A REPORT BY JUSTICE

Pre-Trial Criminal Procedure

Police Powers and the Prosecution Process

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the Royal Commission on Criminal Procedure
(Part 1)

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PREAMBLE

Constitutional Principles and International Obligations

1 The United Kingdom is unlike most other democratic societies in not having any legally enforceable Bill of Rights guaranteeing the fundamental rights and freedoms of the individual against the misuse of power by public authorities. We also differ from many member countries of the Council of Europe in not having incorporated the rights and freedoms guaranteed by the European Convention on Human Rights into our legal system. The right to liberty and security of person is not defined in positive terms in United Kingdom law. Such a right exists in the sense that the individual has a right to personal liberty and security save in so far as that right is restricted by the common law or by express statutory enactment, but in many important respects these restrictions are not defined with sufficient clarity. The law is vague and uncertain. Indeed, in some key areas the liberty of the individual is not protected by the law but is, as Sir Henry Fisher has observed, "governed by rules made by the Judges and by administrative directions which may be varied by the Executive at any time"[1].

2 We agree with Sir Henry Fisher that "the balance between the effectiveness of police investigations and protection for the individual is important enough to be governed by law and that the consequences of a breach of the (Judges') Rules should be clear and certain"[2]. In our view, the right to liberty and security of the person should be codified by statute in clear and positive terms. The process of codification should effectively secure the rights and freedoms guaranteed by Article 5 of the European Convention and the right, guaranteed by Article 13, to an effective remedy before a national authority within the United Kingdom for a violation of Article 5. The Convention contains only minimum guarantees, but even so we are not satisfied that they are sufficiently secured within our legal system in all respects and we hope that the Royal Commission will consider this important point.

3 We also draw the attention of the Royal Commission to the specific provisions of Article 9 of the International Covenant on Civil and Political Rights, which came into force in March 1976 and by which the United Kingdom is bound. This Article provides that:

> 1 Everyone has the right to liberty and security of person. No-one shall be subjected to arbitrary arrest or detention. No-one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
>
> 2 Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

1 Report of the Confait Inquiry, 13 December 1977, para. 15.5
2 ibid. para. 15.6

3 Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantee to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4 Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5 Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

INTRODUCTION

1 In a free society the police cannot perform their duties effectively unless they are given adequate powers and enjoy the full confidence and co-operation of the public. The public has a moral duty to help the police by providing information and active support when called upon to do so. The police for their part have a duty to use the power at their disposal responsibly and in such a way as to deter and catch criminals without trespassing unduly on the rights and freedoms of law-abiding citizens. If therefore we appear to be reluctant to grant the police some of the additional powers they are demanding and want to circumscribe some of the unregulated power which they enjoy in practice, it is not because we want to help criminals escape detection and conviction, but because of the high value which we place on liberty and on effective safeguards against abuse of power.

2 JUSTICE has always stood for the rule of law and shares the objectives of those whose task it is to combat disregard of the law. We cannot accept, however, that these objectives should inevitably override considerations of freedom. We all accept a degree of limitation. Much of the work of the police proceeds satisfactorily without the invocation of sanctions. Questions are answered and searches submitted to voluntarily. For these reasons we do not think it necessary or right to tip the balance in such a way as to undermine the essential characteristics of our free society and in doing so to run a greater risk of bringing about injustice. The question of police powers is therefore of paramount importance.

3 The right exercise of power in any field, and nowhere more than in the police, requires ethical training and self-discipline reinforced by internal and external checks. Without such checks it is not difficult for two or three dishonest officers to secure the conviction of a man for a crime he has not committed and thus contribute to a lowering of police standards. It is equally necessary that the powers conferred on the police shall be clearly defined and adequate for the duties required of them. We believe that, whether or not the powers of the police are to be extended, the time has come when they should be fully defined by statute, in order that it should be clear to everyone what is within their statutory powers and what is not. It is as much in the interest of the police as of the public that their powers should be defined and known. Moreover, the most effective power which the police may command is the respect and co-operation of the public. This they may lose if they claim excessively wide and easily abused powers.

4 It has been widely accepted for a very long time that the powers enjoyed by the police in England and Wales are deficient in both the above respects. The powers of detention, search, seizure, arrest and questioning are vague. The internal checks are often inadequate and the majority of the external checks have no statutory force. On the other hand, some of the restraints imposed, and the various obstacles the police encounter in

their efforts to bring criminals to justice, are clearly frustrating. These restraints have become increasingly frustrating and harmful to society, and successive governments have failed to give the police adequate manpower and the financial resources needed to combat organised crime and the general growth of lawlessness and violence.

Misleading Assumptions

5 The Commissioner of Police for the Metropolis and the Superintendents' Association for England and Wales both concede in their Written Evidence to your Commission that this frustration leads to undesirable bending of the rules. In respect of powers of arrest and search, the Commissioner says with commendable frankness, "The effect of this is that many police officers have, early in their careers, learned to use methods bordering on trickery or stealth in their investigations because they were deprived of proper powers by the legislature. ... One fears that sometimes so-called pious perjury of this nature from junior officers can lead to even more serious perjury on other matters later in their careers."

6 In our experience the Commissioner's assessment of the situation and its dangers is well founded, but we seriously question the assumption implicit in both Memoranda that the consequences of breaking of the rules will normally be brought to light and corrected by the courts. We cannot accept this as a true picture of the situation. The files of hundreds of cases brought to our notice over the years and the experience of our members who practise in the criminal courts indicate that police malpractice is far more widespread in some forces and crime squads than police spokesmen would have us believe. Furthermore, only a small proportion of the resulting miscarriages of justice is remedied on appeal or as the result of subsequent investigation. In support of this view, we would cite that fact that, during his tenure of office as Commissioner, Sir Robert Mark brought about the prosecution, dismissal or enforced resignation of over four hundred members of his force. These were ostensibly based on evidence of financial corruption, but it is reasonable to infer that the officers who were dishonest enough to accept bribes not to press charges against a known criminal may well have been capable of fabricating evidence against another man. Indeed we know that the conduct of some of these officers had been the subject of unsuccessful appeals and petitions on this score.

7 Another false assumption is that there are ample safeguards against malpractice and abuses of police powers. In support of this assumption the Commissioner for the Metropolis prays in aid

(1) The Judges' Rules

(2) Civil proceedings against police officers

(3) Criminal proceedings against police officers

(4) Disciplinary proceedings against police officers

(5) Applications for writs of habeas corpus

Additionally, the Superintendents' Association calls attentionto the Police Complaints Board, the right of access to solicitors at all stages,

and the safeguards afforded by the court of trial.

8 For a number of reasons we think that this assumption is somewhat naive.

(1) The Judges' Rules have no statutory force and it is only rarely that evidence is excluded so that a prosecution fails because they have been broken, either in respect of improper questioning or refusal of access to a solicitor until an incriminating statement has been obtained.

(2) An application for a writ of habeas corpus does not provide a simple remedy. It presupposes prompt access to a solicitor. It requires finance for counsel which may not be available. It may take three or four days to get it to court, by which time a damaging admission may have been obtained. It may further have the effect of forcing the police to prefer charges in cases where they still have doubts as to whether they should.

(3) As the Superintendents' Association points out in its Memorandum of Evidence (para. 38), the number of civil actions in any one year alleging unlawful arrest or wrongful imprisonment is very small. This is intended to show that very few suspects have a sustainable cause of complaint. It has to be borne in mind however that the mounting of successful civil proceedings is extremely difficult. Usually, legal aid has to be obtained and, if an Area Committee is presented with the statement of a complainant which is not supported by independent witnesses and fully documented evidence, it is unlikely to grant a certificate. It will usually take the view that the evidence of police officers is more likely to prevail.

(4) The earliest part of the same paragraph also minimizes the extent and effect of police irregularities, viz.

"At the risk of being accused of chauvinism the few celebrated cases which are introduced to show misuse of police power invariably refer to persons released from H.M. Prisons following either out-of-time appeals or pardons by the Home Secretary. These are often due to irregularity of procedures during the investigation or during the trial. Whilst it may be a moot point, depending upon one's point of view, the question of guilt or innocence is rarely reviewed in such cases, the decision resting on procedural or evidential niceties."

The view expressed here is based on inadequate knowledge of Home Office principles and procedures relating to petitions. These are never based on irregularity of procedures or on legal or evidential niceties. The experience of JUSTICE, which has submitted scores of factually documented petitions over the years with only occasional success, is that the Home Office consistently refuses to take into account any matters which have or could have been considered at trial or on appeal, or any subsequently discovered improprieties. It almost invariably insists on

factual proof of innocence and the refutation of all the evidence on which a conviction was based, including hotly disputed verbal admissions. JUSTICE has recently been concerned with two cases in which, after a post-trial investigation, the Home Office has refused to take any action on the report of a Chief Superintendent expressing his belief in the complainant's innocence.

(5) It is true that the Court of Appeal from time to time quashes convictions because of some technical irregularity in the prosecution process or during the trial. When the appellant is clearly guilty, this must be a cause of frustration to the officers who have secured the conviction. But it has to be borne in mind that the Court of Appeal can and does apply the proviso in appropriate cases and, when allowing a factually meritorious appeal, prefers to base its judgment on a point of law rather than to voice any public criticism of the police officers involved in the case.

