational independence of Chief Constables has until now been secured by the governance framework: legal powers are vested in them, and the local authority which employs them has no power to direct them; Ministers have no power to direct the local authority, nor the Chief Constable. The Bill attempts to create a framework of legal powers in this respect:

- The Chief Constable is “responsible” for the policing of Scotland
- He or she must “account to” a new quango, the Scottish Police Authority (SPA), for it
- This new quango must “maintain” the service
- There is a framework of plans to be approved, no doubt alongside budgets
- Scottish Ministers have a power to direct the SPA but not about a specific police operation or how to carry it out.

This is a valiant attempt to codify a difficult area. It does however need to be seen in the context of wider powers and relationships:

- The power of the purse is very considerable, and Ministers are not afraid to exercise it. At present Scottish Ministers have no legal power to determine the number of police officers in Scotland but have in effect required forces to
employ a set number by micromanagement of police grant. (The issue is not whether have a set number of officers is a good policy or a muddleheaded one; nor whether it was in election manifestos or not; but that the present legislative framework does not allocate to Ministers a specific power to determine it.)

- The power to appoint and dismiss is critical. The SPA is to appoint the Chief Constable, but only with Ministers’ agreement. The Bill also contains new powers for the Authority to require an officer to retire. In a rare example of draftsman’s humour, the clause is entitled “Senior officers: retirement for efficiency or effectiveness”. This form of dismissal from office need not be because the senior officer is inefficient or ineffective, but rather because the SPA think the senior officer’s removal would be in the interests of efficiency etc. There appears to be no reason why it could not be exercised in the event of a disagreement between the Board and the Chief Constable about how operational responsibilities should be exercised. This power can be exercised in relation to the Chief Constable with the agreement of Ministers.

- Scottish Ministers seek a power in the Bill to give specific or general directions to the SPA. Such powers exist in relation to many quangos, but not generally in relation to police authorities. The directions do not apply directly to the Chief Constable. There are no constraints on what purposes the directions may be issued for but could apply to classes of police operation, to numbers of staff or of officers, to the deployment of staff, or indeed to requiring senior officers to be dismissed from office.

This is a very wide set of Ministerial powers, and will give Scottish Ministers much more control over policing than they presently have. Increasing the powers of Ministers over public bodies, bringing such bodies closer into the centre or removing discretion from them, has been a characteristic of Scottish public life since devolution. It need not be assumed that this is always and automatically a bad thing.

A number of reasons have been advanced to justify it, of which the best is a desire to ensure that public services are ‘joined up’ in the pursuit of national outcomes. But the most pressing for Ministers (of all parties) is that they feel that they will be held accountable for what happens anyway, even if they have no control over the decision of an arms length body. There are both general and specific dangers in such an approach. The general danger is that if Ministers are in there micromanaging, they are not standing back and exercising a strategic, supervisory oversight of delivery. [The most successful of the public sector reforms of the 1990’s was to define such an arms length relationship for the delivery of public services, giving Ministers and managers the responsibility for doing what each of them does best.]

There are however specific dangers in relation to policing. I am sure that present Ministers want to have these powers so that they can make the police service run better: that is a proper ambition, but such a wide suite of powers might also be misused. Such misuse may be unlikely, but it would happen, if at all, only insidiously and gradually. It might be better to draw some rather firmer boundaries around
Ministers’ powers to affect operational policing to be as sure as possible that does not happen.

In order to safeguard the independence of the Chief Constable from political interference, the following amendments should be considered:

- **Appointment:** Ministers have had for many years the power to approve the appointment of Chief Constables by police authorities. This was against the background of many forces (including when there were many more than 8) and safeguarded against the risk of perverse or inappropriate local decisions. It was normally exercised however by the central government approving the shortlist from which the local police board made the choice. This emphasised that the police authority made the choice. *This practice should made statutory in relation to the Scottish Police Service and followed, so that it is quite clear that Ministers are not appointing “their man” to police Scotland.*

- **Dismissal or removal from office:** The powers for the SPA and Ministers to require the Chief Constable to retire are far too broadly drawn and are capable of misuse. It is not clear that they are needed at all. The Chief Constable’s operational independence can be better secured by giving him or her security in appointment unless he or she is himself inefficient or ineffective. Such a decision should require the agreement of Parliament as well as Ministers, as in the case of a judge. They should also be redrafted to make clear that the “efficiency and effectiveness” do not relate to particular operational decisions or classes of decisions so that they cannot be used to influence operational decisions.

- **Powers of direction:** it is not clear why powers of specific and general direction over the SPA are needed at all. They are just ‘belt and braces’. They can be removed with no loss, and some gain to the status and standing of the SPA. If they are to remain then they must be given a defined purpose in the statute. It is obviously right that such powers, if they exist, should not extend to a specific police operation. But nor should they apply to classes of operation: policing protests against government policy would, for example, be a class of operation. It should also be made clear that they do not extend to directing the SPA to recruit or retire or dismiss individual staff members or constables. (Given the width of these powers, it is surely an otiose piece of micromanagement to take an additional specific power – see Schedule 1, Part 1, Para 13 – to determine where the Chief Constable’s Office is to be located.)

- **Operational Independence:** it has hitherto been possible to allow this to be defined negatively – given that there are no powers to direct Chief Constables, and given the deliberate separation of powers in police governance, this has proved adequate. Now however that a new and more centralised governance is to be imposed, there is a good case for making the independence of the Chief Constable explicit. There is an excellent precedent for this. When the Scottish Parliament was created, the Lord Advocate became accountable to it, but his independence was explicitly safeguarded in statute. This has worked well in practice and could work equally well for the Chief Constable. Clause 17 could be amended to require that the Chief...
Constable should discharge his responsibility for policing Scotland (17(1)), or his power to direct constables (17(2)), “independently of any other person” (subject to 17(3)).

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