



The Police Foundation
Improving policing for the benefit of the public



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Oxford
Policing
Policy
Forum

The Growth of Police Powers

Report of the fourth Oxford Policing Policy Forum, which posed the question: *Should we be concerned about police powers?*

All Souls
College,
Oxford

POLICING POLICY FORUM
Wednesday 23 January 2008
LIST OF PARTICIPANTS

Name	Job Title	Organisation
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Ms Cindy Barnett	Chairman	Magistrates Association
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Mr David Faulkner	Senior Research Associate	University of Oxford
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Name	Job Title	Organisation
Mr John Graham	Director	The Police Foundation
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The Oxford Policing Policy Forum

The Oxford Policing Policy Forum is a joint initiative of the Police Foundation and the Centre for Criminology at the University of Oxford. The forum provides an opportunity for a wide range of stakeholders interested in policing to discuss fundamental issues under Chatham House rules. The main purpose is to encourage informal debate rather than inviting an audience to listen to formal presentations. Participation is by invitation only (see guest list above). This meeting of the Forum was chaired by Roger Graef and an introductory presentation setting out some key issues was given by Shami Chakrabarti, Director of Liberty.

Background

There is growing concern from academic bodies and the judiciary over the rise in police powers. Anti-social behaviour legislation has been gradually extended, from the creation of the ASBO under the Crime and Disorder Act 1998 to the extension to Fixed Penalty Notices and the introduction of Penalty Notices for Disorder. S44 of the Terrorism Act 2000 allows the police to designate an area inside which they may stop and search anyone without reasonable suspicion. S30 of the Anti-Social behaviour Act 2003 grants broad powers to the police to remove anyone under the age of 16 in a public place between 9pm and 6am. The Police and Justice Act 2006 will allow punitive conditional cautions, and the Criminal Justice and Immigration Bill will extend the power to young offenders¹. Since 1997, according to some estimates, 3000 new offences have been created. This process has occurred with surprisingly little public debate or awareness.

The fourth Oxford Policing Policy Forum met to discuss the growth of police powers. In raising the issue for discussion, the intent was not an attack on the government or the police but to ask: why have these powers evolved? How much power ought the police to hold? Is extension of their powers a good thing? Should we be concerned? Present at the Forum were stakeholders from the police, the judiciary, academia, the media and government. Proceedings were divided into two sessions, a presentation and open discussion on the issues, followed by deeper discussion of emerged topics in smaller groups.

Opening Presentation

Shami Chakrabarti started out by saying that the traditional view of policing, based on consent and the rule of law, is still broadly recognised and accepted. The relationships between the constable and the citizen and the constable and

¹ On 7th February, the Home Secretary announced plans to extend police powers enabling officers to undertake stop and searches in areas where gun or knife crime was suspected and to simplify the process of recording when powers to stop and search have been used.

the legislature, are generally understood. The recent growth in legislation has affected that situation in two apparently conflicting ways – on the one hand the police have been given a wide range of new powers, while on the other they have been increasingly constrained by guidance, targets and performance indicators set for them by the executive. Powers are also being ‘sub-delegated’ to the police who can then often decide which powers they choose to exercise in particular places or at particular times. The need for such powers is generally accepted in principle, but they should be exercised in a way which is sensitive, proportionate and focused on a particular, clearly stated purpose. Much of the legislation is however drafted too broadly, without enough regard for precision and transparency. That situation places the police, including the individual constable, in an invidious position and could have perverse effects.

The point was made in discussion that this was not a new situation – legislation on public order dated from 1936 and developments since then could be seen as part of a process of evolution to respond to the increasing complexity of modern society and the confrontational nature of modern politics. The introduction of New Public Management and of micro-management by central government had however brought in a significant new element.

Sub-Delegation of Legislative Power

S44 of the Terrorism Act allows a Chief Constable to designate an ‘area’ inside which anyone can be stopped and searched. No reasonable suspicion is needed but the authorisation to designate the area must be ‘expedient’ for the prevention of acts of terrorism. The word ‘area’ is extremely wide and has led to the designation of several counties of the UK on a rolling 28-day basis. For example the whole of the Metropolitan Police area has been designated since the Act came into force.