(6) It is equally difficult, if not virtually impossible, for a complainant to bring criminal proceedings against a police officer. Legal aid is not available. A magistrate has to be sufficiently impressed with the evidence to grant a summons. If the complainant is in custody, he will have to obtain the consent of the Home Office, and the Director of Public Prosecutions has power at any time to take over the proceedings and offer no evidence.

(7) Criminal and disciplinary proceedings against police officers following the investigation of complaints likewise provide no real remedy for the complainant, in that the investigations are normally undertaken only after the termination of trial and appeal proceedings and are designed to discover whether the officer has been guilty of any malpractice. Consideration is rarely given to the possibility that the malpractice complained of may have brought about a miscarriage of justice. This point was developed at some length in our submission to the Home Office Joint Working Party on Complaints against the Police.

(8) The courts do not provide adequate safeguards because, as practitioners know, it rarely helps a defendant to ventilate or press complaints against the police either in a magistrates' court, or in the Crown Court, or in the Court of Appeal, however valid and well-supported the complaint may be. In criminal matters it is widely felt by the general public that the Bench is prone to support the police.

9 We further believe it to be wrongly assumed that the scales are too heavily weighted in favour of the accused. The successful prosecution of some known criminals may well be hampered by difficulties in obtaining admissible evidence. There are cases in which falsely contrived defences may succeed and where the right of silence and the jury's ignorance of previous convictions are difficult to overcome. But in many trials the scales are weighted against the accused. Apart from non-disclosure of important evidence, it needs to be understood that:

(1) The prosecution has far greater resources for obtaining and testing forensic evidence and for bringing witnesses to court than has the defence under its limitations of manpower and legal aid.

(2) Whereas the police freely take upon themselves the right to interview defence witnesses, and can bring pressure to bear on them, the defence lays itself open to charges of attempting to pervert the course of justice if it attempts to interview prosecution witnesses.

(3) Trial judges will rarely interrupt or cut short cross-examinations by prosecution counsel but will frequently do so with defence counsel and insist on knowing where the question is leading.

(4) It is very much easier for the prosecution than the defence to obtain a short adjournment or postponement of a trial because of the absence of witnesses.

(5) The prosecution has far greater facilities than the defence for obtaining evidence of rebuttal in the course of a trial.

The Need for Dialogue

10 JUSTICE has accepted for many years that the police require additional legal powers if they are to do their work effectively and honestly, but we have at the same time insisted on appropriate safeguards. We think that we are justified in maintaining this stand. In support of it we would cite what has happened over the requirement to give notice of alibi.* JUSTICE asked for a clause to be added to the Criminal Justice Bill 1967 requiring the police to give notice to the defence solicitors of their intention to interview alibi witnesses, so that they could be present. The government declined to do this but gave an undertaking that appropriate instructions would be given to the police. They were duly given, but have been widely disregarded, and many judges and practitioners are unaware of them.

11 In 1964 representatives of JUSTICE had an all-day meeting with representatives of the Association of Chief Police Officers in the course of which the problems confronting the police were discussed in a friendly and constructive way. At the end of the day we invited them to specify in writing the further powers they required, offering in return to indicate the corresponding safeguards which responsible members of the legal profession would be likely to require. Their response was that they were allowed to make recommendations to the Home Office and not to any outside body. The appointment of your Commission has thus provided the police with an opportunity long denied them to put forward their detailed demands openly and thus to pave the way for constructive criticism and dialogue. We welcome this, but we think that the bodies representing the police are mistaken in thinking and alleging that their only critics are to be found in the ranks of the 'do-gooders' and intellectuals. Our experience is that many responsible lawyers practising in the criminal courts are worried by some aspects of police practice in the

* This requirement was originally proposed by the JUSTICE Committee on Evidence.

gathering and presentation of evidence and by the harm they can do both to the public image of the police and to the integrity of criminal trials.

POWER TO STOP, SEARCH AND ARREST

12 It is beyond the resources of JUSTICE to analyse and list the wide variety of powers at present enjoyed by the police or denied to them. This work has been done so thoroughly and the results set out so clearly by the Commissioner for the Metropolis and by the Superintendents' Association in their Wrilten Evidence that we think it sensible to comment only on some of the specific requests made by them for further powers.

13 The evidence submitted by the Superintendents' Association calls for a general power to stop and search any individual or vehicle on reasonable suspicion. Our view on this is that in relation to individuals such a power is too wide and too vaguely defined to be generally applied, and would be likely to create ill-will, suspicion and fear of the police among the public outweighing any supposed gain in the detection of crime. It is a particularly dangerous power when exercised by officers in plain clothes and we have had a number of cases brought to our notice in which wholly innocent men have mistaken police officers for potential muggers, have run away or resisted arrest, and have ended up being charged with obstruction or assault. We are aware that special powers to stop and search on suspicion of unlawful possession have already been conferred on the police in the Metropolitan area and in certain large provincial cities. This has created anomalies that are obviously undesirable and the question is whether they should be removed by abolishing the special powers or by making them uniform throughout the country.

13A Our view is that such rights as are to be conferred should be uniform throughout the country, and should be restricted to cases where there is a specific suspicion. The physical power to stop and search already exists and is frequently exercised by police officers without resistance or protest. Persons carrying bags are often asked to show their contents. It is only when they refuse that a right to enforce the request comes into question. We do not believe that such a right of enforcement should be conferred except where the officer is in uniform and has a specific suspicion of an offence based on reasonable grounds, analogous to the present law in respect of persons suspected of being in possession of dangerous drugs. Life style or mode of dress does not and should not in itself justify such a suspicion.

14 We do however recognise that some particular areas are so sensitive that special provisions are necessary. They include docks, airports, customs houses, nuclear installations and military bases. Existing statutes covering these institutions and others in the same category vary as to the circumstances in which authorised persons have the right to stop, question and search. Members of the public visiting such areas would normally recognise the need for special security, but notices could make this doubly clear. The right to stop and search should extend to an appropriate radius from the boundaries of the installation but only if the officer reasonably

suspects some unlawful possession or intent. We do not recommend a corresponding amendment to S.54 of the British Transport Commission Act 1949 as it applies to railways, as we do not think that they fall so clearly into the category described above.

15 We believe it to be in the public interest that the police should be empowered to stop and search for offensive weapons, including cans and bottles, any person seeking to enter a football ground or other sports area, or taking part in a public procession or gathering, if they have reasonable grounds for believing that there is a danger of disorder or violence. We further think that such a power should be extended to cover the searching of special coaches and railway trains carrying supporters to such events.

Additional Powers Requested by the Police

16 In relation to the other powers asked for by the Commissioner, our views are as follows:

(1) "To stop search and detain persons and vehicles in public places for articles which may cause injuries or damage to persons or property."

Apart from the specific purpose mentioned in para. 15 above, we would not approve of this general power. We take the view that it amounts to a general right to search without warrant in any public place, as widely construed by the courts, and at any time. The Commissioner envisages a limited use of the power, but this would not prevent an officer exercising it arbitrarily.

(2) "To seize property found in a public place believed to be of evidential value."

We would accept this subject to the belief being based on reasonable grounds, and with the reservation that the retention should be for no more than a reasonable period, the owner to have a right of access to the court. (See Ghani v Jones)

(3) "To search persons and possessions in a public place if by reason of a person's presence at a particular location an officer believes that such search may assist in the prevention of a serious crime or danger to the public."

This is too wide: our recommendations in paras. 14 and 15 above should suffice.

(4) "To set up road blocks authorised by a senior officer for specific purposes."

We would not accept this as the existing powers and practices appear to be adequate. As the Commissioner observes, the law-abiding members of the public always allow search.

(5) "To obtain a search warrant to search for evidence of an offence."

If this means a warrant to search for articles connected with a known offence which the police have reason to believe is to be found at a

particular place, we would have no objection. But if it goes further than this, we would oppose such a wide extension of present powers.

(6) "To obtain a Bankers' Books Evidence Act 1879 order at any stage in an investigation and the definition of 'bank' and 'books' in the Act to be widened."

We would not accept the first of these requests because we feel that a person's bank account and correspondence with his banker may contain matters of a private nature which he is entitled to keep confidential. We therefore think that an order should be obtainable only after investigation has brought to light tangible evidence that the suspected person is engaged in criminal activities. If your Commission should decide that existing powers should be widened, we would take the view that an order should be granted only by a High Court judge and that application should be based on affidavits. As for the second request, we agree that the definition of 'bank' and 'books' should be widened and think that the Department of Trade would be an appropriate authority to designate the banks to be brought within the purview of the Act.

(7) "To obtain names and addresses of witnesses."

We are likewise reluctant to support this proposal, although we appreciate and have considerable sympathy with its purpose. A witness to a crime or accident may have very strong personal reasons for not wanting his presence at the scene to be disclosed. He may be genuinely nervous and unsure of the evidence he may be asked to give and a reluctant witness is rarely a good witness. The difficulty of distinguishing genuine witnesses from persons who merely happen to be present at a scene is very great and the proposed power would on many occasions simply enable the police to compile a dossier on everyone present at a particular time and place. Furthermore, it has come to be generally known that witnesses may be kept waiting for days on end without being called and, if called, may be subjected to hostile cross-examination and the disclosure of any criminal convictions. We think that the reluctance of witnesses to get involved would be considerably lessened if they were treated with greater consideration.

(8) "To extend to places outside England and Wales over which any court in England and Wales has jurisdiction (i.e. British ships and territorial waters) the powers and privileges of a constable."

We agree that the powers and privilages of a constable should be so extended.

(9) "To obtain in certain circumstances from a High Court judge a fingerprinting order for persons in a particular area."

We do not agree with this proposal, as we believe it to be too great an infringement on the liberty of the subject. We have no means of knowing how many refusals are met with in the course of such an exercise but we would imagine that those who refuse automatically become prime suspects and, unless thay can prove sound alibis, are likely to be subjected to prolonged and repeated questioning. We also have in mind the require-

ments of the Magistrates' Courts Act to the effect that when a fingerprint order is made it has to be carried out in the precincts of the court or at a place where the subject of the order has been committed in custody. This provision was specifically designed to prevent the fingerprinting being carried out with undue force by the arresting officers.

(10) "Search on arrest."

We accept the need for the police to be able to search with the minimum of delay not only the person but the personal property (including vehicles) of anyone they have arrested. They should also have the power to seize and retain for a reasonable period any property which might provide evidence of or be the proceeds of an offence and take from him any article which might be used to cause injury or to effect an escape. We do not however think that they should have the power to search any premises where he lives or carries on business without obtaining a warrant. In cases of urgency a police officer can obtain a warrant from a magistrate at any hour of the day or night. We also think that premises where he carries on business should be strictly interpreted and not extended to include premises where he works as an employee without managerial responsibility. A right of access to the court should exist in all cases where property is seized.

We are also worried by the number of cases reported to JUSTICE in which the finding of articles in clothes, cars, homes and business premises has been disputed and the evidence has sometimes been shown to have been planted. We therefore recommend that such searches should be carried out where practicable in the presence of the occupier of the premises, and in any event by at least two officers acting together.

(11) "Use of necessary force when a power of search exists."

We agree that the use of necessary force should be allowed in all cases when a search warrant has been issued. We think however that this power should be used with more care and consideration than it sometimes is at present. It is a terrifying experience for a wife or mother of a suspect to have her house suddenly invaded and overrun by a squad of police officers.

DETENTION AND INTERROGATION

Detention at a Police Station

17 The detention of a suspect incommunicado is the most useful weapon available to the police. It can help them to overcome his unwillingness to make some kind of admission, or to tell them what he knows about a crime and about those who have taken part in it. It can prevent his associates being warned and the proceeds of a robbery, or the weapons used in it, being concealed. All these objectives are legitimate but they should not be pursued by methods which are unlawful, or are physically or mentally oppressive, or result in admissions which are not in accordance with the facts of the case.

18 As we have shown in an earlier part of our evidence, there are at present no effective safeguards against these dangers. The Judges' Rules have no statutory force, and admissions are very rarely excluded on the grounds that they have been improperly obtained. The principle that a suspect should not, except in very serious cases, be held for questioning for more than a day or two has been undermined by the Prevention of Terrorism Act, which has encouraged the police to extend the periods of detention in ordinary cases. An application for a writ of habeas corpus is thought to be cumbersome and protracted.

19 Considerable doubts and misunderstandings arise in those cases where a person is requested to accompany an officer to a police station for questioning, or asked to call at a police station, without being arrested or informed of the reason for the request. The courts have made it clear that he has every right to refuse the request or to leave the police station when he wants to, but this right is rarely exercised through fear of the possible consequences or through ignorance. Once he is in a police station, the suspect is effectively in custody and stands very little chance of being released until the police are satisfied of his innocence or he is charged and taken before a court, or is released on police bail.

20 The Commissioner for the Metropolis accepts the legal position and makes it clear that there is no half-way house between arrest and voluntary attendance at a police station, but he questions the "widespread belief that persons not under arrest will not attend police stations at police request on a voluntary basis to assist the police". He points out that a police officer has a right, acknowledged in the Judges' Rules, "to question any person, whether suspected or not, from whom he thinks that useful information can be obtained", and that there may be very good reasons why it is more convenient for the police, and more acceptable to a suspect or potential witness, to interview him at a police station rather than at his home or place of work. We do not question this view, but it fails to take into account the position of the person who has agreed to go to the police station and is then held for an overlong period against his will, so that his position becomes the same as if he had been arrested.

Need for a Statutory Framework

21 The heart of the problem, as we see it, is to provide a framework of statutory powers and safeguards which so far as is practicable fulfils three conditions:

(1) The police are allowed adequate time and opportunity to question a suspect for information and to make enquiries.

(2) They are not required to release him or to allow him to communicate vital information to the outside world if they believe on reasonable grounds that the prevention or detection of crime, or the prosecution of an offender would be seriously hampered.

(3) They can gain no advantage from obtaining a false admission.

If the last of these three conditions is fulfilled then the objections to the first two are substantially reduced. *The central objective of JUSTICE in its approach to the problem is therefore to ensure that whatever evidence of interviews is presented in court constitutes a true account of what has actually taken place.*

22 This was the main objective of a distinguished JUSTICE Committee on Evidence which, under the chairmanship of the late Cyril Harvey, Q.C., formulated proposals for the control of interrogation by magistrates. Its report was endorsed by the Council of JUSTICE and published in 1967 under the title, "The Interrogation of Suspects". The Committee observed that the existing law and practice was neither logical nor consistent and the comment remains valid today. Despite eleven years of informal representation and discussion, the position relating to the rights of suspects and the verification and admissibility of alleged verbal admissions is probably worse than it has ever been.

Verbal Admissions

23 The urgency of the problem was succinctly expressed by Lord Justice Lawton when, in the course of his judgment on the series of appeals in the Bertie Smalls bank robbery cases, he said "It is time something was done and quickly to make it impossible for these verbals either to be concocted or challenged". And it is not without relevance that, before his appointment to the Bench, Lord Chief Justice Lawton was Chairman of a JUSTICE committee which in its report 'Preliminary Investigation of Criminal Offences' (1964) had said virtually the same thing.

24 Since that date JUSTICE has continued to press for effective steps to be taken on four main grounds.

(1) The present situation offers police officers wholly undesirable temptations to fabricate accounts of interviews with suspects and alleged admissions resulting from them. Two or more officers can write up their notebooks together in identical terms after the interview. They can then read them from their notebooks in the witness box and, if they have agreed to maintain that nothing else, apart from personal trivia, was said, their evidence cannot

be effectively challenged. If defence counsel alleges any kind of conspiracy, as against error or misunderstanding, the accused's record can be disclosed. Police officers are thus far too easily tempted to rely on "verbals" as a means of securing convictions without the need to look for direct evidence. Such a practice is generally excused on the grounds that the police know whether or not they have got the right man. But this is dangerous because there is no safeguard against error or dishonesty. It is only too easy for a young officer to be corrupted by an ambitious senior officer, and in every force or regional crime squad there are officers who are well known to practitioners for their free use of verbals.

(2) Legal arguments over the admissibility and validity of verbal admissions have seriously undermined the integrity and objectivity of the English criminal trial. Quite often the attention of juries is concentrated on them to the exclusion of any factual and circumstantial evidence for the prosecution or the strength of the evidence for the defence – for example, of an alibi. This does not necessarily help the prosecution obtain a conviction. Juries have become more sophisticated and more likely to distrust police evidence. Consequently, if sufficient doubt can be cast upon the genuineness of "verbals", juries may acquit in cases where the prosecution had enough evidence to secure a conviction without them.

(3) Battles over verbal admissions are always immensely time consuming, and in the main, unprofitable. They waste the time of courts and juries, of lawyers on both sides, and of the police. The accused's solicitor will be presented at the committal proceedings with depositions containing perhaps 30 or 40 pages of police interviews. The accused, if he is well defended, is then invited to comment on them in detail. He may need to give his own quite different account of the interview, and these have to be conveyed to his counsel in the brief. Defence counsel, perhaps after a long and unsuccessful battle over admissibility, then has to put his client's version to each police officer in turn. If he fails to put some matter which the accused later blurts out in his evidence, the trial judge may comment on it and suggest that the accused has just made it up. If there are three or four accused who are all alleged to have made statements, then the whole process has to be repeated. By the time prosecuting counsel, defence counsel and the trial judge have recapitulated the examinations and cross-examinations of all the witnesses, days may well have passed and what is worse, juries may have become hopelessly confused as to who is alleged to have said what. We may have cited an extreme example, but we have a number of such cases in our files and our criticism is still valid even if only a day's trial time is wasted.

(4) It cannot be regarded as satisfactory that a conviction should be based, as it now can be, on an alleged admission to one police officer which no-one else has heard and which is not supported

by any other evidence.

(5) When the admissibility of police verbals is disputed, it is rare in practice for them to be excluded.

Interrogation before Magistrates

25 The JUSTICE proposals of 1967, which were specifically designed to eliminate all these disadvantages from our system and to remove all admissions from the realm of controversy, can be briefly summarised as follows:

(1) The police shall be entitled to question a suspect for an adequate length of time to see if he is able and willing to provide any information about the offence being investigated and the part which he and/or others have played in it.

(2) If, in the course of the questioning, the suspect makes any admissions which the police want to adduce as evidence at the trial, they must take him before a magistrate for the admission to be recorded and confirmed.

(3) No statement or alleged admission shall be admissible unless it is so confirmed.