The Act gives the individual police officer in the designated area a blanket authority to stop and search but it contains no guidance as to how officers should use their judgement fairly and equitably. Consequently ACPO has had to publish its own guidance, which means the new legislative powers were interpreted and clarified by a non-legislative, non-judicial body. This should not be taken to imply that we are now at risk of living in a police state, but that we are perhaps living in a ‘prerogative state’. No one criticised the content or drafting of the guidance, but arguably it should not have been needed. The point was made that Parliament ought to speak directly to the police constable in clear and precise terms. It was not in the interests of the police or of the country as a whole for senior police officers to be in a position where they had to take public positions on matters of political controversy.

S44 is only one example. Another is the child curfew powers, which arise under S30 of the Anti-Social Behaviour Act 2003. The broad nature of the power to remove a young person under the age of 16 from a public place was criticised

both for its effect on the public and the difficulty it gave an individual police officer in interpretation. On the other hand, it could be argued that published guidance has allowed the law's intention to be more precisely stated, enabling the public to understand it better and to see more clearly the criteria and grounds on which the law is applied. Codes of Practice and guidance help regulate the police and assist the officer to use their discretion. They have encouraged greater debate and understanding of the issues and law involved – for example, in the case of The Police and Criminal Evidence Act 1984 the primary legislation provides little guidance as to the definition of 'reasonable suspicion' in relation to stop and search. There is also limited case law on this point and no cases have reached the European Court of Human Rights². The Codes of Practice in this instance provide significant guidance.

The police have constantly to exercise their discretion on the ground. As society has grown more complex and politics more confrontational, the police are increasingly being called upon to make their own decisions, including whether and on which offences to act. Discretion and prioritisation require guidance and management, and a legitimate and effective framework in which they can be applied. The more organised the system, the better the police can prioritise their use of resources and the more the public will support them.

Localisation, if it involves greater political control at the local level, should be approached with caution. Police practice should be able to respond to and take advantage of local situations and opportunities, but it should do so within a clearly understood legislative framework that is the same across the country as a whole.

It was suggested that the law should not attempt greater precision or clarity, but that it should provide a flexible framework within which the practical application of police powers could be tested through the courts, using for example the Human Rights Act. Clarity and precision, it was submitted, are not necessarily the answer and technical detail is not always helpful, but against that, it was argued that such an approach may not be acceptable in a democracy and that the Human Rights Act should not be used to correct unclear law.

The Growth of Police Powers

As well as S44 of the Terrorism Act 2000, the powers about which the Forum was concerned included the expansion of the Anti-Social Behaviour Order (ASBO), the child curfew laws and the extension of police powers to issue fixed penalties (summary justice) and conditional cautions.

² Paul Quinton, forthcoming PhD thesis, University of Surrey

How did the growth come about?

The expansion was seen as a consequence of the 'arms race' over law and order between Michael Howard and Tony Blair during the 1990s which had ratcheted up the politics of police powers. Ministers and politicians felt they were faced by political and social imperatives to which they had to respond. In 2004, outlining his five-year plan for law and order, Tony Blair stated "we asked the police what powers they wanted and we gave them to them." Crime figures and statistics on recorded crime, which have been manipulated and/or misquoted by both the media and politicians, has led to public unease both about neighbourhood safety and about the readiness or ability of the police service to serve the needs of the public as they saw them.

The "reassurance gap" – that is the gap between the real (i.e. declining) and the perceived (i.e. increasing) risk of crime - has caused the government to prioritise volume crime, such as burglary, street robbery and anti-social behaviour. The well known 'broken windows'³ theory postulates a causal connection between harassment or anti-social behaviour on the street and the incidence and prevalence of more serious crime and now even the public believe there is a direct connection between levels of anti-social behaviour and, for example, the risk of murder or other serious crimes of violence. The Forum agreed that the increase in police powers is more a response to this than to the new threat of terrorism since 9/11 and 7/7.

Lack of Public Debate

Participants were concerned about the absence of public consideration or debate. The public have little understanding of the impact of some of the expanded police powers. The Criminal Justice and Immigration Bill included a range of new measures for which there had been no public demand or public discussion and which were essentially examples of political opportunism.