(4) If the police have good reason to suspect a man of having been involved in an offence, and he refuses to answer questions, then they shall be entitled to take him in front of a magistrate so that his refusal to answer questions, or any statement or explanation he may subsequently be willing to make, can be duly recorded.

(5) Any person detained for questioning shall have the right to go in front of a magistrate to offer any explanations he gave or was unwilling to give to the police, or to ask for enquiries to be made that might immediately establish his innocence (e.g. in relation to an alibi) or to ask for certain safeguards to be observed in relation to searches or tests of his clothes.

We regard this right as of great importance because of the number of cases in which the police deny having received requests or explanations which an accused claims to have made.

26 The 1967 Committee discussed at length whether or not it was desirable that a suspect's solicitor should be presented during his interrogation in front of a magistrate. It eventually decided that he should be allowed to be present but his role should be confined to ensuring that the questioning was fair and that he should not be allowed to advise his client not to answer. We discuss elsewhere the question of the right of silence and the protective role of solicitors.

27 The 1967 Committee further considered the admissibility of remarks alleged to have been made by a suspect on his first encounter with the police such as the legendary "it's a fair cop", or "I've been expecting you", or, more ambiguous, "who told you that I had anything to do with it?". The police have always set great store on what a suspect may

say when he is taken by surprise and on their right to adduce it in evidence. Similar considerations apply to conversations in police cars on the way to police stations. The 1967 Committee was prepared to regard such statements as admissible with the proviso that considerations should be given to the possibility of using pocket tape-recorders.

28 We broadly take the same view but we think that the police attach too much importance to such admissions and that experienced criminals are not so foolish as to make them. They are the most liable to distortion and misinterpretation, and are rarely recorded at the time.

Since the 1967 Committee made its recommendation, pocket tape-recorders have become smaller, cheaper and more efficient. We are therefore of the opinion that, if the police set such great value on early admissions, it would be to their advantage to equip themselves with pocket tape-recorders. The taped remarks would then form part of the final evidence for the court. We foresee difficulties in relation to the use of tape-recorders at the time of arrest, but none in relation to their regular use in police cars.

29 We have in mind that the method of formal interrogation would in practice be used only in serious cases where statements are likely to be contested and where the suspect has been arrested and detained for questioning. It would be inappropriate and administratively cumbersome to apply it to the daily run of minor cases which are dealt with summarily in magistrates' courts, but in these cases pocket tape-recorders would provide a valuable means of verification for the Court, if and when the police account of the interview or encounter is disputed. It would be a positive advantage to the prosecution to use them in shops and stores where an admission or plainly false explanation is frequently blurted out in the manager's office before the police arrive, and is later denied.

30 When the proposals of the 1967 Committee were published, there was considerable criticism of them on the grounds that they were administratively impracticable. In particular it was said that not enough magistrates could be found to undertake these duties, and that they would not be available when they were wanted. For the reasons which follow we think that these criticisms were ill-conceived and the difficulties exaggerated.

(1) Only a minority of arrested persons would need to be taken in front of a magistrate, i.e. those who had refused to answer any questions or those who had made admissions which the police wanted to introduce as evidence at the trial. There is also some reason to believe that, if unauthenticated admissions were excluded, the police would look for supporting evidence before pressing charges.

(2) Enquiries made of the Lord Chancellor's Department at the time elicited the view that there should be no real difficulty in finding enough magistrates to undertake the duties. There are many benches of which the members sit only half a day a week, or even less. There are many magistrates on the supplemental list who by reason of age have retired from active service but are still in full

possession of their faculties. Further, there are many magistrates who have moved from their districts and have not been enrolled for active service in their new districts.

(3) If it should turn out that a sufficient number of magistrates cannot be found, then this aspect of the problem could easily be solved by enlisting the services of other suitably qualified persons. This would involve a change of nomenclature and indeed we now take the view that whoever presides at the interrogation should be called a "referee".

31 One reason for this change of title is that interrogation in front of a magistrate has given the misleading impression that we are advocating a magisterial inquisition on the lines of the French "juge d'instruction". This is not intended. Our view is that the function of the referee is to ensure that the questioning by the police is done fairly, that the suspect is given every opportunity of giving his explanations or version of events, and that the proceedings are duly recorded and certified. The referee would not be called upon to adjudicate on any of the matters disclosed.

32 The proceedings before magistrates or referees would be tape-recorded, transcribed and certified. Copies would be supplied to the prosecution and the defence. They would be available at the trial to the exclusion of all other evidence relating to statements or admissions. The transcript would of course include refusals to answer questions.

33 Referees could properly be paid appropriate fees for their days of duty, which would be organised on a rota system; and it would be necessary to emply court staff for attendance at interrogations and the transcribing of proceedings. But the total cost would be infinitesimal when set against the saving of the costs referred to in 24 (3) above.

34 Verbal admissions could also be authenticated by the use of tape-recorders or by the presence of solicitors, but we regard both these methods as inferior to authentication by a referee. Administratively, they are more complicated and wasteful of time in that they would have to be brought into operation for every interview at which a suspect is likely to make a disputed admission, whereas our proposals require the presence of a referee only when the police later want to adduce in evidence an admission or a refusal to answer questions. They also offer a number of other and wider advantages.

(1) A suspect who really wants to come clean and tell the full story of his involvement in an offence is more likely to do so if he is confident that anything he says cannot subsequently be misinterpreted.

(2) Evasions, denials, untrue explanations and refusals to answer questions will all appear on the record, as will straight-forward protestations of innocence.

(3) The authentication of incriminating statements by this method, or by one of the other methods discussed, would undoubtedly raise the standard of integrity of criminal prosecutions and trials and increase the confidence of juries and magistrates in the

reliability of police evidence.

(4) The police would still enjoy their present power to question suspects for information and their power to elicit a genuine and voluntary admission would be reinforced. They would have an early opportunity of investigating explanations offered by the suspect, e.g. an alibi defence.

(5) The right of access to an independent referee after a specified period of detention in custody, if only to put a complaint or explanation or request on the record, will provide a valuable safeguard against improper pressure on the part of the police. Our 1967 Committee envisaged that the referees would be magistrates with powers of judicial intervention. Referees who are not magistrates would enjoy no such power, but we see no reason why they should not be given power to ask for further enquiries to be made.

While we believe that our proposals are both feasible and desirable, we would also evaluate the two alternative safeguards.

Tape-Recorders

35 More than ten years ago, the Eleventh Report of the Criminal Law Revision Committee recommended the carrying out of a pilot scheme for tape-recording of interviews. The Home Office has reacted slowly and the possibilities are only now being investigated by your Commission. The police have consistently opposed their use on the grounds that an experienced criminal could discredit police evidence by shouting out "Stop twisting my arm". In our view this danger is exaggerated but it could be overcome, though at considerable expense, by the use of video-tapes as in the U.S.A. Another objection has been that the tapes could be tampered with. We have no technical expertise in such matters but we understand that this possibility could now be virtually eliminated and we would observe only that it would be far more difficult for the police to tamper with a tape than it is for them to fabricate an incriminating statement.

36 Apart from these objections, there is no doubt that the majority of police officers are opposed to the use of tape-recorders on the more general grounds that they would inhibit questioning and create a great deal of administrative work. The Commissioner for the Metropolis devotes 17 pages of his Written Evidence to your Commission to an elaboration of the difficulties and objections to be overcome and finds nothing in favour of the system. We think that some of these difficulties are exaggerated. For example, in summary cases 90% plead guilty and in cases sent for trial 40% plead guilty. The need for transcriptions would not therefore be very great. The police could make a brief summary in every case and a transcription need only be made if the evidence is to be contested. The Commissioner also raises the question of inaudibility and misinterpretation.

37 The experiments being carried out will show the extent to which all these objections can be overcome, but it could well be several years before sufficiently conclusive experiments have been carried out and an

effective and generally acceptable system devised and put into operation. Because of the urgency of the problem we would therefore give it last place in our evaluation of the three alternative methods of authentication. On the other hand we would reaffirm our proposal that pocket tape-recorders should be carried by police officers and used when making enquiries or effecting arrests. This practice could be introduced immediately and would be complementary to any subsequent interrogation in the presence of a referee or solicitor.

The Presence of a Solicitor

38 The other means of authentication is by the presence of a solicitor throughout the interview, or at the critical time when the suspect has indicated that he is willing to make a statement. If, after an opportunity for consultation, the statement is written out by the suspect or a police officer, signed by the suspect and witnessed by a solicitor, there should be no room for any subsequent dispute. The defendant could not then reasonably dispute the making and the wording of the statement, although he would still be free to dispute the truth of its contents.

39 The only disadvantage of having interviews and statements authenticated by a solicitor is that he can be professionally embarrassed if there is a subsequent dispute over the interpretation of the statement, or the police want to introduce matters in evidence which are not implicit in the statement, for example, the physical and emotional reactions of the suspect to some of the questions put to him. In such cases the solicitor might have to enter the trial arena as a defence witness, and be faced with a conflict between his professional duty to his client and his duty as an officer of the court. We nevertheless regard it as a practical alternative to authentication by a referee, as it would require only the minimum of legislation and such time as is needed to have duty solicitors available at all police stations, just as divisional surgeons are available to deal with cases under the Road Traffic Act, 1972.

40 The Commissioner for the Metropolis accepts that a suspect has the right, subject to the exceptions in the Judges' Rules, to have a private consultation with his solicitor at any time and that the solicitor has the right to be present during questioning and the taking of statements. He thus presents a reassuring view of the present situation which is not borne out by the alarming increase in the number of reported cases in which the suspect is denied access to a solicitor until he has made some kind of admission or appears unlikely to do so.

Permitted Periods of Detention

41 We now turn to consider the question of how long the police should be allowed to detain a suspect after lawful arrest for an arrestable offence and before charging him. We entirely reject the proposal of the Commissioner for the Metropolis that the only restriction on the power of the police to detain a suspect should be a requirement that, after 72 hours, they should have to make an ex-parte application to a magistrate for authority to detain for a further period. Instead, we recommend that

there should be conferred upon the police a new statutory power for the lawful detention of a suspect who has been arrested (i.e. who is no longer free to leave and has not yet been charged), but only subject to the following conditions:

(1) Within three hours of his arrest, a solicitor nominated by or acceptable to the subject or failing him a duty solicitor, should be informed by the police of his arrest and detention, and of the nature of the probable charge. This requirement should be brought to the suspect's attention by the station officer, and the time of the notification should be duly recorded.

(2) After a total of 6 hours of detention, the investigating officer should, in the absence of reasonable cause, either release the suspect or charge him. If he does neither he should dictate a note to the station officer, giving his reasons for continuing to detain the suspect without charging him. This note would be available to the solicitor and to the court and detention could thereafter continue for a further period not exceeding 6 hours. On receipt of this note, the station officer should see the suspect and record any complaints.

(3) If the suspect has not been charged within 12 hours of his detention or arrest, he should be taken before a magistrate for a hearing at which the police should be required to justify the need for further detention. If they are unable to do so, the suspect should be released if he has not by then been charged. The magistrate should be able to authorise detention for a further period not exceeding 24 hours.

(4) At any hearing before a magistrate, the suspect should be present and represented, and have the right to ask for a private consultation with his solicitor.

(5) Once a suspect has been charged he must, of course, be brought before a magistrates' court at its next sitting.

(6) Once a person has been at a police station or otherwise in police custody for 3 hours (whether or not he went there voluntarily in the first place) he should be deemed to have been arrested when he first arrived.

42 We are aware that these powers could be abused by frequent, albeit short, periods of detention without charge. We see no answer to this other than the astuteness of local magistrates' courts in detecting such practices, and possible actions for false imprisonment after the event, where, under our proposals, the police would need to satisfy the court that on each such occasion they had reasonable grounds for their conduct.

43 We further think that there should be an absolute prohibition against the enforced detention for questioning of a potential witness. In addition, mothers of young children should not be brought in and held without immediate notification to the social services and arrangements being made for the care of the children in their own home.

Access to a Solicitor

44 We appreciate the difficulties confronting the police when they have taken a suspect into custody and do not want to give him any opportunity of covering up his tracks, or warning his accomplices, or laying the foundation of a false alibi, or passing out important information. Equally they do not want him to be advised to say nothing. In cases where a number of suspects have been arrested, they want the opportunity of playing one off against the other in the hope that they will eventually get sufficiently impressive admissions to justify a charge. This is an accepted technique of investigation. There are also serious cases in which the police believe that, by building up physical and psychological pressures, they can finally break down a suspect's resistance and induce him to make a full confession before he has a chance of obtaining any legal advice and protection. The vital question is the extent to which this kind of interrogation should be controlled and how the rights of the suspect should be protected.

45 The small-time, inexperienced and inadequate offender is particularly vulnerable to fear and pressure when he is suddenly arrested and taxed with an offence of which he has no knowledge. There are cases which have gone to appeal, and others in the files of JUSTICE, where a man has signed a false confession in order to escape from the ordeal of further police pressure by getting bail and in the misplaced expectation that he would later be able to establish his innocence. Suspects in this class really need advice and protection at an early stage, preferably before they are interviewed, and we take the view that the police tend to exaggerate the extent to which the presence of a solicitor prevents them from obtaining a justified conviction.

46 If our major recommendation is accepted, then an immediate consultation with a solicitor may not be so important, but we think it would nevertheless be helpful and desirable. Given a little time and cooperation to learn something about the facts of the case, the solicitor could explain the safeguards afforded by the appearance before the referee and tell his client about the procedures. He could also deal with questions of bail and of identity parades, if any are in contemplation.

The Right of Silence

47 The right of silence, as at present interpreted, means that a suspect cannot be required to answer questions either by the police or at his trial and that only the trial judge is entitled to comment adversely on his silence. In endorsing the recommendation of our 1967 Committee, we ask whether this right, so interpreted, has anything more than evocative and mythological value. There is no safeguard against police evidence that a suspect refused to answer questions, when in fact it was they who refused to listen to his explanations or to record them. A suspect can in practice be induced to speak by unlawful pressures. The jury knows from the evidence that the accused has made no statement of any kind or just denied the offence, and the Court of Appeal has given trial judges wide discretion as to the terms in which they can comment to the jury on the accused's silence at his trial, for example, "You may wonder, members

of the jury, why the one man who could tell us all about this matter has thought fit to remain silent".

48 The abolition of the right of silence will therefore of itself make no practical difference to the present position unless something more definite and meaningful is put in its place. In respect of the suspect, we believe interrogation in front of a magistrate or referee will clearly establish whether or not he did refuse to answer questions and give him the opportunity of making explanation which might otherwise have been denied or misinterpreted by the police. From the point of view of the police, the suspect will have to submit to questioning and the record of the interview will be admissible as evidence.

On the question whether an accused's silence should be capable of being held against him at his trial, we take the view that the trial judge and only the trial judge should be entitled to comment adversely in reasonable terms, provided he also invites the jury to take into account any special circumstances which might have led the accused to maintain silence, for example, any indication of mental disability or of the matters mentioned in para 49 below.

49 An accused would be seriously disadvantaged only if a refusal to answer questions could be regarded as corroboration in cases where corroboration is required. In our view, this recommendation of the Eleventh Report of the Criminal Law Revision Committee was rightly rejected by the majority of practising lawyers. Circumstances arise in which a person suspected of an offence has valid and excusable reasons for not wanting to tell the police all that he knows. By doing so, he may involve his wife or another member of his family. He may fear reprisals if he tells what he knows. He may want to take the blame and need time to reflect. It would be wrong in such circumstances to attach a positive evidential penalty to silence, either under the present system or the system we recommend.

50 In May 1968, our Committee on Evidence produced a Memorandum entitled "The Accused as a Witness', which recommended as a corollary to its earlier proposals that the accused's right to make an unsworn statement from the dock should be abolished and that he should be given the choice of going into the witness box or remaining silent and relying on his counsel to put his side of the story. We regard this proposal as being in accordance with the long-established principles of best evidence and endorse it.

The Judges' Rules and Cautioning

51 Because they have no statutory force, the Judges' Rules provide very little protection for the suspect. It is rare for an alleged confession to be excluded on the grounds of improper pressure, because the evidence of a prisoner in the dock hardly ever prevails over the evidence of two or more police officers giving identical versions of events. Evidence of physical injury may not help very much if the officers claim that the suspect had to be forcibly restrained. There is an escape clause which allows the police to keep a suspect incommunicado until he has made

some kind of admission or they decide to let him go. The rules relating to cautioning are equally ineffective. If a police officer says he administered a caution and the accused claims he did not, it is the police officer who will be believed. On the other hand we have a great deal of sympathy with the police when they complain that it does not make sense that they should have to stop and caution a suspect just when they are on the point of obtaining an admission or some useful information. The Home Office directions regarding the physical treatment of persons detained for questioning have even less force since no kind of penalty is attached to any breach of them except when the treatment leads to a judicial decision that the evidence obtained is inadmissible.

52 For the above reasons we should be content to abolish the Judges' Rules as they stand in their present form, including the rules relating to cautioning, provided they are replaced by the safeguards inherent in our proposals for interrogation in front of a magistrate or referee, or by some other system of authentication which deprives the police of any incentive or opportunity to produce a dubious admission. We would allow this relaxation to include the right to question a suspect after he has been charged, subject to the same safeguards. If these safeguards are not provided, then we think that the Judges' Rules should be given statutory force with the onus placed strictly on the prosecution to satisfy the court that any admission is voluntary and not prompted by fear or expectation of favour. The Home Office directives regarding the treatment of suspects should likewise remain and be given statutory force in any event. Any serious breach should result in the disciplining of the officers concerned and in the exclusion of any evidence so obtained.

Interrogation of Juveniles

53 We are all too aware of the disturbingly large number of crimes being committed by juveniles. Such crimes are increasing and young offenders are becoming more sophisticated. We nevertheless think that, because of their age, they should not be treated in the same way as adults and that, in addition to the presence of a parent or social worker, any admissions should be verified by one of the methods indicated in this report. We support the conclusions of the Fisher Report in their entirety, and in particular the recommendation that only in the "most exceptional circumstances" should a juvenile be questioned without a parent or guardian being present.

54 We are disturbed by reports of cases in which a juvenile is given the choice of being charged with an offence, or admitting it and being let off with a caution. We regard this practice as undesirable in that it can lead to unjustified admissions of guilt which remain on the record. If it is regarded as a necessary ingredient of the system of cautioning, then it should be followed only when a solicitor or parent is present and informed of the evidence in the possession of the police.