Expansion of Summary Powers

The police have the power to issue Fixed Penalty Notices (FPNs) for offences such as littering, graffiti and nuisance. The fine is typically £75 and the offender has 14 days to pay. A Penalty Notice for Disorder (PND) can be issued for offences including retail theft and property damage. The police may also give a Conditional Caution, imposing conditions on the offender, which, if they are not met, may result in prosecution for the original offence. Part 2 Police and Justice Act 2006 will amend the Criminal Justice Act to allow for the conditions to be punitive and introduce power of arrest for breach of conditions. The extension to

³ George L. Kelling and James q. Wilson 'The Police and Neighbourhood Safety' *Atlantic Monthly*, March 1982.

young offenders proposed in the Criminal Justice and Immigration Bill was raised as a particular concern.

The power to issue FPNs and PNDs has wide implications. Their use can have long-term consequences for future mortgage or job applications and the information is held on the police database. FPNs, PNDs and conditional cautions are easily left unchallenged. The expansion of summary justice gives police what is essentially a judicial role and confuses their own and the judiciary's constitutional independence from one another. Matters that were traditionally considered to be of such importance that they needed to be decided in a public court, upon proper hearing of the evidence, and after legal advice are now decided on the street by an individual police officer or police community support officer. Questions posed included whether summary justice is only the formalisation of a role the police have always done; whether it diverts people from the courts or sucks them in; whether it is the speed of the transaction that is worrying, or the location – the street as opposed to a courtroom.

The idea was suggested that perhaps FPNs and PNDs should be more a matter of regulation, such as the parking fine system. The police could impose a fine for behaviour such as drunkenness, the offender would pay and the matter would not go on public record. If the offence occurred again, the fine would be the same, rather than an escalation, thereby avoiding the potentially criminalising effects of up-tariffing and acquiring a criminal record. In contrast, some participants were concerned that offenders would not take the offences sufficiently seriously - many people, while having respect for the law, have little or no respect (and may even be disdainful of) parking fines.

Discretion of the Individual Officer

It was suggested that an individual police officer does have considerable discretion, but less than previously and especially before the Police and Criminal Evidence Act 1984. Their discretion is now controlled, constrained, shaped and more bureaucratically defined. Micro management in the form of targets and key performance indicators and increasing bureaucracy has left officers on the street with less opportunity to use their professional judgement. It was suggested that perhaps of greater concern than increasing police powers is the unchecked rise of executive power. If legislation is drafted in clear and precise terms, professionally trained police officers will be able to use their judgement to decide which offences to prioritise and on which to act. There will always be sub-delegation of decision-making: a matter of more serious concern is sub-delegation of legislation. It is important that in a democracy, the power of the individual police officer is clearly defined in terms of where, how much and in which circumstances he/she may exercise discretion.

An example was given of an area of successful policing in which a standard procedure is always followed, with no room for discretion. In domestic violence

cases the police officer adheres to a strict and rigid standard instruction from which he or she must not deviate. The Home Office ensures that every force follows this procedure by cross checking the number of telephone calls logged with the number of arrests. Thus police discretion in relation to cases of domestic violence has been radically reduced and it is now for the Crown Prosecution Service and the court to decide how to take such matters forward. Some participants raised the question of whether cultural differences should be taken into account or whether the mandatory duty to arrest has made some domestic violence victims unwilling to call the police in at all.

The Forum discussed the need to find a balance between control of the police and empowerment of the individual officer. Recruits today are in general more mature and intelligent and are able to exercise initiative and discretion. However, modern day policing is complex and boundaries are required. The limits of police discretion must be identified. It was ultimately for Parliament to define where discretion should be exercised, and then hold the police accountable for the exercise of that discretion.

The Role of the Police: where should they sit constitutionally?

The question was raised whether the nature and functions of the police should place them closest to the executive, the legislature or the judiciary. Most participants expressed the view that the character of policing should be independent of politics and closest to the role of the judiciary: the police, they felt, should be governed by the rule of law. But the operational independence of the police is also crucial, so they should not be regarded as an arm of either the judiciary or the executive. Despite pressures from central government, police forces are still able to exercise their own judgement in operational situations. A key consideration in this respect is whether the National Police Improvement Agency should be completely separated from the Home Office and be made accountable in the same way as the rest of the police service.