Taking of Statements

As things are, a suspect is very rarely invited to write out his own statement and to read it over himself before signing it. The practice is for the interviewing officer to write out his statement for him with appropriate promptings, and then to read it over to him. Very few suspects are recorded as being unable to read or write. We therefore recommend that, if a suspect indicates his willingness to make a statement, he should be asked to write it out himself in his own words and then to read it out aloud before signing it. Only if he is illiterate should the officer be allowed to write it out for him and should do so in the suspect's own words. If the statement, or part of it, is prompted by questioning, the questions should be incorporated in the record before he is asked to sign it.

56 We take the view that the present emphasis is all wrong and suggest that the rule should be that unless a defendant is unable to write or for some other specified reason declines to do so the onus should be on the prosecution to establish to the satisfaction of the jury or court, as the case may be, that the written statement was fully, accurately and completely made by the defendant. This would in effect reverse the present unsatisfactory position in which the judge rules on admissibility and (once ruled in) the jury is concerned only with the weight, if any, to be given to the statement.

57 We particularly deplore the way in which two or more police officers can compare an account of an interview some time after the event and write it up in their notebooks in identical terms, without the suspect knowing what he is alleged to have said until he is served with the police statements or appears in a magistrates' court. This can happen without the accused ever being invited to make a statement. We therefore recommend that one of the interviewing officers should be required to make a note of the interview at the time and that the suspect should be invited to read it, initial every page and record in his own hand that he has read it and accepts it as being a true record.

OTHER MATTERS

Negative Evidence.

58 By negative evidence we mean forensic evidence which one would expect to find if the suspect had committed an offence, but is not found. Examples are fingerprints, footprints, bloodstains, fibres and soil on shoes. Although the police have an ethical duty to look for evidence under their control which could clear a suspect, they are under no legal duty to do so and, even if tests are made and prove negative, the prosecution is under no legal duty to disclose them. Negative evidence can be of great importance and should not be regarded as neutral, as judges sometimes direct. We therefore take the view that the police should regard it as a natural duty to obtain any relevant forensic evidence which could help to clear a suspect and should be under a legal duty to do so if requested by the suspect or his solicitor.

Photographing of Suspects

59 We know of no serious cause of complaint which arises from existing provisions and procedures. There can be no objection to a suspect being photographed as soon as he has been charged, but we think that there should be no need to photograph persons charged with traffic offences, or vagrancy, or drunk and disorderly offences, or other minor offences where the photograph is not likely to be of any value to the police in the future detection of crime. A person of previous good character should have the right after acquittal to be given the photographs and the negatives, or to witness or be satisfied as to their destruction. This right should be given full publicity and explained to the suspect when he is charged.

Fingerprinting

60 If the provisions of the Magistrates' Courts Act, Section 42, are strictly observed, then any person against whom a fingerprinting order is made should be adequately protected against the use of undue force. The case of Yvonne Jones however showed that they need to be made more widely known. We think that the present law is adequate. However orders should not be automatically granted and the police should be required to give valid reasons when they ask for them. If an accused has refused to give his fingerprints voluntarily, the Bench should be required to explain to him that, if he is innocent, the taking of the fingerprints may help to clear him, and that, if the proceedings terminate in his favour, the fingerprints will be destroyed in his presence.

Medical Examinations

61 Disputes often arise as to the physical condition of a suspect when he arrives at a police station, or after a period of custody. On arrival, he should have the right to be examined by a police doctor and to be supplied with a copy of his report or of any entry in the police station's records

relating to his condition. After 24 hours he should be entitled to an examination by his own doctor or an independent doctor nominated by him. He should also be entitled to a copy of any report by a Prison Medical Officer as to his condition on arrival in prison. Such provisions would serve both as a protection for the accused against ill-treatment and for the police against groundless allegations of brutality.

Criminal Appeals

62 Although your Commission is not concerned with criminal appeal procedure, we wish to point out as forcibly as we can that complaints about the irregularities referred to in various parts of our Evidence are the major cause of the present serious overloading of our criminal appeal system. The present burden on the judges, the staff of the Criminal Appeal Office and shorthand-writers is such that it can take up to 18 months for an appeal to be finally determined and it sometimes happens that cases are not heard before an appellant has completed his sentence or been released on parole. The overloading further means that many meritorious appeals cannot be given the serious consideration they deserve. We firmly believe that, if the safeguards we propose were put on a statutory basis and the areas of judicial discretion were more closely circumscribed, the number of applications for leave to appeal against conviction, now running at around 2000 a year out of a total of 6000, would be appreciably reduced.

THE PROSECUTION PROCESS

63 In its Report The Prosecution Process in England and Wales (1970), JUSTICE recommended that decisions to prosecute in all but trivial offences should be taken out of the hands of the police and entrusted to a national prosecuting authority. The report was the work of an experienced and widely representative committee which included the then senior Crown Counsel at the Central Criminal Court, two Recorders and two Prosecuting Solicitors and was endorsed by the Council of JUSTICE.

64 The background to the Committee's deliberations and the reasons which prompted its recommendations are fully set out in its report which is already in your Commission's hands and has been the subject of study by the Home Office and various interested bodies. Indeed we were given to understand that, before your Commission was appointed, some tentative legislative proposals had been formulated and might well have been introduced if they had not been strenuously opposed by the police.

65 The reasons for the Committee's recommendations set out in its Report can be briefly summarised as follows:

(a) The honest, zealous and conscientious police officer who has satisfied himself that the suspect is guilty becomes psychologically committed to prosecution and thus to successful prosecution.

(b) The decision to prosecute does not and should not always fall to be determined solely by the likelihood of a conviction. Public policy and individual circumstances are rightly to be taken into account.

(c) The English system is the only one in Europe where the interrogation of suspects, the interviewing of witnesses, the gathering and testing of scientific evidence, the selection of evidence to be laid before the court, the decision as to what charges shall be brought and the conduct of the prosecution are in the majority of cases effectively under the control of the police.

(d) The question of whether to prosecute partakes of the nature of a judicial decision, since, although the accused may eventually be acquitted, the bringing of a charge on insufficient evidence can have disastrous consequences on a man's domestic life and career, particularly if he is held in custody pending trial. It is difficult for investigators to achieve the necessary detachment and unfair to expect them to do so.

(e) Once a prosecution is commenced the extent of police involvement – in terms of prestige, fear of public criticism, particularly if there is a risk of an award of costs against the prosecution, and the possibility of an action for malicious prosecution – may, perhaps unconsciously, influence the decision as to whether the prosecution ought to be dropped.

(f) The dominance of the police in the prosecution process exposes them to temptation. They make seek or be prepared to bargain with a suspect, promising to refrain from prosecuting: or to "let him down lightly" or to "put in a good word with the court": or to grant him bail (or not to oppose it) or not to prosecute his wife. The risk of abuse, however well-intentioned the motive, is manifest in such a situation.

(g) Cases do occur in which pressure is brought on counsel to take a hard line against his better judgment.

(h) Sometimes the police do not disclose relevant information which may on occasion be of material assistance to be accused. The possibility of deliberate non-disclosure to try and ensure a conviction cannot be ignored. We would refer in this connection to the JUSTICE report, "The availability of Prosecution Evidence to the Defence".

(i) It is impossible for the police to be adequately trained as lawyers and advocates, nor should the attempt be made, especially as there is a grave shortage of police for proper police duties. Lawyers, by reason of their training and experience, are much better qualified for these tasks.

66 We think that these reasons are as valid and compelling today as they were 14 years ago. In recent years far more cases have been brought to our notice in which charges have been made and pressed when there was not sufficient evidence, or where the police have formed a view too hastily and then resorted to questionable methods in order to secure a conviction. Sometimes these methods have a positive character, for example, falsification of evidence or pressure on witnesses or on co-accused. Sometimes they are of a negative character, for example, failure to make forensic tests or to act on information which might have helped to clear a suspect.

67 The police view regarding paragraph 66 above is that any irregularities can be adequately probed and brought to light in the course of the trial, but every practitioner knows that this is far from the truth. The facilities available to police are not available to defence solicitors and it is usually very difficult to prove and establish irregularities in the prosecution process. The required documentary proof may not be obtainable without special orders or adjournments which the trial judge may not be willing to grant. If a formal complaint is lodged, it will not normally be investigated until after the conclusion of the trial or the determination of an appeal, which is too late.

68 We are aware that your Commission is examining prosecution systems in other European countries and in Scotland and we do not feel that we can make any worthwhile contribution to the knowledge of them which you will have acquired. Nor do we think it would be valuable to attempt any general comparison and evaluation of the respective merits of these systems. Our main concern is to remedy the defects in

our system, in the most sensible and practical way, so as to provide a more effective sieve to prevent cases being brought before the courts on insufficient evidence. *This will effect a valuable saving in stresses and hardships suffered by those who have been unjustly charged, and in the time and money spent in the preparation for and conduct of trials.*

69 It is true that in our system prosecuting solicitors have every opportunity of advising the police that the evidence presented to them does not justify the charges or a particular aspect of them; or that it is not adequate to secure a conviction. But whether police prosecutions are undertaken by county prosecuting solicitor departments, or by solicitors in private practice, the police are their clients and can, if they wish, insist on the charges being pressed. Much therefore depends on the integrity and strength of character of the prosecuting solicitor and his willingness or otherwise to fall in with the wishes of his client. We have recently had two cases in which JUSTICE has asked prosecuting solicitors to provide initial statements of witnesses for the purposes of an appeal and they have been refused permission to do so by the police.

70 It is also true that the traditional independence and ethical standards of counsel will inhibit them from going ahead with prosecutions about which they have serious doubts. But to accept this as a general safeguard is to expect too much of human nature. Having been offered and accepted a brief on which he may not have been consulted, counsel may well be embarrassed or reluctant to abandon the task in mid-stream if he becomes uneasy about the evidence he is presenting. The pressure on young counsel is particularly heavy. They depend to a large extent on prosecution briefs to make a living and risk being taken off the list if they question the rightness of the prosecution or allow ethical considerations to weigh too heavily in their conduct of the case,

71 It is therefore essential that any decision to prosecute in other than trivial cases should be soundly based and arrived at after independent scrutiny and evaluation of the evidence gathered by the police. Accordingly JUSTICE continue to endorse the recommendations set out in paragraph 17 of the Report. These can be summarized as follows:–

(a) That there should be established a Department of Public Prosecutions to be responsible both for the decision to prosecute and for the conduct of the prosecutions.

(b) In principle the Department should be responsible for all prosecutions. In practice it will be necessary to limit it in two respects:

  (i) by leaving prosecution of the trivial and routine type of offence in the hands of the police. The line would be drawn by the Director in the form of regulations, which might require alteration from time to time. In relation to cases falling below the line, the police would have the right to hand over particular cases to the Department and the Department would have the power to call in cases where it felt this to be desirable.

  (ii) by leaving prosecutions at present dealt with by government departments and the public bodies in their hands.

(c) We do not recommend the abolition of private prosecutions.

(d) The Department would be entirely independent of the police. It would be headed by a Director and would be under and subject to the Attorney General. Its funds would be provided out of the Consolidated Fund.

(e) The Department has a ready made basis in and could conveniently be organised and developed out of the existing staffs of the Director of Public Prosecutions, the Solicitor to the Metropolitan Police, and other prosecuting solicitor departments. It would have regional and local offices throughout the country headed by Assistant Directors.

(f) The Department would be staffed by solicitors and barristers.

(g) The Department's staff would have the same rights of audience as are afforded to the staff of the Director of Public Prosecutions and would have full power to instruct and take the advice of counsel.

(h) In addition to receiving information and evidence from the police, the Department would be entitled to pursue further inquiries either by obtaining declarations or statements from witnesses, if necessary on oath, or by suggesting additional lines of inquiry to the police.

72 The recommendations outlined in paragraph 71 have already been put into force to a very large extent in Northern Ireland by the Prosecution of Offenders (Northern Ireland) Order 1972 (S.I 1972 No. 538 (N.I. 1)). Indeed the then Attorney General, Sir Peter Rawlinson, said that it carried out every single recommendation that the JUSTICE Report said should be introduced in England and Wales. He further said that, having regard to the size of the jurisdiction in Northern Ireland, the proposed system improves on the system in England and Wales. The Royal Commission is referred to Hansard for the 8th May 1972 (pages 1057-1086) for a full report of the debate on the introduction of the Order.

73 Further thought has been given to how these recommendations should be put into effect. JUSTICE is conscious of the danger of setting up an organisation which may grow into a monolithic bureaucratic hierarchy. It is anxious to secure the maximum degree of independence for individual Assistant Directors consistent with a national uniformity of practice. Accordingly the following further recommendations are put forward for the implementation of the proposed new system:–

(a) The Central Department would continue to be responsible for prosecuting or advising on specific offences of particular gravity or carrying political implications. The present list would need re-examination. It would not normally intervene in other classes of cases unless they were referred up by an Assistant Director.

(b) The Prosecution of Offences Regulations 1946 (S.R. & O. 1946 No. 1467) would need to be redrafted to provide:

(i) that cases carrying a liability to the death penalty or life imprisonment (other than rape) would be referred directly to the Director. Nomination of counsel would remain with the Attorney-General. Once such cases had been instituted their conduct would be delegated to Assistant Directors;

(ii) that advice to government departments would normally fall to the Central Department;

(iii) that the function of taking over cases with the intention of offering no evidence would remain with the Director. Reports from magistrates' courts of withdrawal of charges or failure to proceed in a reasonable time would be made to the Central Department;

(iv) that cases requiring the Director's fiat would be referred to him directly. Assistant Directors would not need a fiat since they would represent the Director.

(c) A new branch of the Central Department under an Assistant Director would be responsible for:

(i) the appointment and promotion of the staff of area departments;

(ii) the general efficiency and uniformity of practice of area departments;

(iii) The dissemination of information about new legislation (a function at present carried out in part by the Home Office), of model charges and counts, important appellate decisions, and useful initiatives taken by area departments.

(d) Each area department would be staffed by an Assistant Director assisted by a number of qualified senior legal assistants and legal assistants on the normal civil service scales and terms of appointment, assisted by the minimum of administrative staff. The Assistant Director would hold office during good behaviour. He would be removable from office by the Queen upon the advice of the Privy Council. It would be useful if departments covering metropolitan areas included a qualified accountant on their staffs to assist in the investigation of frauds.

(e) Existing staffs of prosecuting solicitors' departments would need to be taken over on terms and conditions which avoided their suffering any loss by the change. It is noteworthy that some existing departments have a more complicated career structure than that proposed by JUSTICE for a national service.

74 The larger and more heavily populated part of England and Wales is already covered by the prosecuting departments of individual police authorities so that although our recommendations envisage an added expense on Central Government Funds this is more apparent than real. Prosecuting solicitors' departments are, at present, largely financed by taxing the costs of prosecutions out of Central Funds and the shortfall is made up from local funds which themselves attract substantial

government grants.

75 JUSTICE further proposes that the Attorney General should have ultimate responsibility in Parliament for the Department of Public Prosecutions. No change is proposed in the Attorney General's powers to enter a nolle prosequi in any prosecution although it has already been rendered somewhat anomalous by the Director of Public Prosecution's power to take over prosecutions and offer no evidence. We do not propose any specific changes in the list of offences requiring the Attorney General's fiat although it is obviously in need of detailed revision.

The Attorney-General's Discretion

76 The Attorney-General and the Director of Public Prosecutions already exercise a discretion to refuse their fiats where they are required by law before a prosecution can be commenced. They also exercise powers to stop prosecutions which have been commenced by other authorities and by private persons. In the exercise of these functions they are influenced by various considerations, such as the possible political effect of a prosecution, or the defendant's age and state of health, or that he may already have suffered enough for his actions. An example of the last situation would be where an act of dangerous driving had resulted in serious injuries to the defendant or to a close member of his family who was a passenger at the time. JUSTICE has no observation to make on the exercise of these discretions.

ALTERNATIVES TO PROSECUTION

General Criteria

77 It is essential for the proper administration of justice that the courts shall be able to try cases within a reasonable time from the date of the facts from which they arise. It is equally important that the courts shall not feel under pressure to get through trials quickly owing to the back-log of cases. Magistrates' courts in particular are under great pressure from the size of their daily lists. We have therefore considered various possible means of reducing the number of cases coming to the courts for trial or sentence.

Cautioning

78 It is suggested that the number of cases coming to court could be reduced by greater use being made of the existing system of issuing written cautions. It is not known by what criteria the various police forces decide when to caution rather than to prosecute. It is clear, however, that a great many very trivial offences are brought to court. It is suggested that greater use could be made of this system for the type of offence, whether traffic or otherwise, which is likely to result in an absolute discharge, and in absolute offences where, on the facts, there is no moral blame – for example when drivers by mistake enter a one way system in a district which is unfamiliar to them, or, in other than motoring cases, where there was clearly no criminal intent, and minimal harm or loss has been inflicted. Tests 3 and 5 applied by the Prosecutor Fiscal in Scotland are relevant. (See p. 11 of JUSTICE report on the Prosecution Process.)

Mitigated and Fixed Penalties

79 We have considered the question of mitigated and fixed penalities and have been greatly helped by the valuable article by Patrick Halnan in the Criminal Law Review (1978, p. 456). We feel very strongly that the work load of magistrates' courts needs to be lightened in order to reduce the number of cases awaiting trial, and to make room for the additional work put upon them by the Criminal Law Act, 1977, and the Bail Act, 1976. We also have in mind the time wasted by police officers through unnecessary appearances in court. In relation to some of the questions raised in this article we put forward the following views.

Mitigated Penalities

80 This is obviously a useful power and is widely used in respect of Road Fund Licences, V.A.T. and Income Tax offences. In our view, it could be extended with advantage to cover failure to obtain or renew television licences where the investigator is satisfied that the failure was due to a misunderstanding as to liability or other acceptable reason. Although we have no evidence of such discretionary powers being abused, we consider that decisions should not be left to the investigating officer but

should require endorsement by a professional officer.

Fixed Penalities

81 (a) These constitute a valuable method of lightening the work load of magistrates' courts. It could usefully be extended to a range of non-endorsable road traffic offences. We see no reason why the fact that an offence is endorsable should in itself exclude it from inclusion in any system of fixed penalities but, to effect this, Sections 93(3) and 101 of the Road Traffic Act, 1972, would require amendment and provision made for ensuring that the offender did not escape any liability for disqualification under the totting-up provisions.