Demands on the Police

The Forum agreed there is confusion over the proper role and function of the police. As a society, Britain suffers from many forms of behaviour that are anti-social and undesirable, but it does not follow that all acts of anti-social behaviour should be governed by criminal law and enforced by the police. The country has lost sight of non-legal frameworks and informal methods, with the default position now being to criminalise behaviour and apply criminal sanctions. Research on public perceptions of anti-social behaviour in European Countries⁴ asked who should be responsible for dealing with anti-social behaviour. The public in all countries placed the primary responsibility with parents but only in England and Wales did the public say that after parents, it should be the responsibility of the

⁴ Freedom's Orphans: Raising Youth in a Changing World Nov 2006 Margo, J and Dixon, M Institute for Public Policy Research

police and the courts; other countries placed schools and local communities in second place. There are simply now too many minor matters appearing in court that should not be dealt with formally by the criminal system, but rather informally by schools, local authorities and local communities.

One problem with the anti-social behaviour legislation is that action depends on whether the victim takes offence. The court assesses whether a defendant has committed acts causing or likely to cause harassment alarm or distress. There is no requirement to show that the defendant intended to cause distress, but if the victim suffers distress, the action can attract an anti-social behaviour order. As some people are more easily offended than others, the anti-social behaviour legislation catches both serious nuisance and minor irritation, so valuable police time sometimes gets taken up unnecessarily.

The Forum agreed there are too now many demands on the police – the public is unclear as to their proper role or their proper place in society. As a consequence, policing has become too thinly spread and combined with increasingly onerous national targets, their ability to meet the needs of an increasingly fearful public has declined. This has, in turn, reduced public trust and legitimacy at a time when public expectations have risen.

Relationship between police and public

The relationship between the police and the public is vital to the concept of consent based policing and trust is integral to this relationship. There are two main aspects to this relationship – contact with individual officers on the street, and the wider perception of, and confidence in, policing as a whole. People still generally trust the police, perhaps because there is no alternative. The police start from a position where they can expect to be trusted, and the public expect the police to be professional, organised, ethical and motivated by a genuine desire to do their best. However, public dissatisfaction with the police has grown over the last decade and trust in the police has fallen.

Although overall crime figures have been going down since the mid nineties, fear of crime has been going up. To increase public satisfaction and confidence, the Government decided to tackle visible street crime together with nuisance and disorder. The then Home Secretary Jack Straw stated: “obvious symptoms of physical disorder - litter, graffiti, and noisy neighbours - also feed the fear of crime and correlate with crime itself.”⁵ But by emphasising street crime and raising public awareness of these issues as policing issues, politicians ratcheted up public expectations and increased concerns about the capability of the police to respond to the modern challenges of society. This flies in the face of the findings from recent research on trust in the police, which shows that in those

⁵ We must end the "walk on by" society Straw, J The New Statesman 19 Feb 1999

countries which invest the most in law and order, public trust in the police is lower (not higher) than in those countries where levels of investment are more modest⁶.

A second possible explanation for the public's growing lack of trust in the police can be found in research undertaken by Wesley Skogan.⁷ Skogan measured public satisfaction with the police and found that, as one might expect, the more negative contact a person had with the police, the lower his/her opinion of the police. However, his research also shows that where the public have more positive contact with the police, their opinion of them was unchanged and thus even by doing the job well the police are unable to impact on the public's view of them. As the demands of policing have grown and the government responds to public demands for greater protection and security by increasing the number of police officers, more members of the public will come into contact with the police, which in turn can only contribute further to public dissatisfaction and mistrust.

Conclusion

Participants highlighted areas that are in need of further consideration. In particular there is a need to find a balance between control and management of the police, and the empowerment of the professionally trained individual police officer to use his/her professional judgement and discretion. Further debate is also needed into the role of the police in society - their independence both from the judiciary and from the executive has become blurred and there is now a position where the police both deal with, on the one hand minor matters that used to be dealt with by schools and other authorities, and on the other important judicial issues which previously were considered by the courts.

It is hard to tell whether the present situation is part of an inevitable process of post-modern social and economic change, as government has sometimes argued, or a temporary state of affairs which may change. However that may be, participants felt that the country had sleepwalked into the current position. Whether police powers ought to be extended and controlled, or reduced in favour of more informal regulation, is an issue that must be debated and discussed. The public seemed to be insufficiently aware of the implications of some of the new police powers, particularly in the field of summary justice, and bills for new statutes in this field appeared with no specific public demand or public discussion.

Abie Longstaff, February 2008

⁶ Trust in the Police in 16 European Countries: A Multilevel Analysis Kääriäinen *European Journal of Criminology*.2007; 4: 409-435

⁷ Wesley Skogan *Police and Community in Chicago*, Oxford University Press (USA), 2006