(b) We propose that the fixed penalty system should include speeding offences with a basic fine of, say £10 augmented by, say £1.50 per mile an hour over the relevant limit. This fixed penalty should only be available up to a prescribed maximum speed. An offender should however be offered the option of a fixed penalty only if the prosecuting authority was satisfied that he held a clean licence. The licence would have to be sent with the fine for endorsement.

(c) A system of fixed penalities could also be applied to nuisance and litter offences, and to travelling on buses and trains with intent to avoid payment of the appropriate fare in cases where the inspector was satisfied that the offence was an isolated one and not part of a systematic fraud.

Taking into Consideration Other Traffic Offences

82 We support Patrick Halnan's view that there is no logical reason why road traffic offences should not be taken into consideration by magistrates' courts. Much time is wasted when a defendant has been charged with a whole string of offences relating to one incident and the Bench has to decide the appropriate fines for each offence, or when an unlicensed vehicle has been observed and reported in four or five different areas. If legislation is required for this purpose, it would be sensible to include provision for the Crown Court to take into consideration summary offences related to the offences before the Court, for example, in a case of causing death by reckless driving, the Court could take into consideration that the defendant was also driving without insurance, or, in a case of assault causing actual bodily harm, it could take into consideration offences of criminal damage below £200.

Overseas Visitors

83 Some concern has been expressed about the way in which overseas visitors are allowed to break our traffic laws with impunity. By the time a summons has been served or a fixed penalty parking ticket processed for enforced collection by the Fixed Penalty Office, the offender has often left the country.

84 We have been impressed by an idea which originated overseas and which deals effectively with this problem. In a case where any car is

parked in contravention of the law (provided of course it is not creating actual obstruction), the police can apply to the front wheels of the car a locking device which makes the car immobile. When the driver of the car returns and finds his car immobilised, he has to contact the nearest police station (directions would be left on the windscreen) and the police come and unlock this device provided he has paid the appropriate fixed penalty. We see no reason why such a system could not be adopted in this country. It would be far more effective and simple than the two present alternatives of towing the car away or allowing the offender to escape any penalty.

Spot Fines

85 We have further considered the advisability of giving law enforcement officers, e.g. police officers, traffic wardens, and transport officials, the power to exact the payment of fixed penalities "on the spot" but have concluded that such a system could be open to abuse, possible corruption and allegations of corruption.

General Proviso

86 The above recommendations should be regarded as provisional pending the report of the JUSTICE Committee on Decriminalisation.

SUMMARY OF MAIN RECOMMENDATIONS

1 The police should not be given a general power to stop and search any individual or vehicle on reasonable suspicion, but they should be given an absolute right to stop, question and search within the boundaries of sensitive areas such as docks, airports and military installations and on reasonable suspicion in an appropriate area surrounding the boundaries. (Para. 14)

2 The police should be given power to stop and search for potentially dangerous weapons any person entering a sports arena or taking part in a public procession or gathering if they have reason to believe there is a danger of disorder or violence. This power should extend to special trains and coaches. (Para. 15)

3 The police should be given power to seize and retain for a reasonable time property found in a public place and believed on reasonable grounds to be of evidential value, the owner to have access to the courts. (Para. 16 (2))

4 The police should be given power to obtain a search warrant to search for evidence of an offence provided it is for articles related to an offence known to have been committed. (Para. 16 (5))

5 The definition of 'bank' and 'books' in the Bankers Books Evidence Act, 1879, should be widened. If it is thought desirable to be able to obtain an order under the Act at any stage in an investigation, permission should be granted only by a High Court Judge on the production of affidavits. (Para. 16 (6))

6 The police should have power, after arrest, to search persons and property (including vehicles) and retain for a reasonable time any property which might provide evidence or be the proceeds of an offence or any article which might cause injury or help to effect an escape. They should however have to obtain a warrant to search any premises where an arrested suspect lives or carries on business. Where practicable, searches should be carried out in the presence of the occupier and by at least two officers acting together. (Para. 16 (10))

7 The police should be able to use necessary force to effect a lawful search but the power should be used with more care and consideration than it is at present. (Para. 16 (11))

8 In respect of interrogation, the police should be entitled to question a suspect for an adequate length of time for the purposes of obtaining information, but no confession or incriminating statement obtained from him should be admissible, unless it is authenticated by a magistrate, or by a solicitor or by a tape-recording. (Para. 25 et seq)

9 The safeguard to which we give priority of choice is interrogation before a magistrate or other qualified person, who should record and certify any replies which are given. This can be at the request of the police or of the suspect. (Para. 25)

10 Remarks made by a suspect on his arrest or in a police car should

so far as is practicable be recorded on pocket tape-recorders. (Paras. 27 & 28)

11 Because of the length of time before a universal system of tape-recording of interviews at police stations can be agreed and brought into operation, and because of the urgency of the problem of verbals, our second preference is that statements must be authenticated by a solicitor if they are to be admissible in evidence. (Paras. 35 to 40)

12 The police should be given a lawful power to detain an arrested person without charging him for a maximum period of 36 hours, but only on condition that:

(a) After 3 hours a solicitor must be informed of the arrest and the nature of the suspected offence;

(b) After a total of 6 hours, the investigating officer must dictate a note to the station officer, which must later be made available, giving his reasons for continuing to detain the suspect. On receipt of this note, the station officer should see the suspect and record any complaints;

(c) After a total of 12 hours, he must take the suspect before a magistrate and justify the need for detention for a further 24 hours. At the end of this period he must be either charged or released;

(d) At any hearing before a magistrate, the suspect should be present and represented and be entitled to ask for a private consultation with his solicitor;

(e) Once a person has been at a police station or otherwise in police custody for 3 hours (whether or not he went there voluntarily in the first place), he shall be deemed to have been arrested when he first arrived. (Para. 41)

13 There should be an absolute prohibition against the enforced detention for questioning of potential witnesses, and mothers of young children should not be brought in and held without arrangements being made for the care of the children in their own time. (Para. 43)

14 Early access to a solicitor should be regarded as desirable but not made statutory if effective provision is made for the authentication of statements and admissions. (Paras. 44 to 46)

15 The right of silence, as at present understood, should be abolished, as we regard it as having only an evocative and mythological value. A suspect's refusal to answer questions before a magistrate would be reported to the jury and the trial judge should be able to comment on this and on his failure to go into the witness-box in reasonable terms, but failure to answer questions should not be given any evidential value. The accused's right to make an unsworn statement from the dock should be abolished. (Paras. 47 to 50)

16 We would be content to abolish the Judges' Rules in their present form, including the rules relating to cautioning, provided they are replaced by effective provisions for the authentication of statements and, subject to the same safeguards, we would give the police the right to question a suspect after he has been charged. (Paras. 51 & 52)

17 If these safeguards are not provided, the Judges' Rules should be given statutory force with the onus placed strictly on the prosecution to satisfy the court that any admission is voluntary. The Home Office directives regarding the treatment of suspects should remain and be given statutory force in any event and any serious breach should result in the disciplining of the officer concerned and the exclusion of any evidence obtained. (Para. 52)

18 New rules should be introduced to cover the taking of statements and the writing-up of police officers' notebooks. (Paras. 53 to 55)

19 The police should be under a duty to obtain any forensic evidence relating to articles under their control which might help to clear a suspect, and to make it available to the defence.

20 All the recommendations of the Fisher Report relating to the interrogation of juveniles should be implemented. (Para. 57)

21 A suspect should have the right to be examined by a police doctor on arrival at a police station and to be supplied with a copy of his report. After 24 hours in custody he should be entitled to an examination by his own doctor or an independent doctor nominated by him. (Para. 61)

22 There should be established a Department of Public Prosecutions, to be responsible both for decisions to prosecute and for the conduct of prosecutions in all except trivial and routine offences, the line to be drawn by the Director of Public Prosecutions. (Para. 71)

23 This Department should be entirely independent of the police and have regional officers under Assistant Directors, and be developed out of the staffs of existing prosecuting agencies. (Para. 71)

24 Prosecutions at present dealt with by government departments and public bodies should remain in their hands and the right of private prosecution should be retained. (Para. 71)

25 The Department should be entitled to take statements from witnesses and to suggest additional lines of enquiry to the police. (Para. 71)

26 Care should be taken to secure the maximum independence for individual Assistant Directors consistent with national uniformity of practice. (Para. 73)

27 The existing responsibilities of the Director of Public Prosecutions in relation to serious cases should be retained. (Para. 73)

28 The Attorney-General should have ultimate responsibility in Parliament for the Department of Public Prosecutions. (Para. 75)

29 To reduce the overloading of the courts with trivial offences, greater use should be made of the system of issuing written cautions. (Para. 78)

30 The system of mitigated penalties should be extended to failure to obtain or renew television licences. (Para. 80)

31 Consideration should be given to extending the system of fixed penalties to less serious traffic offences, nuisance and litter offences, and travelling with intent to avoid payment of fares. (Para. 81)

32 The powers of the Crown Court and magistrates' courts to take traffic offences into consideration should be extended. (Para. 82)

33 New measures should be introduced to eliminate the avoidance of payment of parking fines by overseas visitors. (Para. 83)

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